THE INCLUSION OF LAND WITHIN A PERSONAL PROPERTY SECURITY ACT (PPSA) FRAMEWORK IN ANGLOPHONE SUB-SAHARAN AFRICA: A CASE STUDY OF GHANA

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DECLARATION

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

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ABSTRACT

Through a mixed methodology that employs qualitative socio-legal and doctrinal approaches to legal research, this thesis considers the inclusion of land within a Personal Property Security Act (PPSA) framework of modern secured transactions in Ghana, as an example in Anglophone sub-Saharan Africa. This consideration is in the broader context of the main intellectual debates about secured transactions law reform, namely; (i) whether and how secured transactions reform produces economic benefit, through increase in certainty and reduction in transaction cost, and; (ii) how far it is legitimate to take a legal framework from one country and transplant it into another with different social and economic issues, as well as a different legal culture,

This thesis, thus, provides a case study of how a legal transplant (the PPSA/Model Law system) can be adapted to relate specifically to the needs and problems of a particular state or group of states and throws light on the challenges created by that type of adaptation. It is, however, not an economic study that examines or proves whether economic benefits from this reform have been attained in Ghana, but rather identifies the benefits of such an adaption of the PPSA relating to how the inclusion framework promotes legal certainty, which is (as a matter of the application of transaction cost theory) expected to enhance access to credit as well as lowering the cost of credit. The associated challenges with such an adaptation are identified as both conceptual and practical. This conclusion, among others, is informed by the qualitative study.

In addition to providing a basis for further reform and refinement of the reform law in Ghana, both on the books and in practice, this thesis initiates a debate on the desirability and/or feasibility of the inclusion of land within the secured transactions regimes of other Anglophone sub-Saharan Africa countries.

This thesis argues that, despite the accompanying challenges, including land in a PPSA framework of modern secured transactions in Anglophone sub-Saharan Africa is a more legally efficient arrangement for the use of land to access credit than the traditional real property mortgage regime, especially in Ghana and other countries in the region that have land administration and real property mortgage law challenges.

DEDICATION

This work is dedicated to my late father (1938-2012)

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ASA	Anglophone sub-Saharan Africa
BOG	Bank of Ghana
B&L Act	Borrowers and Lenders Act 2008 (Act 773) of Ghana and Borrowers and Lenders Act 2020 (Act 1052). Their combined essence.
CCPPSL	The Canadian Conference on Personal Property Security Law, better known as the Canadian PPSA
CLS	Customary Land Secretariat
CR7	Memorandum of No-Objection
EBRD	European Bank for Reconstruction and Development
GDP	Gross Domestic Product
GPS	Global Positioning System
HMFA	Home Mortgage Finance Act 2008 (Act 770) of Ghana
IFC	International Finance Corporation
ILO	International Labour Organization
LAP	Land Administration Project
LDT	Law and Development Theory
LRAs	Law Reform Agencies
LTT	Legal Transplant Theory

LTRA	Land Title Registration Act 1986
MAD	Mortgages (Amendment) Decree, 1979 (Ghanaian legislation)
MPs	Members of Parliament
MT	Modernisation Theory
PPSA	Personal Property Security Act
PVLMD	Public and Vested Lands Management Division
TCT	Transaction Cost Theory
UCC	Uniform Commercial Code (of the United States of America)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WBG	World Bank Group

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Chapter I

Introduction

1.0 Introduction

This thesis answers the integrated question: what are the conceptual and practical issues associated with the inclusion of land within a PPSA framework of modern secured transactions in Anglophone sub-Saharan Africa (ASA)? Are there any benefits to inclusion, and how should any associated challenges be addressed?

The PPSA is a model legal instrument for modern secured transactions law reform,[1] which transplants the core values and objectives of Article 9 of the Uniform Commercial Code (UCC) of the United States, or its replicating enactments in Australia, Canada and New Zealand,[2] through broad operational principles, effected by special rules. This model abandons the description of security with reference to the form of the security, adopting instead, a functional definition that focuses on substance rather than form.[3]

Through a doctrinal analysis and qualitative empirical study related to Ghana, this thesis argues that the inclusion of land within a PPSA framework of modern secured transactions poses significant (albeit not insurmountable) conceptual and practical challenges. Thus, in addition to the opportunities that accompany such an adaptation of a legal transplant (the PPSA) in Ghana, and in other ASA countries that face land administration and real property mortgage law challenges, there are real challenges to be confronted.

Many economies around the world have over the past three decades reformed their secured transactions laws along the lines of the PPSA framework to enable individuals and businesses who wish to access credit to do so more easily at a lower interest rate if they offer a piece of movable property as security. These reforms have included rules that: (1) simplify the creation of an enforceable interest in a movable asset, by agreement between the creditor and the debtor;

[1] See Para 4.1.2 for a discussion of the PPSA. Wood identifies the broad objectives of the PPPSA, including (i) promoting the availability of secured credit in a simple and efficient manner; (ii) the publication of the potential existence of a security interest; (v) providing clear rules regarding the ranking of competing claims; and (vi) reducing the costs of taking and enforcing a security. See Roderick Wood 'Identifying borrowed sources in secured transactions law reform' (2019) Uniform Law Review, 24(3), 545-575. The PPSA served as a model for the UNCITRAL Model Law on Secured Transactions (UNCITRAL Model Law), which has been the basis of a number of reforms since its adoption in 2016.

[2] These countries adopted and adapted Article 9 of the UCC. See Para 4.1.2.2.2

[3] For a fuller, richer discussion of the PPSAs, see Hugh Beale and others, *The Law of Security and Title-based Finance* (3rd edn, OUP 2018) paras 23. 17-23, 91-160.

(2) provide a comprehensive scheme for determining the relative priority of competing interests in the asset, including all relevant types of interests that may affect the creditor's right; (3) enable the publicity of interests in the secured asset, by introducing a public registry in which all claimants to interests in an asset may give notice of their interests in addition to alternative means of publicity; and (4) assure a process for the enforcement of security interest in a simple, speedy manner.[4]

Modern secured transactions discourse has taken place in the context of movable assets. Almost every jurisdiction and transnational instrument, such as the United Nations Commission on International Trade Law's Model Law on Secured Transactions ("the Model Law"),[5] the International Finance Corporation (IFC) Toolkit on Secured Transactions and Collateral Registries,[6] the European Bank for Reconstruction and Development (EBRD) Model Law of Secured Transactions and the Cape Town Convention,[7] do not include land in the scope of assets to which the regimes apply. UCC Article 9 also excludes land,[8] although it gives some, albeit limited, guidance on fixtures (goods that become so affixed or otherwise so related to real property that they become part of the real property).[9] Article 9 is the original basis of the 'modern' secured transactions law, now exemplified in the international instruments mentioned above.

Frequently, the reasons for the exclusion of land from the scope of modern secured transactions law are not articulated. In his discussion of the exclusions in the revised UCC Article 9 in 1999, Zerunyan argues that the UCC's deference to federal constitutional and statutory law on the matters excluded from Article 9, informed their non-inclusion.[10] He explains that UCC Article 9 was never intended to apply to those subjects, since the federal law governed them or they (the subjects excluded from UCC Article 9) were not considered security interests.

[4] World Bank, 'Secured Transactions, Collateral Registries and Movable Asset-Based Financing: Knowledge Guide' (Washington, 2019); World Bank Group, 'Secured Transactions Systems and Collateral Registries' (2010) <https://openknowledge.worldbank.org/handle/10986/25982> accessed on 30th June 2022.
[5] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Secured Transactions* (United Nations, 2017). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlst_guide_to_enactment_e.pdf. Accessed 10th January 2022. This instrument was based on the UNCITRAL Legislative Guide on Secured Transactions (2010)
[6] World Bank Group (n 4). It is this Model Law that will serve as the benchmark instrument for the analyses of the issues in this thesis
[7] Cape Town Convention on International Interests in Mobile Equipment (2001) <https://www.unidroit.org/instruments/security-interests/cape-town-convention> accessed on 3 October 2018.
[8] See Uniform Commercial Code, Article 9-109 (d).
[9] UCC Article 9-334.
[10] Frank Zerunyan, 'Is your Client's Collateral or Secured Transactions Excluded by Article 9 of The Uniform Commercial Code?' (1999) 116(1) The Banking Law Journal 25.

Nevertheless, in relation to security interests over land, the exclusion of landlords' liens, leases and other interests in land merely followed the limitation of coverage already made explicit in the original Article 9.[11] This begs the question of why land was originally excluded. Zerunyan was writing about the revised UCC Article 9 and fails to explain why land was excluded in the first place. Gilmore's history of UCC Article 9[12] appears to offer two reasons for the exclusion of land. First, it was considered important to promote security interests in movable assets to improve access to credit in the modern economy, given the preference of lenders for immovable property and the dominance of land in secured lending. To this end, the legal framework for commerce preceding the UCC simply dealt with the use of personal property as collateral.[13] This framework was unified by the UCC without expanding the scope to include land. Second, it appears that the exclusion of land was based on the perception that the law relating to land and real property mortgages was well developed. Further, since land was local, the municipal land law was deemed a suitable framework[14] for governing the security interests therein.

The question then becomes: why should land not be included in the scope of assets covered by modern secured transactions regimes? The emphasis on movable assets in secured lending does not mean that land must be excluded from a secured transactions framework, especially as a security interest over land performs a similar function to such an interest over movable property. Moreover, the second justification for the exclusion, mentioned above, is not universally applicable, since not every country's land and real property mortgage laws are well developed. Indeed, for example, there exist significant problems within Ghana's real property mortgage laws, which have a detrimental effect on housing and businesses.[15] This leads some authors[16] to exempt Ghana from the proposition that countries with a common law tradition tend to have better financial markets, including a well-functioning mortgage finance market, compared with others with other legal traditions,[17] especially since Ghana, although it follows

[11] Former UCC § 9-102(3), now codified at UCC § 9-109(d)
[12] Grant Gilmore, *Security Interest in Personal Property* (Little, Brown and Company 1965).
[13] Conditional Sales Act 1918; Uniform Chattel Mortgage Act 1927; Uniform Trust Receipt Act 1933.
[14] Gerard McCormack, 'The American Private Law Writ Large? The UNCITRAL Secured Transactions Guide' (2011) 60(3) The International and Comparative Law Quarterly 597, 607.
[15] Kenneth Appiah Donkor-Hyiaman and Kenneth Nii Okai Ghartey, 'Legal Origins and Mortgage Finance Contradiction' (2017) 10(1) 156 International Journal of Housing Market and Analysis; Nicholas Boamah, 'The Regulatory Environment and Housing Finance Market in Ghana' (2011) 29(5), Property Management 406.
[16] Ibid
[17] Simeon Djankov and others, 'The effect of corporate taxes on investment and entrepreneurship' (2010) 2(3) American Economic Journal: Macroeconomics 31; Rainer Haselmann, Katharina Pistor and Vikrant Vig, 'How law affects lending' (2006) 23(2) Review of Financial Studies 549; Aldo Musacchio, 'Can civil law countries get good institutions? Lessons from the history of creditor rights and bond markets in Brazil' (2008) 68(1) Journal of Economic History 80; Douglass C North, 'Ideology and political/economic institutions' (1988) 8(1) Cato Journal 15.

traditional common law, has an underdeveloped mortgage framework and market.[18] Because land is the major asset of most people, but has become "dead capital" because of a lack of title registration,[19] it is argued that a reform of a country's secured transactions law, which takes into account this reality, would be beneficial.

There is literature showing that the legal facilitation of secured transactions influences access to credit,[20] but there appears to be no literature dealing with the inclusion of land within a PPSA framework of modern secured transactions reforms. Siebrasse and Walsh[21] show up, but only in the limited context of proposing new legislation for land security interest law that contains the principles of the PPSAs for New Brunswick in Canada. They fail to address the inclusion of land within a PPSA framework; that is, having movable and immovable assets in a single framework based on the PPSA principles, which is the focus and thrust of this thesis.

This thesis uses a qualitative case study of the Ghanaian reform to argue that the choice of inclusion or exclusion of land from a secured transactions law in ASA countries, must be dictated by the local conditions. In this context, this thesis examines the strengths and weaknesses of the Ghanaian legal regime in the books and in action, concluding that, beyond the benefits of the inclusion of land within a PPSA framework, there exist significant conceptual and practical challenges to overcome. The benefits identified are related to how the inclusion framework promotes legal certainty, which is (as a matter of the application of transaction cost theory) expected to enhance access to and lower the cost of credit.[22] Nonetheless, since this thesis is not an economic study, it does not examine, specifically, whether the expected economic benefit has been attained in Ghana.

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[18] Donkor-Hyiaman and Ghartey (n 15).

[19] Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Blackswan, 2001).

[20] John Armour, 'The Law and Economics Debate About Secured Lending: Lessons for European Law making?' (2008) European Company and Financial Law Review; Louise Gullifer and Orkun N Akseli (eds), *Secured Transactions Law Reform Principles, Policies and Practice* (Hart Publishing Limited 2016). Chapters 1 and 24; Haselmann and others (n 17) 494; Charles W Calomiris and others, 'How collateral laws shape lending and sectoral activity' (2017) 123(1) Journal of Financial Economics 16.

[21] Norman Siebrasse and Catherine Walsh, 'The Influence of the ULSIA on the Proposed New Brunswick Land Security Act (1996) 20 Nova Law Review. Drawing heavily on the ULSIA in their proposal for reform in New Brunswick and regretting ULSIA's failure in the US, the authors refer to the ULSIA as the "proverbial prophet (which) hath no honor in (its) own country."

[22] For a discussion of the economic benefits of legal certainty, see Calomiris and others (n 20) 163; John Armour and others, 'How do creditor rights matter for debt finance? A review of empirical evidence' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar Publishing 2015) Haselmann and others (n 17) 494; Murillo Campello and Maurico Larrain, 'Enhancing the Contracting Space: Access to Credit and Economic Activity' (2016) Review of Financial Studies 249*;* Frederique Dahan and John Simpson, 'Legal Efficiency for Secured Transactions Reforms: Bridging the Gap Between Economic Analysis and Legal Reasoning' (2008) 27 Penn Street International Law Review 623, 634.

The benefits include the fact that the inclusion framework mitigates land administration challenges by making possible security interests over unregistered land, which constitutes approximately 90% of the country's land stock.[23] It also addresses some of the problems associated with the Pre-B&L Act law for land security interests,[24]including the insufficient and confusing priority rules.[25] These benefits are in addition to the introduction of efficiency in the taking of security interest over land through computerisation,[26] centralisation[27] and the effective enforcement of land security interests,[28] and the consequent reduction in specific transactions costs achieved by efficiency savings.

The challenges of the framework, however, which are identified in this thesis by doctrinal analysis and qualitative empirical work, include concerns about the certainty of titles to land when presented as security for credit, which flow from the liberalities within the mechanisms for using unregistered land as security for credit under the framework,[29] and which is exacerbated by the informality within the land sector as well as the economy as a whole.[30] The confusing, poorly-defined, mutually-undermining relationship between the prior regime and the reform framework for land security interests represents a further challenge.[31] Moreover, securing the understanding and support of the stakeholders for a reform that entails replacing the familiar statutory/common law mortgage with a new concept like the PPSA framework poses a practical challenge under the inclusion framework.[32]

Thus, a PPSA framework for security interests, operating with common rules for both movable and immovable assets, is not only feasible and beneficial in Ghana and other ASA countries that have land administration and real property mortgage law challenges, but is also accompanied by significant conceptual and practical challenges.

[23] Para 10.1.1
[24] Para 10.1.2
[25] Ibid
[26] Para 10.1.3
[27] Para 10.1.4
[28] Para 10.1.1.2
[29] Paras 5.0; 5.5
[30] Paras 6.5; 6.0
[31] Paras 7.3.3; 7.0; 7.4.2; 7.5
[32] Para 9.0

1.1 Contribution

This thesis's contribution can be summarised as follows. First, it contributes to the discourse on legal transplantation by providing a case study of how a legal transplant (the PPSA) can be adapted to relate specifically to the needs and problems of a particular state or group of states, and throws light on the challenges created by that type of adaptation. The Ghanaian case study not only affirms the legal transplant theory with respect to the importance of taking account of local peculiarities when adopting a foreign law[33] but also, and more importantly, demonstrates the theoretical adjustments (or extension) of the legal transplantation of the PPSA in a manner that captures the true essence of the theory as a vehicle for law and development.

This is demonstrated not only by the inclusion of land in a PPSA framework *simplicita*, which is in and of itself alien to the PPSA concept and to that extent an advancement of the concept, but also by the adaption of the PPSA rules. For instance, the adjustment of the PPSA rules on the creation and perfection of security interests to accommodate the informality within the Ghanaian economy through the use of the Registry templates, that are able to capture oral and informal security agreements over unregistered land.[34]

The thesis offers insight into the fact that the adaption of the PPSA framework in Ghana to include land was designed to mitigate the failures of land administration by functionally abolishing the distinction between registered and unregistered land. This makes it possible for untitled land to be leveraged for credit, thereby making capital from the vast tracts of land which were "dead capital". The reform, which was initiated by the relevant statute[35]was also intended to fill some of the gaps in the real mortgage property laws of Ghana, particularly, by enabling the registration of customary law interests in land which were unregistrable, and over which it was difficult to take security (within the Pre-B&L Act framework). The reform also enabled the application of some of the best practices from security interests in personal property (such as extrajudicial enforcement and comprehensive priority rules) to land, thereby encouraging lending using land as security. The Ghanaian adaption of the PPSA, however, also creates significant challenges.

Secondly, this thesis makes a contribution by providing a basis for the further reform and refinement of the reform law in Ghana, both on the books and in practice. The empirical

[33] Para 1.2.2
[34] Paras 6.3.2; 7.3.2
[35] The Borrowers and Lenders Act 2008, Act 773 (as repealed and replaced by the Borrowers and Lenders Act 2020, Act 1052, hereinafter called B&L Act framework). See Paras 4.0, 4.2. 4.3

evidence suggests that the inclusion of land within a PPSA framework would achieve its objectives optimally if the easily identifiable benefits associated with inclusion were enhanced and the concomitant challenges addressed by adopting appropriate measures. This thesis identifies these measures and subjects them to critical analysis.[36]

Thirdly, the arguments outlined in this thesis initiate a debate in relation to whether it is desirable and/or feasible to include land within the secured transactions regimes of other ASA countries. An assessment of the difficulties of introducing such an inclusion is also presented.

This thesis claims that substantial similarities exist between the land law (both customary and statutory) and real property mortgage law of Ghana, on the one hand, and that of the majority of other ASA countries, on the other.[37] These similarities make any intended reforms that follow the Ghanaian example feasible, especially as lessons from the Ghanaian experience could be learned. Certain differences which would change how the reform would need to be introduced, however, may be identified.[38] It should be briefly acknowledged here that the first step towards assessing how land could be included within the secured transactions law of ASA countries would be to undertake a comparative legal analysis of the current regimes for taking security interests over land in this region, with Ghana as the comparator. This thesis, due to reasons of space,[39] does not present detailed comparative legal analyses of the subjects and jurisdictions concerned, but instead makes general observations on related matters, giving particular examples in appropriate cases, to enable the argument of this thesis to be constructed.

It would be useful if the transnational instruments on secured transactions, such as the UNCITRAL Guide,[40] included guidelines on the choices regarding the inclusion of land within the reforms. This would be preferable to the current practice within the reform toolkits to

[36] Para 10.3
[37] The main examples are Zambia and Uganda, although the subject is generally considered across the region of interest.
[38] Para 11.0
[39] This candidate undertook a comparative legal analysis of the land tenure system, land administration and real property mortgage law of Zambia and Uganda, compared with that of Ghana (albeit limited by the circumstances of the thesis). However, only so much as to enable the argument of this thesis to be constructed was presented. The countries chosen for this comparative legal analysis were selected as examples of the discourse, but belong to the common law tradition and have populations who are predominantly indigenous Africans. Although these countries (Uganda, representing East Africa; Zambia, representing Southern Africa; and Ghana (the comparator), representing West Africa), individually and jointly, might not necessarily give a complete account of the relevant legal issues in the sub-regions of sub-Saharan Africa, the stories provide invaluable insights.
[40] UNCITRAL Model Law (n. 5)

merely acknowledge the possibility of including land within secured transactions reforms, and mentioning some of its potential benefits.[41]

In the following paragraphs, the main theoretical framework within which the thesis' main arguments can be situated will be summarised.

1.2 Theoretical Framework

The underlying theoretical concepts of the thesis are the law and development theory and the legal transplant theory. Whereas the former provides insights into the influences on and adoption of the PPSA framework in Ghana, the latter provides the intellectual and theoretical foundation underlying the inclusion of land within a PPSA framework: the need to adapt law transferred from another jurisdiction to address or suit local circumstances. The legal transplant debate generally focuses on how far it is legitimate to take a system from one country and transplant it into another with not only a different legal culture, but also different economic and social issues.

Systems of rules, norms, and legal traditions have been transferred from one society to another (through conquest, colonization and voluntary reception), since time immemorial,[42] but the term 'legal transplant' first appeared in the 1970s.[43] In modern times, the voluntary reception of a foreign law is largely based on the assumption that the foreign law is superior and will facilitate development.[44]

Indeed, the global reform agenda in modern secured transactions led by the World Bank Group, is based on the law and development hypothesis and operationalized through legal transplantation. Modern secured transactions law reform is premised on the legal efficiency principle; namely, that there exists a strong nexus between an effective, efficient legal framework and economic growth via improved access to credit.[45]

A third theory that is worthy of consideration (albeit very briefly) in this thesis is Transaction Cost Theory (TCT). This, in its simplest form, is used to explain why the use of the PPSA for

[41] World Bank Group (n 4) 47.
[42] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 American Journal of Comparative Law 163, 165.
[43] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993).
[44] Kenneth W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press 2007).
[45] Dahan and Simpson (n 22), 634-638

security interest in land is preferred over the common law/statutory mortgage under the Pre-B&L Act regime. More importantly, this theory is the basis for the assertion that an increase in legal certainty, and a reduction in the actual transaction costs, will expand access to credit.[46] It thus anchors the argument that the reform is beneficial.

1.2.1 Law and Development Theory (LDT)/ Modernisation Theory (MT)

In considering LDT in the context of this thesis, it is important to note two important statements from the outset. First, in the law reform discourse, the law is both the norms and systems of rules embodying the spirit of the people (volksrecht),[47] and law developed by means of transferred norms (legal transplant).[48] Second, increased legal certainty and reduced transaction costs are the main arguments that underpin the claim that secured transactions reform expand access to finance and promote economic growth.[49]

In its simplest form, LDT is concerned with the nexus (if any) between law and economic/social progress. It posits that modernization or development necessarily entails the adoption of a system of rules according to which modern societies exists and are also able to achieve social order.[50] Emphasizing the instrumentality of law to development (otherwise known as 'liberal legalism'), the ideological roots of LDT may be traced back to the 'idea of progress, movement for law reform, law and society, social engineering through law, and foreign assistance'.[51] Developing countries, thus, could achieve development through the adoption of modern law, which institutionalizes the free market economy, liberal democracy and the rule of law.[52] This idea of the facilitative role of law with regard to development is particularly dominant in the US scholarship, despite its European roots.[53] Through the concept of 'liberal legalism', LDT has adapted the tenets of MT.[54]

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[46] Para 1.0
[47] Watson (n 43) 21.
[48] Ibid
[49] Gullifer and Akseli (n 20). The 'Introduction' to this work is highly instructive regarding the link between secured transactions reform and economic growth; Haselmann and others (n 17) 549.
[50] David M Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 The Yale Law Journal 1, 5.
[51] John Henry Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement' (1977) The American Journal of Comparative Law 457, 461.
[52] Brian Z Tamanaha, The Lessons of Law-and-Development Studies (1995) 89(2) American Journal of International Law 470, 471-473
[53] Scholars like Weber, Maine, and Montesquieu are credited for linking the use, reform and/or transfer of laws for economic development. See Kevin Davis and Michael Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics' (2008) 56 American Journal of Comparative Law 895.
[54] Tamanaha (n 52).

MT asserts that development is evolutionary achievable in phases via a process known as structural functionalism, by which economic progress is considered inevitable, but can only be achieved structurally, and in stages.[55] According to this theory, the adoption of a modernisation process from the West will invariably lead to 'a free market system, with liberal democratic political institutions, and the rule of law'.[56]

LTD restates this idea drawn from MT by positing that, in developing countries, the adoption of modern law from the West through a modernization process, and establishment of a free market economic system, which is supported by liberal democratic political institutions, and the rule of law, is conducive to development.

According to MT, therefore, the transfer of 'modern law' is what enables leapfrogging in terms of a traditional society passing through four development stages, in Rostowian terms,[57] thus avoiding the conventional development trajectory of a traditional society.[58]

Developing countries that adopt market economic systems are constantly encouraged to adapt to uniform rules, such as the UNCITRAL Model Law,[59] that ensure market predictability. Accordingly, such reforms are vigorously promoted in the developing world.[60] It is this belief in the facilitative role of modern law in economic development that informed the reform of Ghana's secured transactions law, and also the inclusion of land within a PPSA framework of modern secured transactions.[61]

Although this thesis does not seek to prove that the Ghanaian reform has brought economic benefits, the reform's legal benefits, that could lead to economic benefits, are made clear, including the availability of better enforcement mechanisms within the framework, which

[55] The stages are rationalization, nation building, democratization and mobilization. See Tamanaha (n. 52)
[56] Tamanaha (n 52) 471.
[57] Namely, 'the preconditions period, the take-off, maturity and the period of diffusion on a mass basis of durable consumer goods and services'. See Walt Whitman Rostow, The Stages of Economic Growth: A Non-Communist Manifesto (Cambridge University Press, 1990).
[58] That is, progressing systematically through the five stages to the point of attaining economic growth, development and freedom of choice, which are typical of an industrialized economy. Trubek (n 50).
[59] Para 7.1.5
[60] Alvaro Santos, 'The World Bank's uses of the 'Rule of Law' promise in economic development' in David Trubek and Avaro Santos (eds), *The new law and economic development: A critical appraisal* (CUP 2006) 253.
[61] The desire to improve access to credit to spur economic development, which is usually associated with secured transactions law reforms, underpinned the Ghanaian decision to enact reform to include land in a PPSA framework. See Para 4

reduces transaction costs, and the introduction of clarity in the priority of security interests, which leads to certainty and the associated economic benefits.[62]

1.2.1.1 Criticisms

MT, as a proxy to LDT, is undermined at its core by the Dependency Theory (DP): the notion that modern law is central to economic development is refuted. It is argued that the international/global capitalist system exploits the developing world and hampers the latter's economic development.[63] This, thus, rejects any claims about the development quality of 'modern law'. Indeed, this position is substantiated by the contention that economic growth in non- liberal political and institutional environments such as Southeast Asia and Latin America refutes any supposed link between modern law and economic development.[64] MT is thus seen as simply a Western ideology that has been crafted to keep resources flowing from developing counties, referred to as the 'periphery', to the developed 'core' of wealthy countries.[65]

In Ghana's specific context, the failure of the common law mortgage (a colonial transplant) and related land administration regime that was inherited during the colonial rule (albeit with subsequent statutory modifications)[66] lend credence to this criticism. This device and the related regime for the taking of security interest over land in Ghana have proved ineffective with regard to the overwhelming bulk of the nation's land stock, which de Soto describes as "dead capital". Also, the modern transplant, namely, the recently-adopted modern secured transactions framework, which is another modern law borrowed from the West, would fail to achieve its intended purpose, without the adaption discussed in this thesis.

This notwithstanding, the economic progress that has been achieved in developing countries through the adoption of liberal modernization and structural functionalism cannot be glossed over by dependency theorists,[67] neither are they able to point to another or better economic

[62] Para 1.0
[63] Tamanaha (n 52) 477.
[64] David F Greenberg, 'Law and Development in Light of Dependency Theory' (1980) 3 Research in Law and Sociology 129.
[65] David Ernest Apter, *Rethinking Development: Modernization, Dependency, and Postmodern Politics* (Sage Publications, 1987) 16.
[66] Paras 3.3; 3.2.4.1
[67] Tamanaha (n 52) 478.

paradigm,[68] nor do they face up to the causes of underdevelopment in the developing world, including ethnicity and patrimonialism.[69]

That said, the main claim of LDT: the instrumentality of law to development still faces the criticism that there is the absence of data to back the claimed link between law and development. Allott considers this gap as emanating from "phantom legislation," meaning, "the passing of laws which do not have, and most probably cannot have, the desired effect".[70] In this regard, as noted earlier, this thesis merely focuses on the legal benefits of the Ghanaian reform that might lead to the economic benefits, and does not seek to prove such benefits.

Additionally, LDT is criticized for its naïve, ethnocentric presuppositions.[71] Scholars chastise the theory's claims that Western norms and legal systems are the *sine qua non* for development in the Third World, especially as such views fail to acknowledge the local social, political and cultural contexts of the receiving countries, or take account of the measure of hypocrisy embedded in such views, given that " [i]f we look at the United States legal system, we find that the liberal legalist model of law in society does not describe reality very well. An example is the basic assumption that rules are made and applied to achieve general, social purposes".[72]

The empirical component of this thesis demonstrates that the adoption of 'Western norms' (the PPSA framework), while beneficial, is insufficient. There are legal benefits associated with the adoption of the PPSA framework, but only with significant adaptation. The processes of the transplanted secured transactions registry have been adapted, for instance, not only to include land, but also to accommodate unwritten security agreements over land.[73]

LDT is further criticized for proposing a universal diagnosis and solution to the problem of underdevelopment. It is argued that the theory takes insufficient cognizance of the fact that other variables, like the level of resources and cultural/political factors, impinge on the underdevelopment conundrum and that law reforms simply aim to create the necessary economic environment in this context. In this connection, it is further suggested that it might

[68] Apter (n 65) 25.
[69] Tamanaha (n 52) 478.
[70] AN Allott, 'The Unification of Laws in Africa' (1968) 16(1/2) American Journal of Comparative Law 51, 52.
[71] David M Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) Wisconsin Law Review 1062, 1080.
[72] Ibid 1081.
[73] Paras 6.4.2; 5.4.4

be more accurate to speak of a 'reciprocal model' in which development influences law, rather than *vice versa*.[74]

1.2.1.2 Secured transactions reform and LDT

Despite the above criticism, the global reform agenda within modern secured transactions, as championed by the 'global norm entrepreneurs',[75] is anchored on the law and development hypothesis, so any attack on the law and development theory is equally directed at secured transactions reforms around the world.

Indeed, it is worth recalling that modern secured transactions law reform is premised on the legal efficiency principle: that is, the belief that there exists a strong nexus between an effective, efficient legal framework and economic growth via improved access to credit,[76] arising from increased legal certainty and reduced transaction costs. However, it is cautioned that this nexus must not be taken simplistically, and should not motivate any inadequately considered transfer of the laws from one jurisdiction to another. It is thus argued by Roderick Macdonald that "[a] "law and economics" approach to legal regulation simply misses the key lessons of 50 years of comparative law: law is not simply an independent variable and legal doctrine is not fungible. Transplanting Article 9 into civil law Ukraine would be like transplanting a pig's liver into a horse".[77]

The adoption of the PPSA framework within Ghana's secured transactions reform was influenced by the hope that benefits would ensue from a such a reform, and the adaption of the PPSA by including land aimed to achieve even more: to address the land administration challenges and enliven land which had become dead capital. The centralizing tendencies of the framework, including cost reduction, speed, enhanced flexibility, the transparency and accessibility of the legal rules, simplicity and modernity, are examples of such benefits that were anticipated to arise from the PPSA.

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[74] Elliot M Burg, 'Law and Development: A Review of the Literature & a Critique of "Scholars in Self-Estrangement"' (1977) The American Journal of Comparative Law 492, 516.

[75] States acting individually or collectively (e.g., the International Institute for the Unification of Private Law ("UNIDROIT")), the agencies of which States are members (e.g., UNCITRAL), or private organizations (e.g., the National Conference of Commissioners on Uniform State Laws). See Roderick A. MacDonald, 'Three Metaphors of Norm Migration in International Context' (2009) 34 Brooklyn Journal of International Law 603, 605.

[76] Para 1.0

[77] Roderick A. Macdonald, 'Article 9 Norm Entrepreneurship' (2006) 43 Canadian Business Law Journal 240, 250.

The following paragraphs consider legal transplant theory. Law reform through legal transplantation is a common strategy in the field of secured transactions.

1.2.2 Legal Transplant Theory (LTT)

The central claim of LDT is the transfer of modern laws from the developed world to developing countries to secure economic development. This transfer role is fundamental to the relationship between law (from the developed world) and development in the developing world.

Watson coined the term 'legal transplant',[78] although Roscoe Pound had previously discussed the 'history of a system of law which is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law'.[79]

In no particular order, the following summarizes the main ideas within Watson's theory. First, the idea that the transfer of law from one society to another is not only a fact of human history but can also be socially easy so to do is a major point of Watson's theory. Thus, secondly, partial or total legal reform tends to occur through borrowing. Third, and related to the first, is the idea that legal transplantation is also contemporary and that, fourthly, such transfer of law provides the foundation for economic progress in developing countries, and may also, as a fifth point, be more potent in dealing with difficult private law cases.[80] Watson also acknowledged that voluntary transplantation informed different factors, including economic ones.

Despite the potent criticism levelled against this claim, the transfer of law from one society to the other has undeniably occurred in the past.[81] Upon the transfer of laws, the recipient country assimilates the transferred law over time, which process indigenizes the law and promotes its acceptance.[82] Watson challenges the traditional conception of the law as a system of rules embodying the spirit of the people (volksrecht)[83]

Large-scale transplantation occurred in Ghana (and other ASA countries)[84] during the colonial era when the colonialists controlled their new settlements by transferring wholesale the law of the acquiring state to the law of the new territory. The common law/statutory

[78] Watson (n 43) 21.
[79] Ibid, 22, quoting Roscoe Pound.
[80] Ibid 97.
[81] Ibid 22.
[82] Ibid 27.
[83] Ibid 21.
[84] Para 3.1.1

mortgage, as a legal device for security interests over land, together with related laws, for example, were imposed by the British colonial powers. After World War II, however, the newly independent-states in the developing world voluntarily adopted the laws of Western countries,[85] largely because, in line with Watson's theory, the law of the West was deemed beneficial and worthy of adoption. Indeed, according to Watson, solicited transplantation carefully considers the source of the borrowed law, whose authority—the 'superior', 'reputable', 'efficient' and 'acceptable' quality of the foreign law—must not appear questionable to the receiving jurisdiction.[86] Beyond this, Otto Kahn Freund argues that the social and political contexts of the law being transplanted cannot be ignored in any meaningful attempt to transfer foreign law to another jurisdiction. [87]

1.2.2.1 Criticisms

Watson's theory has been criticised in various ways. First, the claim that 'reception is possible and still easy when the receiving society is much less advanced materially and culturally',[88] which finds favour with modernization theorists, has been described as ethnocentric.[89] This criticism is curious in the context of our Ghanaian case study, because the challenges related to the transplantation of the PPSA in Ghana in unconnected to the question of whether Ghana is 'advance materially or culturally', but linked instead the entrenched nature of the prior law and legal culture, which make adaption to the PPSA (the inclusion of land) even more challenging.[90]

Secondly, LTT is criticised for undermining the idea that the law emanates from and mirrors society.[91] The Ghanaian case study, in a sense, disputes this. It shows that the law still emanates from the people even in the context of the LTT. Since the inclusion of land, which is not foreign but emanated from Ghana,[92] was undertaken within the context of a legal transplant (the PPSA framework), this criticism is not entirely merited.

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[85] Li-Wen Lin, 'Legal transplants through private contracting: codes of vendor conduct in global supply chains as an example' (2009) 57(3) American Journal of Comparative Law 711.
[86] Watson (n 43) 31.
[87] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1.
[88] Watson (n 41) 99.
[89] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 111, 122; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) American Journal of Comparative Law 489, 508.
[90] Paras 4.4.3.2; 8.4.3; 9.1.1.3; 9.5.3
[91] Ewald (n 89) 489.
[92] Para 4.1.3

Thirdly, LTT is challenged by Legrand,[93] who maintains that legal transplant is impossible. He argues that since Watson does not contemplate the transfer of rules with their associated or accompanying cultural subtexts from one jurisdiction to another, rules cannot be transplanted. Thus, the law is only transportable across jurisdictions with their historical, epistemological or cultural encumbrances. According to Watson, the rule which is sought to be transferred can only be interpreted in light of an appropriate knowledge of the history and culture of its natural home. The original rule in a different or new jurisdiction changes due to the new epistemological and cultural variables or assumptions that influence the interpreter in the new jurisdiction. This criticism, to a limited extent, is borne out by the Ghanaian experience, given that the inclusion of land within a PPSA framework significantly (but not entirely) changed the principles regarding the transplantation of the PPSA, which does not typically cover land. Indeed, in a few cases, the applicable rules for the attachment of security interests under the PPSA would need to be adapted for land. More importantly, ASA countries that might wish to reform following the Ghanaian example would need to take this caution seriously.

The impossibility charge, however, appears harsh since, in addition to the regular occurrence of legal transplantation in modern comparative law, references to the cultural subtexts of a transplanted law merely offer insights and reminders about the need to internalize the necessary social factors that would facilitate acceptance of the new law. These facilitative processes are both possible and necessary. Indeed, Sacco cites Somali's adoption of the Egyptian Civil Code to illustrate a legal transplant shaping the legal formant source of the law.[94] The inclusion of land within a PPSA framework, designed to address land administration and the real property mortgage law challenges in Ghana, also undermines this impossibility claim.

Nonetheless, Berkowitz and other scholars warn about the detrimental outcome of the 'transplant effect' when a new rule is poorly assimilated by the institutions and social contexts of the receiving jurisdiction.[95] It is for this and similar reasons that LDT, as supported by modernization thought, faces criticism for aiming to leapfrog the stages of

[93] Legrand (n 89)
[94] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) American Journal of Comparative Law 343.
[95] Berkowitz and others (n 42); Timothy Lindsey, Law Reform in Developing and Transitional States (Routledge, 2007) 54.

development by transferring modern law to developing countries with little regard for the concomitant social and cultural contexts and variables.

That said, in modern times, proponents of law and development emphasize the conscious efforts that have been made to adapt the law to suit the local conditions of the receiving jurisdiction, such as encouraging local participation.[96] This has thus moved the debate from whether or not the transfer of modern law from the West spurs economic development to how to undertake legal reform to ensure the best outcome.[97] The Ghanaian experience emphasises the need to deepen the stakeholders' involvement, education and training.[98]

This thesis contributes to the LTT by providing a case study which exemplifies the importance of reflecting the local circumstances when transplanting a foreign law (the PPSA), thereby affirming the key tenets of the theory. It also underscores the possibility and occasional necessity to make adaptations to the transplantation in order adequately to address the peculiarities of the receiving jurisdiction, as well as drawing attention to the fact that challenges are associated with such adaptations. This is in the context of the case study's advancement or progression of the idea of the PPSA as a transplant that could include land in the scope of assets covered by the framework.

1.2.2.2 Secured Transactions Reform and LTT

In secured transactions law in particular, considerable attention is now paid to the standards or reform models in the implementation of reforms. This has arisen due to the documentation of the shared experiences and practices by different countries that are facing and dealing with various issues and challenges. [99]

Given the evidence that reforms that are promoted, owned and led by local stakeholders are the most successful,[100] development partners in the secured transactions reform space now make a persuasive case for reforms to the officials of developing countries following an assessment of the economic and legal environment of the target country for their buy-in.[101] The drafting of the reform legislation, as well as public education and training, also usually include local involvement. It must be noted, however, that, as the Ghanaian experience

[96] Ibid.
[97] Davis and Trebilcock (n 53).
[98] Para 9.5
[99] George Affaki, 'Increasing Access to Credit: Reforming Secured Transactions Laws' (2010) International Trade Centre: Technical paper 14, 17.
[100] Ibid.
[101] Ibid, 17-19

shows,[102] this engagement tends to concentrate on a few agencies of state, like the central bank, and government ministry officials, thereby leading to the risk of bureaucratic policy-making.[103]

These principles for effective reforms are equally reflected in the guidelines for the secured transactions reforms of institutions like the World Bank Group[104] and EBRD.[105] Scholars in the field have also made contributions regarding the most important considerations related to secured transactions reforms. Citing Macdonald, Gullifer and Dubovec argue that the three most important factors to ponder when considering secured transactions law reform are: (1) the economic, social and political and institutional conditions; (2) the citizens' confidence in the judiciary; and (3) the capacity-building of the legal actors both prior to and even decades after the reform.[106] The Ghanaian transplantation of the PPSA not only affirms these observations or considerations, but also establishes that they assume a heightened level of importance where the transplant is to be significantly adapted. The Ghanaian adaptation of the PPSA (through the inclusion of land) required far more stakeholder engagement, education and training than was actually achieved. This thesis concludes that a lot more public participation is needed to 'dislodge' the entrenched common law/statutory mortgage (with the related legal culture) and to establish or ground the PPSA as the new legal framework for the taking of security interest over land. It also involves changing the judicial attitude through providing more training for judges, as well as an efficient judicial system that forestalls the overreach of the mechanisms designed to enforce security interests.[107]

This thesis shows that transplanting the PPSA might entail more than one attempt to enact the reform,[108] especially if the potential challenges (some of which might be difficult to

[102] Paras. 9.51; 9.5.2
[103] Para 9.1.1.2
[104] See World Bank Group (n.4), 21; World Bank, 'Secured Transactions, Collateral Registries and Movable Asset-Based Financing: Knowledge Guide' (Washington, 2019), 97 <https://openknowledge.worldbank.org/handle/10986/32551> accessed 30th June 2022.
[105] This Model Law emphasises (1) building consensus on the reform; (2) establishing commitment to reform in the target jurisdiction; (3) producing a draft reform Bill; and (4) encouraging ownership of the draft Bill. These are in addition to the implementation stage and program for the reform. See European Bank for Reconstruction and Development, 'EBRD's Legal Reform Access to Finance and Secured Transactions' <http://www.ebrd.com/what-we-do/legal-reform/access- to-finance/transactions.html>. Accessed on 18 September 2022.
[106] Marek Dubovec and Louise Gullifer, *Secured Transactions Law Reform in Africa* (Bloomsbury 2019) 15.
[107] Para 9.0
[108] Borrowers and Lenders 2008 (Act 773) and Borrowers and Lenders Act 2020 (1052) have so far tried to enact the reform. A third attempt is being proposed by this thesis.

anticipate) are not addressed in advance. Nevertheless, the Ghanaian experience could serve as a model for other ASA countries, and help them to avoid some of the pitfalls.

The next section will consider the third theoretical framework of this thesis: the transaction cost theory.

1.2.3 Transaction Cost Theory (TCT)

In this thesis, TCT helps to explain the selection, and comparative advantage of using, the PPSA framework for the taking of security interest over land, rather than the traditional real property mortgage device under the Pre-B&L Act regime.

TCT describes firms, not in neoclassical terms (as production functions), but in organizational ones (as governance structures). Coase defines transaction costs as the expenses related to organizing and participating in a market or implementing a government policy. He uses the phrase "the cost of carrying out market transactions" to refer to the interactions between firms or between individuals and firms.[109] TCT, in simple terms, is the cost of measuring and enforcing exchange agreements. What are measured are the valuable attributes of goods and services or the performance of agents as well as the enforcement costs, consisting of the costs associated with realising the terms of exchange. In other words, transaction costs consist of "the resources necessary to measure both the legal and physical attributes being exchanged, the costs of policing and enforcing the agreement, and an uncertainty discount reflecting the degree of imperfection in the measurement and enforcement of the terms of the exchange". [110]

TCT posits that exchange agreements must be governed, and also that, depending on the transactions to be organized, some forms of governance arrangement are better than others. Consequently, a comparative analysis of the costs of transacting under the relevant organisational and governance alternatives must inform the eventual choice, based on the net benefits, if any.[111]

As noted earlier,[112] this thesis only highlights the legal benefits of the reform that could lead to economic benefits, including the availability of better enforcement mechanisms within the

[109] Ronald H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.
[110] Douglass North, *Institutions, Institutional Change and Economic Performance* (CUP, 2012).
[111] Nicolai J Foss and Peter G Klein, 'Critiques of transaction cost economics: An overview' in Peter G Klein and Michael E Sykuta (eds), *The Elgar companion to transaction cost economics* (Edward Elgar Publishing 2010) 264. The authors were summarizing the central argument in Ronald H Coase, (1937), 'The Nature of the Firm' (1937) 4(16) Economica, 386.
[112] Paras. 1.0; 1.2.1.2; 1.2.1

inclusion framework, which reduces the transaction cost, as well as the introduction of clarity in the priority of security interests, which leads to certainty and the associated economic benefits. It, thus, represents merely a qualitative treatment of TCT, and does not prove the economic benefits that might have accompanied the Ghanaian reform.

1.3 Organization of the Thesis

The rest of the thesis proceeds as follows. Chapter 2 focuses on the methodology of the thesis, demonstrating the combination of empirical (interview-based qualitative) and doctrinal (socio-legal) intellectual approaches to the study. Chapter 3 discusses land as a subject of security interests, including the interests in, administration of, and security interests in land in ASA countries, particularly Ghana, which is the primary jurisdiction of study. In chapter 4, the reform (and aim) to include land within a PPSA framework of modern secured transactions law in Ghana are considered. Chapters 5-9 discuss the distinct themes that emanated from the empirical study of the Ghanaian reform. Chapter 5 examines property rights issues around using land as collateral within a PPSA framework that includes land. The chapter demonstrates a practical challenge related to the inclusion of land within a PPSA framework: the challenge to the certainty of title arising from the difficulty of ascertaining ownership of unregistered land that is presented as security for credit. It also shows the superiority of the inclusion framework over the pre-B&L Act regime in certain respects. In Chapter 6, informality, as a further practical challenge to the inclusion of land identified by the qualitative study and doctrinal analysis, is considered. The chapter considers how informality impinges on the challenges related to certainty of title, and how limited any reform efforts must inevitably be in such a context. Chapter 7 discusses one of the beneficial, yet challenged, achievements of the inclusion framework: the opportunity to take security over land under a comprehensive and unified legal and institutional framework, rather than a disjointed, uncoordinated regime involving the mediation of multiple state agencies and legal instruments. The chapter demonstrates how a significant gain from the reform to include land could be undermined by a failure to define clearly the relationship between the reforming framework and the prior regime. Chapter 8 focuses on the efficient enforcement of security interests over land as another strength of the inclusion framework compared with the prior regime, but emphasizes how this benefit is diminished by the overreach of the available extrajudicial mechanisms under the framework. Chapter 9 argues that the inadequacy of public participation (public engagement and awareness raising, including training) in the

reform effort partially explains the challenges associated with the enactment of the reform, and also holds the key to its implementation and success. While Chapter 10 considers how to improve the law in Ghana, Chapter 11 relates the empirical findings in Ghana to other ASA countries which might decide to reform following the Ghanaian example. Chapter 12 concludes the thesis.

Chapter II

Research Methodology

2.0 Introduction

This chapter explains how the research was carried out. It provides the logical scheme and chosen methods, as well as the views, beliefs, and values that guided the choices made in the quest to answer the research question: what are the conceptual and practical issues arising from the inclusion of land within a typical PPSA framework of modern secured transactions in ASA?

This thesis employs a socio-legal approach to qualitative legal research, as well as a comparative analysis of the law in a purely doctrinal context. This chapter shows how, empirically, I consider Ghana's inclusion of land within a typical PPSA framework of modern secured transactions law, by probing the associated conceptual and practical issues from the relevant stakeholders' perspectives, alongside undertaking a doctrinal consideration of the associated discourses. This chapter further explains that the thesis' non-empirical component, which adopts a comparative approach, studies the land and real property mortgage law in ASA and compares them to those of Ghana in order to clarify how ASA countries that decide to include land in their secured transactions law, following Ghana's example, might fare. It should be emphasized that the comparative law analysis is the focus only insofar as it clarifies the argument of this thesis.

This chapter is divided into three main parts: sections 2.1, 2.2 and 2.3. Sections 2.1 and 2.2 focus on the thesis' empirical and doctrinal components, respectively, while section 2.3 presents the study's limitations and briefly concludes the chapter.

Section 2.1 is further divided into sections, which explain various aspects of the thesis' empirical component. Section 2.1.1 explores the philosophical underpinnings of the research, highlighting its epistemological and ontological approach, as well as several methodological aspects. Section 2.1.2 discusses the qualitative research design and the reason for its use, touching on the data collection strategies employed (interviews and documentary analysis), which are fully discussed in section 2.1.4. Section 2.1.3 considers how and why the research participants, as key stakeholders in Ghana's reform to include land within a PPSA secured transactions law, were chosen and recruited. Section 2.14 considers the practical ethical and safety issues related to the participants (as well as the researcher), including confidentiality,

anonymity and consent, and examines how I reflected on my relationship with the participants and how it might impact the research. This section considers 'in-the-field' issues, such as the interviews' format, as well as the documentary data collection. Section 2.1.5 explores how and why thematic analysis was employed to explain the data collected, and touches on the measures implemented to ensure the research's rigor, as well as how the research findings were presented.

Section 2.2 very briefly outlines the thesis' doctrinal component and explains that a comparative analysis of ASA land and real property mortgage law (compared with Ghana's pre-reform law) using the functionalist comparative method was undertaken for this thesis, albeit not presented in full herein.

2.1 Empirical Component

For this thesis' empirical component, I used qualitative data to discuss Ghana's inclusion of land within a typical PPSA framework of modern secured transactions, probing how the relevant stakeholders experience/perceive the enacting legislation, with a view to unravelling the conceptual and practical issues associated with the reform.

2.1.1 Philosophical Worldview and Research Approach

2.1.1.1 Philosophical worldview

The philosophical worldview with which I approached my study's empirical component is Social Constructivism (often combined with Interpretivism), which was developed by Berger and Luckmann,[113] and also Lincoln and Guba,[114] and was more recently espoused by Crotty.[115] This constructivist's (interpretivist's) assumptions about the nature of our world—the nature of reality (ontology) and our knowledge about it (epistemology)—were preferred because of the nature of the research problem. This choice had a bearing on the research design as well as the specific data collection, analysis and interpretation methods employed.[116]

[113] Peter L Berger and Thomas Luckmann, *The social construction of reality: A treatise in the sociology of knowledge* (Anchor 1967).
[114] Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985).
[115] Michael Crotty, *The foundations of social research: Meaning and perspective in the research process* (Sage 1998).
[116] Brent D Slife and Richard N Williams, *What's behind the research? Discovering hidden assumptions in the behavioural sciences* (Sage 1995).

Constructivism seeks to identify world views, subjective meanings and perspectives within social contexts, based on the beliefs and opinions of those being researched.[117] The researcher identifies patterns and themes in the "complexity of views rather than narrow meanings in a few categories or ideas".[118] This world view holds that human beings construct meanings as they engage with the world that they are interpreting, based on their historical and social perspectives. Thus, qualitative researchers seek to understand their research participants' context/setting by visiting their contexts or meanings, and gathering information personally through processes that are largely inductive. The researcher generates meaning from the data collected in the field,[119] the interpretation of which is shaped by the researcher's own experiences and background through inductive processes. Epistemologically, therefore, knowledge, to the interpretivist, is actively constructed by the researcher and participant, who exert mutual influence on one another.

This paradigm recognizes the importance of the subjective human creation of meaning but does not reject outright some notion of objectivity. 'Pluralism, not relativism', is stressed.[120] This paradigm is appropriate here because it accords with the study's goals. This research is intended essentially to gauge the participants' experiences and perceptions of a legal phenomenon—land's inclusion within a typical PPSA framework of modern secured transactions, the associated conceptual and practical issues, and how it facilitates or inhibits access to credit. Such an exercise must acknowledge that the implementation of a law or policy occurs in a socio-cultural context external to law. Thus, the stakeholders' reality, against which the law interacts, including social, economic and political forces, must be understood.

Land rights, including their use as security for credit, are always embedded in individuals' socio-legal and economic contexts, including credit parties and the relevant institutions.

2.1.1.2 Socio-Legal versus Doctrinal Methodology

Having approached this research's empirical component with the social constructivist or interpretivist worldview, the socio-legal approach (as opposed to the purely doctrinal method) to legal research became even more appropriate here, as it involves analysing law with close reference to the social situation in which it applies. The law is thus placed in the context of

[117] Frank Bogna, Aldo Raineri and Geoff Dell, 'Critical realism and constructivism: Merging research paradigms for a deeper qualitative study' (2020) 15(4) Qualitative Research in Organizations and Management 461.
[118] John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (4th edn, Sage 2014) 8.
[119] Ibid.
[120] Benjamin F. Crabtree, Doing qualitative research (Sage 1999) 10

that situation to determine the part it plays in creating, maintaining and/or changing that situation.[121] This focus on the societal perspective on law is facilitated by the use of social science methodologies,[122] and makes it necessary to: (1) formulate a type of research question that concerns the law; (2) employ empirical enquiry methods; and (3) adopt a conceptual framework that analyses the interaction between the law and social forces.[123]

Under this approach, law and its understanding are sought from the 'outside'. Every effort is thus made to "explain legal phenomenon in terms of their social setting".[124] This approach is distinguished from the doctrinal or 'black letter law'[125] approach, which treats the law as an internal, self-sustaining set of principles that are discoverable in statutes and judicial decisions, with little or no regard to considerations outside the law.[126]

The doctrinal approach assumes an unduly instrumental view of law, stemming from the perception that: (1) there exists a perfect knowledge of the law, which is always communicated in the clearest, least distorted way possible; (2) the law emanates from the state and supersedes other sources of regulation, such as culture, business and peer pressure; and (3) the law is an autonomous social instrument that does not depend on other forms of regulation.[127] Griffiths rejects these assumptions about the law,[128] and identifies: (1) the 'socially contingent character of legal communication', which concerns how legal rules are translated into concrete contexts; (2) legal pluralism, which argues that many other forms of regulation exist; and (3) the inextricability of law from the social context which produces it (even if the degree is contestable).[129]

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[121] David N Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 (3) The Modern Law Review 287.

[122] Kaijus Ervasti, 'Sociology of Law as a Multidisciplinary Field of Research' in Ulf Bernitz, S Mahmoudi and P Seipel (eds) *Law and Society. Scandinavian Studies in Law* (Vol. 53) (The Stockholm University Law Faculty 2008).

[123] Reza Banakar, On Socio-Legal Design (2019) <https://ssrn.com/abstract=3463028> Accessed 10th August 2021

[124] Lawrence M Friedman, The Law and Society Movement' (1986) 38(3) Stanford Law Review 763.

[125] Shari Seidman Diamond and Pam Mueller, 'Empirical Legal Scholarship in Law Reviews'(2016) 6 Annual Review of Law and Social Science, 58.

[126] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd ed, Edinburgh University Press 2017).

[127] Darren O'Donovan, 'Socio-Legal methodology: conceptual underpinnings, justifications and practical pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 31.

[128] John Griffiths, 'The Social Working of Legal Rules' (2003) 8 Journal of Legal Pluralism and Unofficial Law 1.

[129] O'Donovan (n 127).

The doctrinal approach is thus criticised for being intellectually rigid, inflexible and inward-looking.[130] This is contrary to the socio-legal methodology, which is said to enrich the doctrinal approach by transcending what is written in the statutes and academic materials to explore 'law in society'. Thus, it studies the law in broader socio-political contexts in order to understand the internal factors that bear or act upon it, and helps to answer the research question.[131]

My use of the socio-legal approach stems from my interest in exploring the stakeholders' experiences of the reform, including whether and how the reform addresses the problems due to which it was introduced, as well as any benefits or challenges that have arisen. The socio-legal approach is therefore useful for 'law in action' research, such as mine, as it fills gaps in our understanding of a 'law in action' found in the 'black letter methodology perspective',[132] and also probes 'how legal rules, doctrines, legal decisions, institutionalised cultural and legal practices work together to create the reality of law in action'.[133]

Despite the benefits of the social-legal approach, besides the practical problems related to accessing research subjects, it is said to be challenging because researchers may find themselves in no-man's land between the law and non-law. Thus, "where do we stop speaking of law and find ourselves simply describing social life?"[134]

Again, this approach is attacked for being theoretically and methodologically underdeveloped compared with sub-fields such as the sociology of education or organisations.[135]

Notwithstanding this criticism, the socio-legal approach is useful for research on property law, such as mine, because it combines an understanding of the relevant legal rules with a capacity to investigate how law affects and is affected by real life.[136]

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[130] McConville and Chui (n 126) 4; Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 Journal of Law and Society 163, 181.

[131] McConville and Chui (n 126).

[132] Law Teacher, 'Writing a Law Dissertation Methodology' <Writing A Law Dissertation Methodology (lawteacher.net)> accessed 14 July 2022.

[133] Reza Banakar, 'Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 139.

[134] Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law and Society Rev 869, 878.

[135] Max Travers, 'Putting Sociology Back into the Sociology of Law' (1993) 20(4) Journal of Law and Society 438.

[136] Kitty Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law* (University of Chicago Press 2010); Sarah Blandy, 'Socio-Legal Approaches to Property Law Research' (2014) 3(3) Property Law Review 166.

2.1.2 Research Design

This section discusses the research design and why it was chosen.

Qualitative methods were chosen as the most appropriate means to address the research aims, as they make it possible to develop an in-depth, detailed understanding of the participants' experiences and the meaning that they give to them, placing value on the subjectivity of their views and allowing access to a variety of multifaceted understandings of a single phenomenon.[137]

Qualitative methods are highly recommended where research essentially explores the research participants' social world,[138] and have been widely used in the social sciences for some time. Indeed, this method's credibility is established by the observation that 'all research must respond to the canons of quality–criteria against which the trustworthiness of the project can be evaluated'.[139]

2.1.2.1 Case Study

The specific qualitative design that I used for undertaking this socio-legal research was a qualitative single case study.[140] The multiple case study approach[141] was not chosen because the phenomenon of interest, the inclusion of land within a PPSA framework of secured transactions law, is unique to Ghana. Sierra Leone, which borrowed wholesale from Ghana,[142] is the only other country that has adopted this kind of legal framework, and so could have been included in the research also, but is not a significantly different context so a single case study was chosen.

The qualitative case study is a research approach that facilitates the exploration of a phenomenon within its context, using a variety of data sources. This ensures that the research problems are not explored through a single lens only, but rather through a variety of lenses, which allows multiple facets of the phenomenon to be revealed and understood.[143] According to Yin,[144] a case study design should be considered in situations where: (a) the research focus is on answering "how" and "why" questions; (b) it is impossible to manipulate the

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[137] Robert A Croker, 'An introduction to qualitative research' in Juanita Heigham and Robert A Croker (eds), *Qualitative research in applied linguistics* (Palgrave Macmillan 2009) 3, 9.
[138] Juliet Corbin and Anselm Strauss, *Qualitative research. Techniques and procedures for developing grounded theory* (Sage 2008) 3.
[139] Catherine Marshall, Gretchen B Rossman and Gerardo L Blanco, *Designing Qualitative Research* (3rd edn, Sage 1999) 191.
[140] Lisa Webley, 'Stumbling blocks in empirical legal research: Case study research' (2016) Law and Method 5.
[141] Robert K Yin, *Case Study Research: Design and Methods* (4th edn, Sage 2009) 53).
[142] Marek Dubovec and Louise Gullifer, *Secured Transactions Law Reform in Africa* (Bloomsbury 2019) 191.
[143] Pamela Baxter and Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (1994) 13(4) The Qualitative Report 544.
[144] Robert K Yin, *Case Study Research: Design and Methods* (3rd edn, Sage 2003).

participants' behaviour; and (c) the aim is to cover contextual conditions in the belief that these are relevant to the phenomenon under study. Guided by the research question,[145] my study aimed to measure the participants' understanding and experience regarding Ghana's legal regime, which included land within a PPSA framework of secured transactions reforms, together with its strengths and weaknesses, the reasons behind the participants' experiences, and how any challenges were confronted. This made the qualitative single case study design the most appropriate choice for this study. The design protocols also permitted the use of a variety of data sources to answer the research question,[146] from which this study benefited. In addition to the interviews, I also used documentary material gathered from the stakeholders, which facilitated a holistic understanding of the phenomenon under study.

2.1.2.2 Data collection methods

In this case study, in-depth interviews and documentary analysis were the main data collection methods employed.[147] A reflexive journal of my experiences and thoughts in the field was also kept and consulted, in order to enhance the meaning of the collected data.

2.1.3 Sampling

This section considers who the research participants were, why they were selected, and how they were accessed. A total of 74 participants were interviewed.

Participants who were key stakeholders in Ghana's reform were sampled for this study. The sampling technique that I employed was purposive sampling, because its underlying principle is that 'the inquirer selects individuals and sites for the study because they can purposefully inform an understanding of the research problem and the central phenomenon in the study'.[148] By using this sampling method, I was able to recruit participants with relevant posts in Ghana's financial sector, or who were in otherwise connected with Ghana's legal reform relating to land as security for credit. Marshall and Rossman,[149] however, remind us that a sampling plan may, at times, need to be altered to accommodate the reality on the ground. This happened in this research, when the sampling plan for borrowers had to be changed in light of the reality.[150]

145 Para 1.0
146 Baxter and Jack (n 143); Yin (n 144).
147 Paras 2.1.4.3, 2.1.5.2
148 John W Creswell, Qualitative Inquiry and Research Design Choosing among Five Approaches (3rd edn, Sage 2012) 156.
149 Catherine Marshall and Gretchen B Rossman, Designing Qualitative research (5th edn, Sage 2010).
150 See Para 2.1.3.2.6

The sample used in the research (with its distinct categories) is identified below.

2.1.3.1.1 Judges

Ghana's judicial service helped to recruit all six participants for the judges' sample. Three judges from the commercial division of the High Court's and three justices from the Court of Appeal, with varied experience of commercial and land-related matters, were accessed.

2.1.3.1.2 Lenders

All of the banks were contacted and tasked to recruit participants for the study. Banks with only a representative office in Ghana were, however, excluded (namely, the Bank of Beirut, Citibank N.A. Ghana, Exim Bank of Korea and Ghana International Bank Plc).

The reason for using all of the banks was to make the study more robust. This was partly informed by the fact that the central bank's recent regulatory and supervisory interventions have led the majority of the micro-finance and savings and loans companies to collapse, especially those mainly operating in towns and cities outside the capital. Although some of these 'defunct' institutions still operate underground, accessing them proved challenging. Using all of the banks, with their diverse capital and operational strengths, produced a complete as possible insight into the lenders' views on the issues under investigation. Nonetheless, three different micro-finance/savings and loans institutions, who were available and able to contribute, were contacted, and together supplied six research participants.

Ghana's various commercial banks, as well as several non-bank financial institutions, supplied all of the lender participants in this research from within their own body, in accordance with the nature of their credit administration. In all, 41 lender participants, consisting of 35 from 21 of the 23 banking institutions existing nationwide during the data collection, and six from three non-bank financial institutions, were interviewed (see the table below).

The interviewees who were heads of the legal, credit and risks departments attended mini-focus group interviews, depending on their institutions' operational structure. Credit advancement and recovery in the majority of Ghana's banks involve key personnel's very active participation, like lawyers, and finance and risk management staff.

2.1.3.1.3 State agencies

Participants from the Collateral Registry, Bank of Ghana, Lands Commission, and Companies Registry were recruited through their institutions. Schedule officers in these institutions' mid-level and top management positions were interviewed. One interviewee was from the Land Title, Public and Vested Land Division of the Land Commission and the Companies Registry respectively, and two from the Bank of Ghana and the Collateral Registry, respectively.

2.1.3.1.4 Borrowers

There were six borrower participants, who came from the leadership of three distinct borrower associations, who were purposively sampled. Three main typical business types in the private sector, who are borrowers, were identified, namely: (1) the corporations (big businesses) represented by the Association of Ghana Industries (AGI); (2) the small and medium scale businesses (regular SMEs), some of whom engaged in manufacturing and services, represented by the Association of Small-Scale Industries (ASSI); and (3) the Trader Associations (mostly individuals with very small businesses, largely engaged in the importation and internal trading of goods. These are brisk business activities, employing substantial numbers of Ghanaians, represented by the Ghana Union of Traders Association (GUTA), which is an umbrella body regulating different traders' unions in Ghana. It is usually consulted on most government economic policies, including national budgets. The GUTA's prominence in Ghana is attested by the fact that the country's balance of trade is always negative. Such business membership associations contribute to the democratic debate and influence public policy worldwide.[151]

2.1.3.1.5 Customary Land Secretariates

Six participants from three different Customary Law Secretariats were interviewed following the purposive sampling of the most efficiently-run customary land secretariates. I interviewed two participants from the Odae Ntow, Agbawe and Teshie Secretariates, respectively.

The customary landholding structure owns about the 90% of Ghana's land and function nowadays, through the nationwide CLSs, which are decentralized customary land administration units that oversee the management of customary landholding within their

[151] Anne Skorkjaer Binderkrantz, 'Legislators, lobbying and interest groups' in Shane Martin, Thomas Saalfeld and Kaare W Strom (eds), *Oxford Handbook of Legislative Studies* (Oxford University Press 2014).

respective communities. They derive their authority from the community members, and their functions include recording land transactions in their communities, settling land disputes using Alternative Dispute Resolution mechanisms, and engaging in boundary demarcation and identification, land use planning, public education and sensitization.

2.1.3.1.6 Lawyers/Law Teachers

Three managing partners from three reputable commercial law firms, who regularly engaged in the issues under review, were interviewed. Two of these also happened to be law teachers, and one had recently been appointed director of the Ghana School of Law.

Table 1: List of research participants

Pseudonym	**Role**	**Years of Service**
GB32	Head of Credit Risk	10
GD2	Head of Legal	10
GB31	Head of Legal	20
GB81	Manager, Collateral Unit	8
GB11	Legal Officer	7
GB91	Credit Documentation Officer	7
GB91	Legal Officer	6
GB101	Executive Head of Legal	18
GB21	Head of Legal	12
GB111	Acting Head, Credit	7
GB112	Legal Officer	6
GE1	Head Financial Stability Department	28
GE2	Legal Officer	15
GB162	Credit Risk Department in charge of Collateral registration	10
GB163	Credit Risk Department in charge of Collateral registration	11
GB33	Head, Credit Enforcement	20
GB171	Head of Legal	24

Pseudonym	Role	Years of Service
GB191	Head, Credit Management	14
GB201	Credit Risk Officer	9
GA4	Judge, High Court	14
GA5	Judge, High Court	10
GA6	Judge, High court	6
GB121	Head of Legal	17
GB133	Credit Officer	8
GB131	General Manager for Risk Management	18
GB132	General Manager, Legal	13
GB151	Head of Risk Management	8
GB152	Credit officer	10
GB141	Legal Officer	7
GB142	Legal Assistant	6
GB143	Collateral Administrator	7
GD1	Registrar, Collateral Registry	7
GD2	Registrations and Realizations office	8
GB41	Legal and Credit Specialist	8
GB42	Collateral Fulfillment Team	9
GB43	Credit Team Coordinator	6
GB44	Legal Officer	6
GB51	Head of Credit	12
GB52	Legal Officer	11
GB61	Head Risk Control Unit	15
GB53	Credit Officer	8
GB71	General Manager in Charge of Legal and Recoveries	24
GB142	Legal Assistant	6
GB143	Collateral Administrator	7
GB181	Head of Risk Department	13

Pseudonym	Role	Years of Service
GB182	Head of Recoveries	14
GG31	Assistant Secretary and Legal Officer	6
GG32	Compliance officer	7
GB183	Legal Assistant	7
GG11	Head, Risk Management	10
GG12	Head Credit Management	8
GG13	Collateral Documentation	7
GB114	Credit officer	9
GF11	Coordinator	8
GF12	Land Economist	5
GC3	Managing Partner, BELA	20
GF21	Coordinator	9
GF22	Surveyor	8
GF31	Administrator/Coordinator	11
GF32	Land Economist	4
GA3	Justice of Appeals	4
GC1	Managing Partner, Ampofo, Oppong &Co	22
GA1	Justice of Appeals	9
GA2	Justice of Appeals	3
YL	Deputy Registrar, Mortgages	10
YR	Deputy Head, Company Inspectorate	14
YVL	Assistant Registrar, Legal	4
YC2	Senior Partner, Reindorf Chambers.	45
RC1	Research Director	8
RC2	Finance Director	4
RT1	President	10
RT2	Secretary	12

Pseudonym	Role	Years of Service
RS1	President	12
RS2	Secretary	7

2.1.3.2 Negotiating Access

Negotiating access to research participants is often complicated, involving multiple (formal and informal) gatekeepers.[152] Moreover, formal permission/access does not necessarily translate into a smooth interaction with the research participants,[153] as cooperation and a rapport must also be cultivated.[154] In negotiating access to my research participants, I leveraged my long-standing relationship with the stakeholders in the financial system to reach out to research participants other than borrowers. However, I quickly discovered that accessing suitable participants using my personal connections might prove problematic and time-consuming. The schedules and personnel in some of the stakeholder institutions, especially the commercial banks, had changed in my absence, and the Coronavirus pandemic also posed challenges related to meeting people face-to-face. As it was going to take me far longer to access most of the participants through my personal connections than my academic schedule would permit, I consequently decided to recruit the participants using certain 'gatekeepers'. Gatekeepers are persons or institutions who have influence over who is invited to participate in research and what prior information about the research they recieve, and may be viewed as facilitators and collaborators regarding research.[155]

2.1.3.2.1 Lenders

The Bank of Ghana (by a letter of introduction) facilitated my access to all of the lenders whom I interviewed. I wrote to every bank in Ghana and the non-bank financial institutions I engaged, to explain about my research and request their participation. These participants were at liberty not to participate, so the regulator's intervention could be seen as highly influential here. However, the participants expressed genuine enthusiasm to participate, and I also

[152] Creswell (n 148); Matthew B Miles and A Michael Huberman, *Qualitative data analysis: An expanded sourcebook* (Sage 1994).
[153] Carla L Reeves, 'A difficult negotiation: Fieldwork relations with gatekeepers' (2010) 10 Qualitative Research 315.
[154] Martyn Hammersley and Paul Atkinson, *Ethnography: Practices and Principles* (Routledge 1995); Jennifer Hasty, *The Press and Political Culture in Ghana* (Indiana University Press 2005).
[155] N Turner and K Almack, 'Recruiting young people to sensitive research: Turning the 'wheels within wheels' (2017) 20(5) International Journal of Social Research Methodology 485.

ensured that their consent was not a ‘one-off’ exchange between the gatekeepers and the participants by constantly renegotiating the participants’ consent throughout the interviews. Indeed, the lenders (to whom the Bank of Ghana wrote) made available for the interviews officers whom they thought could adequately discuss the relevant issues.

2.1.3.2.2 Judges

Judges as stakeholders were also accessed through the Judicial Secretary of Ghana, with the permission of the Chief Justice of the republic, but the judges’ consent to be interviewed was given before such assignments from the judicial secretary. On meeting the judges individually, however, I confirmed their consent to participate.

2.1.3.2.3 State Agencies

State agencies, such as the Bank of Ghana, Collateral Registry, Lands Commission and Registrar General’s Department, were accessed with relative ease, given my familiarity with the system. Notwithstanding, several calls had to be made to confirm the interview appointments, which were postponed several times. Interviews with participants from the Registrar General (Company Registry) and Land Registry were cancelled twice, although I attended at the appointed time.

2.1.3.2.4 Lawyers

My experience with the lawyer participants was similar. Having agreed to be interviewed, they struggled to commit to set times. I would visit their chambers or offices at the agreed times and find them with clients.

2.1.3.2.5 The Customary Law Secretariates (CLS)

The CLSs were the easiest participants to access. A telephone call was made from the offices of the Stool Land Secretariate and they agreed to engage with me. Having visited one of them immediately after this call, in order to introduce my research, my next visit occurred on the day of the interview. The interviews with the others were, however, often interrupted by visitors, and resumed only after these visitors departed. In one case, I had to return on a different day to complete the interview.

2.1.3.2.6 Borrowers

I hoped that the lenders would introduce me to their clients (borrowers) as a researcher, as a good basis for me seeking their voluntary participation in the research.

Unfortunately, this did not go according to plan. The lenders did not cooperate as well as I had hoped, providing excuses ranging from difficulty in reaching their clients to not having received any response from them. Undoubtedly, the Coronavirus pandemic exacerbated the situation. I, consequently, explored an indirect way of gaining their perspectives on the research question, through their associations, which contacted by sending an introductory letter from the Law Faculty at the University of Cambridge. After making approximately three visits to each of the head offices of these national associations, interviews were successfully conducted with their leaders.

2.1.3.2.7 Ethics of access

Having used gatekeepers like the Judicial Secretary and Bank of Ghana to procure access to the judges and lenders respectively, and also to recruit other interviewees through their parent institutions, it is important to reemphasize here that I reflected on the propriety of this approach.[156] I was conscious of the inherent bias, including the selection of participants whose experiences fitted the gatekeepers' views or, in the case of the Bank of Ghana, as noted earlier, a sense of subtle or benign compulsion for banks to participate in the research against their will. I therefore renegotiated their consent with the interviewees throughout the process.

2.1.4 Fieldwork: the research in practice

2.1.4.1 Considerations when entering the field

Several scholars have warned that 'going into the field' to conduct research requires practical consideration and preparation, as much as intellectual readiness.[157] Ethical issues and practical matters, including safety, must be considered before the fieldwork begins. I heeded this caution during my research journey, as far as possible.

Ethical issues arise at various stages of socio-legal research.[158] They are an ongoing, iterative process,[159] and the qualitative researcher faces many ethical issues that surface while collecting data in the field, as well as during qualitative reports' analysis and dissemination.[160]

[156] Lesley Noaks and Emma Wincup, *Criminological research* (Sage 2004) 121.
[157] Geoff Payne and Judy Payne, *Key concepts in social research* (Sage 2004).
[158] Alan Bryman, *Social Research Methods* (5th edn, OUP, 2016).
[159] Catriona Mackenzie, Christopher McDowell and Eileen Pittaway, 'Beyond 'do no harm': The challenge of constructing ethical relationships in refugee research' (2007) 20(2) Journal of Refugee studies 299.
[160] Creswell (n 148).

First, I secured ethical approval for my research after considering all of the foreseeable ethical issues, including travel and health risks due to the Coronavirus pandemic. Ethical issues were constantly in my thoughts, since they can arise at any time, with the potential to compromise the research's integrity, not to mention the participants' safety. Informed consent, anonymity, confidentiality and the potential risk of harm to both the researcher and participants were of particular interest to me as I entered the field.

2.1.4.2 Positionality/Reflexivity

Positionality in the field can produce multiple identities for a researcher.[161] A researcher sometimes needs to develop the ethical ability to assume and maintain these multiple identities in order to access vital information in the field, which impacts on the richness of the data gathered.[162] I approached this study with the view that I was an outsider but one with the special status of being regarded by some as a (potential) insider. McFarlane-Morris describes this as a position of 'betweenness'.[163] My many years spent working as a legal officer at the Bank of Ghana (the central bank of Ghana), brought me into contact with the subject under investigation and most of the proposed participants, making highly relevant McFarlane-Morris's caution that researchers returning home in order to conduct fieldwork should be alert to any implications of "betweenness".

I used reflexivity, as a concept in the research, to navigate this challenge. Reflexivity refers to 'consciousness about being conscious and thinking about thinking',[164] and requires researchers critically to reflect on their own role in the research process.[165]

2.1.4.3 Interview

I conducted semi-structured interviews with stakeholders in the Ghanaian secured transactions reform, identified above. I chose semi-structured rather than structured interviews because of their flexibility which, among other things, enables topics to be sufficiently probed. During in-depth interviews, the researcher avoids using predetermined, focused, short-answer questions, which action encourages the interviewees to discuss the

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[161] Shenika McFarlane-Morris, '"Home sweet home?" Struggles of intracultural "betweenness" of doctoral fieldwork in my home country of Jamaica' (2019) 00 Area 1 <https://doi.org/10.1111/area.12580> accessed 9th September 2021; Ding Fei, 'Negotiating Chineseness: Incorporating Critical Reflection into Workplace Research on Chinese Investment in Ethiopia' (2020) Area <https://doi.org/10.1111/area.12607> 5th September 2021.

[162] Fei (n 161).

[163] McFarlane-Morris (n 161).

[164] Raymond J Michalowski, 'Ethnography and Anxiety' in Rosanna Hertz (ed), *Reflexivity and Voice* (Sage 1997) 49.

[165] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (Sage 2013).

topic in detail.[166] Through employing broad pointers that facilitate the discussion a wide range of issues, this method helps researchers to address the research questions, and also allows any emerging issues to be clarified.[167] Again, this method, for the participants, provides "a great deal of leeway in how to reply", giving insights into their construction of and response to their social world.[168]

I developed an interview guide for the participants in English. The research question, literature and my practical knowledge about the subject informed the questions formulated. In all, 74 in-depth interviews were conducted, between April and November 2021. They were tape-recorded, and each lasted around 90 minutes. One judge, however, was uncomfortable about being recorded, for reasons that were undisclosed.

I used face-to-face interviews primarily because this provided me with a unique opportunity to gather additional, rich data from, for instance, non-verbal cues, including facial expressions, bodily gestures, postures, etc., which enriched the meaning-making process. The respondents' non-verbal cues have been noted to be an important aspect of rich data collection and analysis yet, as Denham and Onwuegbuzie[169] remind us, researchers unfortunately tend to pay limited attention to these. Although I benefitted from this, the wearing of face masks during the interviews due to the Coronavirus pandemic was unhelpful in this regard.

2.1.4.3.1 The interview process

I began every interview by briefly introducing myself and explaining the research. I then addressed the ethical issues, such as the participants' consent to participate, confidentiality, anonymity and how the data would be used. The interviewees' permission to audio-record the interviews was also sought, and they were assured that they could always pause and request that what they had just said be deleted. Consent to participate and permission to audio-record the interviews were obtained in all cases except, as already noted, that of one participant, who requested that I take notes by hand, and also provided concise written responses to the interview questions after the interview ended.

[166] Bryman (n 158).
[167] Ibid.
[168] Ibid.
[169] Magdalena Denham and Anthony J Onwuegbuzie, 'Beyond words: Using nonverbal communication data in research to enhance thick description and interpretation' (2013) 12(1) International Journal of Qualitative Methods 670.

With every interviewee, I went through the interview guide's demographic information section, not only to build a rapport with them but also to discover more about their educational background and experience. During the interviews, however, this section was largely taken for granted, especially as I wished to cover a great deal of ground within the time available rather than dwell on 'less important' issues. This was particularly true when I interviewed persons whose faces were familiar to me, as asking such questions appeared awkward, but I often returned to such issues at the end of the interviews.

Although the interview schedules were semi-structured, I sometimes adopted a flexible approach. I listened actively to the interviewees, which had a positive impact on them and facilitated our conversation. The open-ended questions that I asked enabled them to express themselves in their own way. The participants engaged more when they felt that they were being listened to.

Despite having prepared an interview guide, I did not ask every participant the same questions. I followed and explored different themes extensively with different participants, who had the flexibility to speak about different issues, to ensure that I explored their multiple experiences. The potential risk associated with this is that not every research themes may be covered evenly, which may affect the data analysis. This was unlikely in my case, given that I had conducted enough in-depth interviews so that 'additional data do not lead to any new emergent themes'.[170]

The interviews thus reached saturation point. To ensure that I would be able to interpret the interview data correctly, I always clarified my understanding of the points that the interviewees made by asking questions like: 'Is your point that…?'

2.1.4.4 Documentary Analysis

I supplemented the interviews by collecting documents from the key stakeholders (participants), which provided evidence of policy directions, legislative intent, insights into the legal system's perceived shortcomings or best practices, as well as the agendas for change.[171] Collecting documents for this project improved my understanding of some of the main stakeholders' motivations regarding Ghana's reform.

The documents accessed included minutes of meetings, parliamentary Hansards, internal organizational memoranda, and association bulletins. This enabled me to access and assess the participants' language and words related to the issues under investigation. Using

[170] Lisa M Given, *100 Questions (and Answers) About Qualitative Research* (Sage 2016) 135.
[171] Lisa Webley, 'Qualitative approaches to empirical legal research', in Peter Cane and Herbert M Kritzer (eds), *The Oxford handbook of empirical legal research* (OUP 2012) 926, 927.

documents was beneficial because they could be accessed when convenient, as an unobtrusive information source,[172] and also reduced the time required for the transcription, since they were written materials. Accessing some of them, however, involved overcoming bureaucratic hurdles, and the poor record-keeping culture in my research environment sometimes produced incomplete documents or ones with doubtful authenticity.[173]

I focused on documentary research before officially gaining approval to begin the fieldwork. The search continued throughout the fieldwork and even beyond. I visited the libraries of the stakeholders in the Ghanaian reform, such as the Bank of Ghana and the Parliament, then began collecting less accessible public documents that my participants referenced. Pre-legislative work on reforms bill (draft bills) was also accessed.

Legal research using documentary sources can, however, suffer from the 'analyses of traces' flaw.[174] Because documents are written for a specific audience by those with a specific purpose in writing them, it is likely that sensitive issues or discrepancies will be removed, so that only other types of data, such as interviews, can uncover the hidden transcript.

With respect to access limitations, I encountered little resistance, but the delays and procrastination among the custodians of these documents were concerning.

2.1.5 Data Analysis/Findings

This section describes how the collected data were processed and analysed. It also briefly discusses the concern about quality and rigour, which underpinned this research, and how the findings are presented.

It was my practice to record my initial thoughts after each interview, noting the themes and general issues that I considered to be of interest. This helped me to keep track of the data as well as the setting, feelings, and attitudes of both the participants and myself.

2.1.5.1 Transcription

The actual data analysis started once I had transcribed the audio-recorded interviews. This process was challenging, onerous, and performed manually, without the use of software. I attempted to use an assistant (with some guidance) for this process, but this proved unsuccessful. I therefore spent many hours listening to and transcribing the interviews. It could take about six hours to transcribe an hour-long interview and I did my best to complete at least one per day, alongside conducting further interviews. Despite this task's daunting

[172] Creswell (n 148).
[173] Ibid.
[174] Webley (n 171).

nature, undertaking it myself enabled me to familiarise myself with the data, which is 'essential for the analyst's subsequent decision regarding coding of the data'.[175] Also, relevant themes and issues that had passed unnoticed during the interviews could be rediscovered or identified.[176]

I transcribed the interviews in full, and in as much detail as possible, as this exercise was key to the analysis process. I captured obvious grammatical errors, following the advice that "it is not the purpose of transcription to produce a corrected version of what people have but rather an accurate one".[177] This decision, although not regretted, caused some discomfort, when I had to use interview excerpts containing some of these errors.

2.1.5.2 Data Analyses

Having transcribed the interviews, I read them all to gain a broad sense of the data, then read each one of them again, this time highlighting anything that might clarify the participants' views, perceptions and experiences related to the research question.[178] I then wrote brief comments on points of interest in the texts I had highlighted. These were my descriptive codes, which subsequently led me to develop the interpretive codes. This was the first of five integrated stages my thematic approach that I used to analyse the qualitative data, as described by Braun and Clarke, namely: data familiarisation; initial code generation; theme searching; theme reviewing; and theme definition and naming.[179]

The thematic approach to data analysis is a method for identifying, analysing and reporting patterns (themes) within data. It 'allows the researcher to see and make sense of collective and shared meanings and experiences'.[180] Themes are recurrent, distinctive elements of the participants' accounts, characterising perceptions and/or experiences that the researcher regards as relevant to the research question.[181]

By using this method, the researcher can identify and make sense of the commonalities within how a topic is discussed, including collective or shared meanings and experiences.[182] Following Braun and Clarke, my next step was to undertake the coding, which entailed colour coding (using coloured pens) each interview transcript's hard/physical copy to identify

[175] Noaks and Wincup (n 156) 129.
[176] Nigel King, Christine Horrocks and Joanna Brooks, *Interviews in qualitative research* (Sage 2010).
[177] Ibid. 199.
[178] Ibid.
[179] Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) Qualitative research in psychology, 77.
[180] Virginia Braun and Victoria Clarke, 'Thematic analysis' in Harris Cooper (ed), *APA Handbook of Research Methods in Psychology* (Vol 2, American Psychological Association 2012) 4.
[181] King, Horrocks and Brooks (n 176) 200.
[182] Ibid

issues of interest. Notes were also made on the transcripts, with regular references to earlier interpretations of the interviews and the contents of other transcripts. I subsequently used coloured sticky notes, and extracted as many codes as possible from the data.

Creswell defines coding as a process of aggregating text or data into small categories of information, seeking evidence for the code from the various data sources being used in a study and then labelling each code.[183] To quote Braun and Clarke, codes 'are succinct and work as shorthand for something you the analyst, understands, they do not have to be fully worked–up explanations–these come later'.[184]

The process of looking for themes, as the third step, required me to read through the whole text to identify the contexts of the extracts and bearing in mind that statements may be coded under different themes simultaneously.[185] The various codes generated were then sorted into themes, together with the relevant data extracts. The different code names were written on individual, coloured sticky notes, then pasted on the walls to sort, organise and reorganise the themes. I then refined and aligned the themes with the coded data extracts, as well as the whole data set, as Braun and Clarke advise that, during this fourth stage, the researcher should scrutinise each theme's collated extracts and ensure that they form a coherent pattern.[186] It was, therefore, necessary for me to collapse certain candidate themes, since they contained insufficient data extracts to be viable. Some were also too diverse and had to be broken down to form separate themes.

During the final stage, I defined and named the themes, again following Braun and Clarke (2006). This involved identifying the essence of each theme and determining which aspect of the data it captured. In doing this, it was important to consider the 'story' that each theme told, and how it fitted into the broader overall 'story' that the data told in relation to the research question.

Overall, the thematic approach to the data analysis involved five main, integrated stages:

[183] Creswell (n 148).
[184] Braun and Clarke (n 180).
[185] Uwe Flick, *The SAGE handbook of qualitative data analysis* (Sage 2014).
[186] Braun and Clarke (n 179).

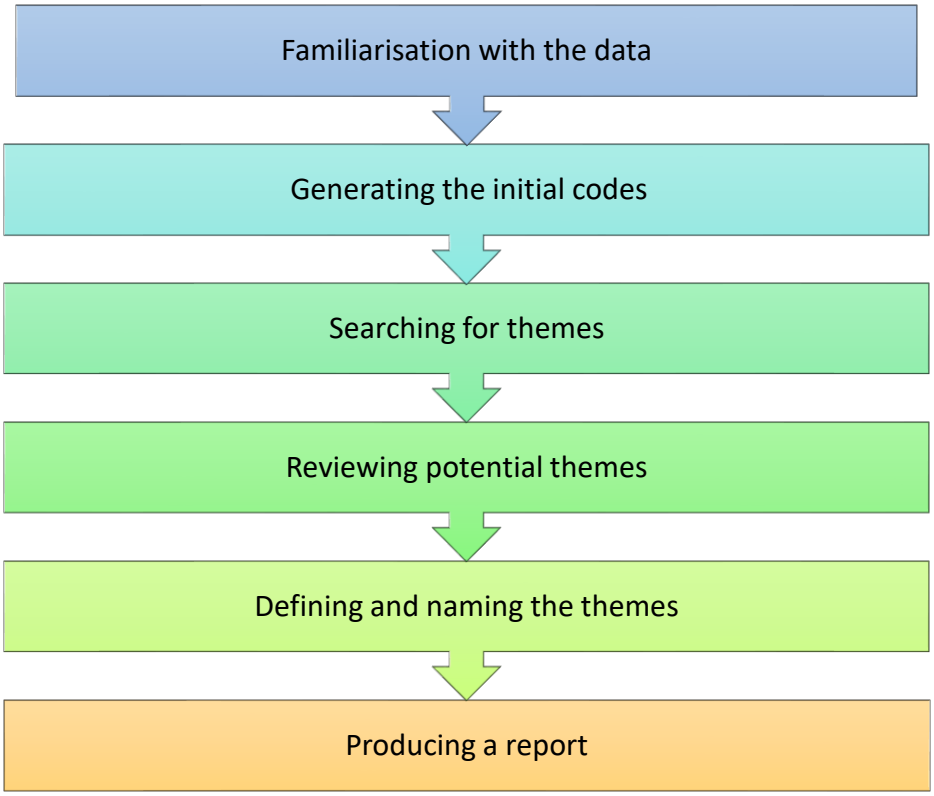

Figure 1: Stages of thematic data analysis

2.1.5.3 Benchmark Secured Transactions Framework

In this thesis, the UNCITRAL Model Law of Secured Transactions is employed as the benchmark for assessing the Ghanaian framework. The Ghanaian law is evaluated against the provisions of the Model Law. This instrument was chosen because it was developed to help developing/transitional economies, like Ghana, to reform and modernise their secured transactions law to reduce the cost of and increase access to credit. Also, the instrument is versatile and could work within a PPSA framework like Ghana's, even though it includes land.

2.1.5.4 Reliability and Validity

To ensure that my research would withstand scrutiny, the question of its validity was assessed. Validity concerns the integrity of research conclusions.[187] As a test of rigour, the term is more widely associated with quantitative research, with some scholars preferring 'trustworthiness' (covering credibility, transferability, dependability, and confirmability) as a functional equivalent in qualitative research.[188] Reliability and validity are achieved by

[187] Bryman (n 158) 41.
[188] Egon G Guba and Yvonna S Lincoln, *Effective evaluation: Improving the usefulness of evaluation results through responsive and naturalistic approaches* (Jossey-Bass 1981).

implementing integral verification strategies that are self-correcting while conducting the inquiry itself. Accordingly, I employed strategies, including investigator responsiveness, methodological coherence, sampling and sampling adequacy, active analytic stance, and saturation,[189] during the study to detect and correct serious threats to the research findings' reliability and validity at an early stage. This approach, according to Morse and others,[190] is preferable to waiting until a study has been completed to deal with such issues.

Additionally, I used Lincoln and Guba's principles (credibility, transferability, dependability and confirmability), which can achieve reliable, valid research outputs, to ensure the rigor of the current research. To achieve credibility, Lincoln and Guba recommend that researchers should conduct 'member checks', which entail checking the data with the participants to strengthen the credibility of the findings.[191] In this research, I used interview questions to check the responses of the participants to preceding questions. Also, after the interviews, I sent each interviewee a copy of their interview transcript to check for accuracy.

Transferability, according to Lincoln and Guba, concerns research findings' applicability in other contexts. This demands a detailed description of, or sufficient information about, the setting studied to enable readers to judge the findings' applicability to other settings.[192] Thus, I ensured that I selected research participants who would help me to answer the research question.

Dependability entails providing an 'audit trail': documenting the data, methods, and decisions made during the project.[193] It essentially concerns transparency. Documenting vital aspects of a research project enables the readers to examine the process and assess whether the findings/conclusions are well-founded.[194] An audit trail also enhances the data's 'confirmability'. Keeping a reflexive record throughout the research helps to ensure the credibility, transferability, dependability, and confirmability of the process.[195] I made notes about my thoughts, experiences and observations throughout the data collection and beyond.

[189] Janice M Morse and others 'Verification Strategies for Establishing Reliability and Validity in Qualitative Research' (2002) 1(2) International Journal of Qualitative Methods 13.
[190] Ibid. The authors recommend using strategies to establish trustworthiness, such as an audit trail, member checks when coding, confirming the results with the participants and peer debriefing.
[191] Lincoln and Guba (n 115) 316.
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Ibid. 327.

2.1.5.5 Presentation of the findings

Scholars have debated how qualitative research may be presented in order to communicate its findings and insights effectively, and different ways of doing this are discernible.[196] The most appropriate approach is said to be that which suits the empirical discovery and meets the critical standards of trustworthiness (credibility, transferability dependability, and confirmability).[197] In this study, the Gioia Method was used, which is an interpretive model that, among other things, seeks to communicate the essentials of distilled findings in simple, compelling ways,[198] by supporting them with interview quotations and field note excerpts. These were then situated within a doctrinal review of the relevant issues and literature.

2.2 The Doctrinal Component

2.2.1 Black Letter Law/Comparative law

This component of the study adopted a desk review or a socio-legal/doctrinal approach, which involved reviewing cases, textbooks, journal articles, internet materials and other written sources of law. It was intended to include a basic comparative baseline legal survey, that would help to ascertain the relative feasibility and suitability of including land within the secured transactions reforms of ASA, but the limited space prevented a full presentation of the relevant analyses and findings. Nonetheless, the thesis makes the relevant argument within this limited context.

2.2.2 Functionalism

The methodology for a comparative law enquiry is usually a function of its goals, purpose and focus.[199] Law reform, harmonisation and unification motivated this comparative analysis, making functionalism the most appropriate method of enquiry.[200] Zweigert and Kotz regard functionalism as the basic methodological principle of comparative law. To them, functionality is purpose, and purpose is fundamental to law. A functional enquiry starts by posing a concrete problem and examining foreign law to

[196] Trish Reay and others 'Presenting findings from qualitative research: One size does not fit all!' in Tammar B Zilber, John M Amis and Johanna Mair (eds), *The production of managerial knowledge and organizational theory: New approaches to writing, producing and consuming theory* (Emerald Publishing 2019).
[197] Ibid.
[198] Ann Langley and Chahrazad Abdallah, 'Templates and turns in qualitative studies of strategy and management' in Donald D Bergh and David J Ketchen (eds), *Building methodological bridges* (Emerald Publishing 2011).
[199] Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015); Yseult Marique, 'Jaakko Husa, A New Introduction to Comparative Law' (2017) 21(1) Edinburgh Law Review 139.
[200] Maurice Adams and others, *Comparative Law Methodology Volume 1* (International Library of Comparative Law 2017).

determine whether it can be resolved (identifying functional equivalents).[201] This thesis, therefore, identified and employed a non-legal *tertium comparationis* as a yardstick to identify the laws under comparison's real-world effects.

The countries chosen for this comparative legal analysis follow the common law tradition and have a population constituted predominantly of indigenous Africans. Moreover, they recently embarked upon reforms of their secured transactions law, but excluded land. Although these countries (Zambia, representing South Africa; Uganda, representing East Africa;[202] and Ghana (the comparator), representing West Africa), individually and jointly, might not necessarily give a full, complete account of the relevant legal issues in ASA's sub-regions, their stories provide invaluable insights. This clarification is important because the choice of the legal system for comparative purposes is part of the research methodology of every comparative law project.[203]

2.3 Study Limitations and Chapter Conclusion

This part briefly outlines the limitations of the study's empirical and doctrinal components, and also concludes the chapter.

2.3.1 Study Limitations

This thesis' empirical findings should be considered in the light of certain limitations related to the research sample. First, the borrowers' perspectives were captured largely through proxies, which may have reduced the depth of the insights obtained from the borrower sample. Borrower association representatives were interviewed, due to the challenges associated with accessing the borrowers themselves.[204] It should, however, be noted that the said representatives, these borrower associations' leaders, were themselves businessmen and borrowers in their own right. Ultimately, only six borrowers (speaking both for themselves and their respective associations' members as borrowers) were interviewed.

Second, moneylenders, who are very active in Ghana's informal sector and rural areas, proved inaccessible, since the majority of them have gone underground owing to the central bank's regulatory actions and law enforcement agencies' clampdown. This type of lender's

[201] Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (Tony Weir (tr), North-Holland Publishing Company 1977).
[202] Para 2.3.1 Although the author considered these three countries, references to Uganda are very little, while comparative references are chiefly made to Zambia.
[203] Marieke Oderkerk, 'The Importance of Context: Selecting the Legal Systems in Comparative Legal Research' (2001) 48(3) Netherlands International Law Review 293.
[204] Para 2.1.3.2.6

perspective could, not therefore, be factored into the discussion. Interviewing participants from all of the banks in different capacities and geographical locations, however, ensured that the experiences of the lenders, both small and big, were captured. Nonetheless, this may not be equivalent to speaking to moneylenders, who usually operate in the hinterlands. Six participants from micro-finance institutions were, however, interviewed.

With respect to the doctrinal component's limitations, since this thesis is intended to serve as a resource for the secured transactions law reforms that include land within a PPSA framework in ASA, the comparative law analyses originally included Uganda and Zambia, but a detailed, comparative discussion of Ugandan and Zambian law (compared with that of Ghana) could not be included due to limitations of space. Nonetheless, while this thesis makes general observations about the relevant discourse in ASA, the position in Zambia on certain key issues related to customary land could be a valuable example for the region and is referred to in chapter 11.

2.3.2 Conclusion

This chapter traced the journey of this thesis. It discussed the methodologies and methods that were employed to answer the research question, focusing on the socio-legal approach for the empirical component and the functional comparative approach for the doctrinal component. The chapter discussed the technical and ethical difficulties I faced while collecting the data for the qualitative study and the reasons behind my choices and decisions. The chapter also highlights the usefulness of the reflexivity concept in qualitative research endeavours such as this, and has shown how it was deployed, for instance, to make my preconceptions and biases transparent, as well as mitigate their influence on this research. My experiences in the field, including the interviews and documentary data collection, as well as the thematic analysis, and the steps taken to ensure rigour have all been considered in the empirical part of this chapter, together with the study's limitations.

Section 2.2 also shed light on this research's doctrinal component, which was designed to be basic comparative baseline legal survey intended to ascertain the relative feasibility and suitability of including land within the secured transactions reforms of ASA, such as in Zambia.

Chapter III

Interests in Land, Administration and Security Interests over Land

3.0 Introduction

This chapter considers land as a subject of security interests in Ghana, and to a lesser extent in ASA in general. It discusses interests in land, land administration, and the taking of security interests over land. It is descriptive and analytic, providing a context for this thesis' empirical component, as well as a foundation for the observations made regarding the feasibility of reforming secured transactions law in ASA to include land within a PPSA framework.

This chapter argues that an overwhelming share of landholding in Ghana, as in many other countries in Anglophone sub-Saharan Africa, is based on the norms, traditions, and structures of the customary society, whose land is usually located in rural areas. However, the services of the modern state land registries, which record and publicize rights and interests in land, tend to be unavailable and inefficient in rural areas and fail to address people's needs, including access to credit using land as collateral.

Moreover, the legal devices for the taking of security interest over land in this region (for instance, the common law/statutory mortgage and customary law pledge) are inefficient in enhancing access to credit. The chapter points out that, for example, in Ghana, prior to the B&L Act reform in 2008, the extant framework for land security interests faced significant challenges.

This chapter contains three sections. Section 3.1 briefly examines interests in land in ASA, the administration of these interests, and the taking of security interests over land. It provides the context for the specific discussion of Ghana. Section 3.1.1 surveys the various interests in land. It particularly highlights the customary law attitude towards the sale of land in Zambia as an example of how the countries in this region differ. These differences are due to a familiar narrative about land rights in Africa: the issue regarding their degree of proprietariness. 3.1.2 focuses on land administration in ASA, while 3.1.3 discusses security interests over land there.

Section 3.2, meanwhile, examines land rights, their administration, and the taking of security interests over land in Ghana. Section 3.2.1 summarises the various interests in land. 3.2.2

focuses on land administration, while 3.2.3 discusses the regime for the taking of security interests over land in Ghana before the B&L Act reform, which included land within a PPSA framework. Section 3.3 concludes the chapter.

Section 3.2.4. provides a comprehensive background to the discussions in chapters 5 and 6.

3.1 Land in ASA

This section generally discusses the various types of interests in land that can exist in ASA and how they are administered. It describes the context for the specific discussion of Ghana.

3.1.1 Nature

The land regimes in the majority of ASA countries are a product of their historical, cultural, economic, and legal traditions. These regimes are dualist, having a transplanted system from the British colonial power and also a customary system based on the indigenous culture and traditions.

A parcel of land is defined as customary or state land depending on whether it is governed by customary law or state (statutory) law. The location of the allodium over the land[205] usually determines the law governing it. Where the allodial interest is in a customary unit, with traditional chiefs, clan heads, or family elders exercising authority, customary law governs the land, making it customary land. This characteristic of the land will remain unchanged, even if the state acquires a lesser interest, such as a leasehold, in this land.[206] However, where the state owns the allodial interest, the state law is applicable to the land, making it state land. A lessor interest granted out of this,[207] nonetheless, retains its character, as state land.

Customary land may still be subject to the state's legal regime (for the duration of a lease, for example) but may revert to the customary fold upon the expiration of the lease. Additionally, customary practices' statutory recognition does not change customary law to state law (nor, for that matter, state land). Furthermore, where the state acquires an interest in customary land, other than the allodial interest, the land will remain customary land. The day-to-day decisions over customary land's allocation, together with dispute adjudication, are undertaken by the traditional authority, which is largely independent of the state, although the state offers

[205] Para 3.1.2.1
[206] In Zambia, however, such an acquisition will convert this customary land into state land, in perpetuity.
[207] This is the type of interests in land that is most preferred in the region of interest, due to its title certainty and security.

general guidance.[208] Although customary land dealings are largely informal, globalization has introduced modern practices, including land management, land formalization, and customary practices' statutory recognition. This has led some scholars to discuss the emergence of a 'new' customary tenure in Africa, distinct from the ideal or pristine.[209]

Under colonial rule, natural resources, including the colonised land, were controlled by the colonial administration, which rarely recognized the indigenous communities' rights to these resources. White farmers and miners were allocated both freehold and leasehold in productive land, which was administered based on the English common law and land administration systems.[210] This is the foundation of the majority of the state/statutory land in ASA.

3.1.2 Interests in Land

Interests in land that can be used as security are diverse: ranging from allodial to customary law tenancies as considered below.

Generally, land in ASA can be communal or private. With the former (especially in the case of customary land), every community member has a right to a certain minimum use of the communal land,[211] through various tenancy arrangements.[212] Customary land is usually described in these terms, albeit pejoratively, to indicate that it is neither proprietary nor alienable. Land is private where the rights acquired are both heritable and alienable, and the interest holder is entitled to use the land for any desired purpose.[213] These characteristics may apply to both state and customary land, although normally to the former. Customary land rights are not uniform but differ according to the prevailing social norms and cultural practices. Customary land rights range from the ownership (rights) of an individual, family, or group of families, to those of clans and tribes.

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[208] Admos Chimhowu and Phil Woodhouse, 'Customary vs Private Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa' (2006) 6(3) Journal of Agrarian Change 346.
[209] Admos Chimhowu 'The 'new' African customary land tenure. Characteristic, features and policy implications of a new paradigm' (2019) 8 Land Use Policy, 897 <https://www.sciencedirect.com/science/article/pii/S0264837717310207#bib0090> accessed 15 August 2020.
[210] Kablan Antoine Effossou and Moses Azong Cho, 'Land tenure conflict and agribusiness development in sub-Saharan Africa' (2022) 104(2) South African Geographical Journal 155.
[211] Max Gluckman, 'Studies in African Land Tenure' (1944) 3(1) African Land Tenure 14.
[212] Zambia Ministry of Lands and Natural Resources, 'Zambia Land Policy Document' (December 2017) <https://www.lusakatimes.com/wp-content/uploads/2018/03/Final-Draft-Land-Policy-for-validation-ex-CM_final-working-document-for-validation-_final_-EDITED.pdf> accessed 15 November 2019.
[213] S Rowton Simpson, 'Land Tenure, Some Definitions and Explanations' (1954) 6(2) Journal of African Administration 50, 52.

Proof of ownership of (customary) land in Africa is largely based on physical possession and occupation, combined with the community's recognition of such, especially the adjoining landowners.[214] Nevertheless, land possession and occupation, whether through self-help or formal allocation, must be based on blood/social ties, under the customary norms; otherwise, it constitutes trespass. However, regarding state land, proof of land ownership is based on documentary evidence, and must comply the relevant state law.

In ASA, although there are various means of occupying land. Generally, interests in land are an allodial interest in state/customary land, usufruct/customary freehold and customary tenancy over customary land, and common law freehold and leasehold over state land. A lease (over customary land) is also recognized in ASA. In certain areas,[215] its creation converts customary land to state land in perpetuity but, elsewhere,[216] upon the determination of such a lease, the land reverts to its original customary land status. Moreover, a community's members have certain rights to access all land, including private land for grazing, thoroughfares, and certain specific uses at certain times of the year.

3.1.2.1 The Allodial Interest

The allodial interest is at the apex of all of the interests in a piece of land, and the foundation for the customary law scheme of interests in land in the majority of ASA.[217] This interest is typically held by customary communities represented by the traditional authorities, including the chief or family (clan) elders, in trust for the people.[218] It may also be held by the state, as represented by the head of state or president, when the modern state compulsorily acquires land originally belonging to the traditional community and its structures.

In Zambia, the site of the allodial interest in land is difficult to locate conclusively. The Land Act 1995 vests all land in Zambia in the President of Zambia absolutely, in perpetuity. All land transactions require the president's approval, except for grants based on use and occupancy rights related to customary land, over which the chief/head exercise power.[219]

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[214] Raymond T. Abdulai and Adarkwah Antwi, 'Traditional Landholding Institutions and Individual Ownership of Land Rights in Sub-Saharan Africa' (2005) 2(3/4) World Review of Science, Technology and Sustainable Development 302.
[215] For example, Zambia, see paras. 3.3; 3.1.
[216] For example, Ghana see para 5.1.4.
[217] Bernard Joao da Rocha and Christian Hans Kwame Lodoh, *'Ghana Land Law and Conveyancing'* (2nd Edition, DR & L Print. and Pub. Services 1999).
[218] *Amodu Tijani v Secretary, Government of Southern Nigeria* (1921) 2 AC 399.
[219] See s.8(3) of the Lands Act 1995.

However, right or authority of the chief and headman (even in centralized customary societies) to allocate land in Zambia is doubted.[220]

The allodial interest could be acquired (especially in the past) by conquest, discovery by hunters, and also by gift. Modernization has rendered the allodial interest's acquisition via the former two methods impractical, if not illegal. Transfer by purchase or gift (albeit rare) seems to be the only viable means of acquiring the allodial interest by a person (corporate or individual, natural or juridical), other than the state (which can acquire it compulsorily). The allodial interest's owner can deal in the land in any manner whatsoever, subject solely to the fetters of the law in the community. From the allodial interests, other interests could be granted.

3.1.2.2 Customary Usufruct/Freehold

Customary freehold/usufruct is the customary right of a customary community's members to unappropriated portions of customary land, where the allodial interest is held by that community (headed by the chief/clan head). This right is distinct from the Roman concept of *usufructs,* which connotes the use of land and fruit and instead confers rights of ownership beyond that.[221] It is an alienable, proprietary, formalized right of possession, cultivation, and control. Its functional equivalent in English law is the common law freehold. Land occupation, rather than its formal granting, is the main mode of acquiring the usufruct, except that the traditional authorities now alienate formally in urban areas to manage scarcity and promote orderliness and proper planning. This mode of acquiring the usufruct, together with its incidents has, in some traditional societies, blurred its distinction from allodial interest.

In Zambia, it is debatable whether the customary freehold (or the allodial interest) is what an ordinary member of a lineage, who tills or cultivates unoccupied land or reduces a parcel to his possession by acts like cutting down a few boughs,[222] obtains, since such a right over such land is strongly asserted by such a member of the community.

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[220] Scholars like Colson, White and Gluckman deny any land owing right of chiefs or headmen in customary law. They rather see these traditional leaders' function as merely administrative, in nature giving information and certifying who owns which land in the community: Elizabeth Colson, 'Land Rights and Land Use Among the Valley Tonga of the Rhodesian Federation: The Background to the Kariba Resettlement Programme' in Daniel Biebuyck (ed), *African Agrarian Systems* (Routledge 1963) 141.

[221] Zaid Abubakari, Christine Richter and Jaap Zevenbergen, 'Exploring the" Implementation Gap" in Land Registration: How it Happens that Ghana's Official Registry Contains Mainly Leaseholds' (2018) 78 Land Use Policy 539.

[222] Henry C Gouldsbury and Hubert JW Sheane, *The Great Plateau of Northern Rhodesia* (London 1911).

The customary freehold is terminated by the abandonment of the land in question or a failure of successorship. In this event, the allodial owner resumes dominium. Sale, gift, compulsory acquisition, and forfeiture are other means by which customary freehold could be lost or alienated.

There is a direct relationship between the allodial interest and the usufruct. Where the allodial title resides in a centralized landowning authority within a community, the lineages, clans, and families forming the community may have customary freehold (over different community land tracts). The individual members of the respective clans, families, or lineages in this community may be assigned the usufruct (but over smaller plots) upon their occupation of specific plots. They could also be given customary tenancies (or leases),[223] created by the lineage/family heads. However, the land-owing authority may permit (by occupation or allocation) the usufructuary interest directly in the members of the various lineages or families that form the community, without the mediation of the lineage or family heads.

However, where the allodial interest is in the family, lineage, or clan, the members' interests are typically the usufruct, obtainable via occupation (through allocation or self-help).

3.1.2.3 Customary Tenancies

Customary tenancies are customary arrangements by which the allodial owner or usufructuary grants to a tenant farmer (usually, but not always, a stranger) the right to cultivate his land for an agreed period, in return for rent (usually an agreed portion of the farm's produce). In Zambia, through this contractual arrangement of temporary acquisitions, which include seasonal rentals and borrowings,[224] a tenant farmer tills another person's unutilized, preprepared fields, and both share the harvest.[225] This interest is alienable to the extent of the rights given. The English law equivalent of this is the leasehold.

3.1.2.4 Common Law Freehold and Leasehold

The freehold and the leasehold interests are understood in ASA as in English law. They are, however, typically granted over state land throughout most of the region. In countries like Zambia, where they are available over customary land, their grant converts customary land

[223] Para 3.1.2.4
[224] Michael J Roth and Steven G Smith (eds), 'Land Tenure, Land Markets, and Institutional Transformation in Zambia' (1995) LTC Research Paper 124.
[225] Ibid.

into state land.[226] They are preferred by lenders as security for credit because they tend to be documented.

3.1.2.5 Sale of Customary land

If land is to be included within the secured transactions reforms in ASA, then the subjects of security interests' proprietary nature should be clear. This paragraph explains the common perception regarding interests in land's proprietary nature in ASA.[227] Although such views are largely misconceived and receding,[228] they are informed by certain indigenous (albeit dynamic) views about land, as this section (which focuses on Zambian customary law) will demonstrate.

As a general custom in Zambia, a lineage or community member's interest in customary land cannot be sold.[229] The land itself cannot be bought or even rented, nor made a subject of a monetary transaction, including its use to access credit. The land, or its rights, can only be given away.[230] Further, it appears that transferring land in exchange for goods is discouraged,[231] as it is deemed to be identical to a sale. Improvements to land can, however, be sold, albeit this is viewed as merely a disguised land sale, because the transaction involves the transfer of land rights which, being like fixtures, are irremovable.[232] Land transfer in return for services is nonetheless permissible,[233] as is the temporary use of another's land in return for a share of the farm produce it generates, provided that there is no monetary consideration, and the transfer is not to a stranger.

The customary law prohibition of the sale of land must have originated in the context of an abundance of land, as it would be unreasonable for anyone to pay for what is plentiful; namely, land. Amidst population pressures, as well as economic and social changes, it is hard

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[226] The conversion of customary land into state land is permitted under section 3 (3) & (4) of the Lands Act, 1995

[227] Formal and informal property markets of varying levels of maturity have always existed, and are of growing importance in many parts of Africa today. This debunks narratives that that Africa neither knows nor has a history of property markets in which land is managed through various terms of tenure access, use, transfer and exchange; deny the proprietary nature of interests in land in Africa. See Adebayo Olukoshi, 'Property rights, investment, opportunity and growth: Africa in a global context' in Julian Quan, Su Fei Tan, and Camilla Toulmi, *Land in Africa: Market asset or secure livelihood?* (International Institute for Environment and Development 2005) 25, 29; Chimhowu and Woodhouse (n 208) 348.

[228] Ibid.

[229] See Para 11.2 for analysis of this position.

[230] MJSV Priestly and P Greening, *Ngoni Land Utilization Survey 1954-1955* (Government Printer 1956) 22.

[231] *Ndonji v. Makiko* (In the Makinjila Local Court Grade "B") Case No.5 1975.

[232] Charles MN White, 'A Survey of Land Tenure in Northern Rhodesia' (1959) 79 < https://onlinelibrary.wiley.com/doi/pdf/10.1002/j.1099-162X.1959.tb00140.x>

[233] Charles MN White, 'Factors Determining the Content of African Land Tenure Systems in Northern Rhodesia' in Daniel Biebuyck (ed), *African Agrarian Systems* (Routledge 1963).

to see how this customary law position can persist. Customary law must eventually adapt, particularly if vast swathes of customary land are to be leveraged for credit to enhance the economy. Indeed, evidence abounds of customary land's alienation for monetary considerations in recent times, which (unfortunately) has led to land grabbing and indigenous populations' displacement.[234]

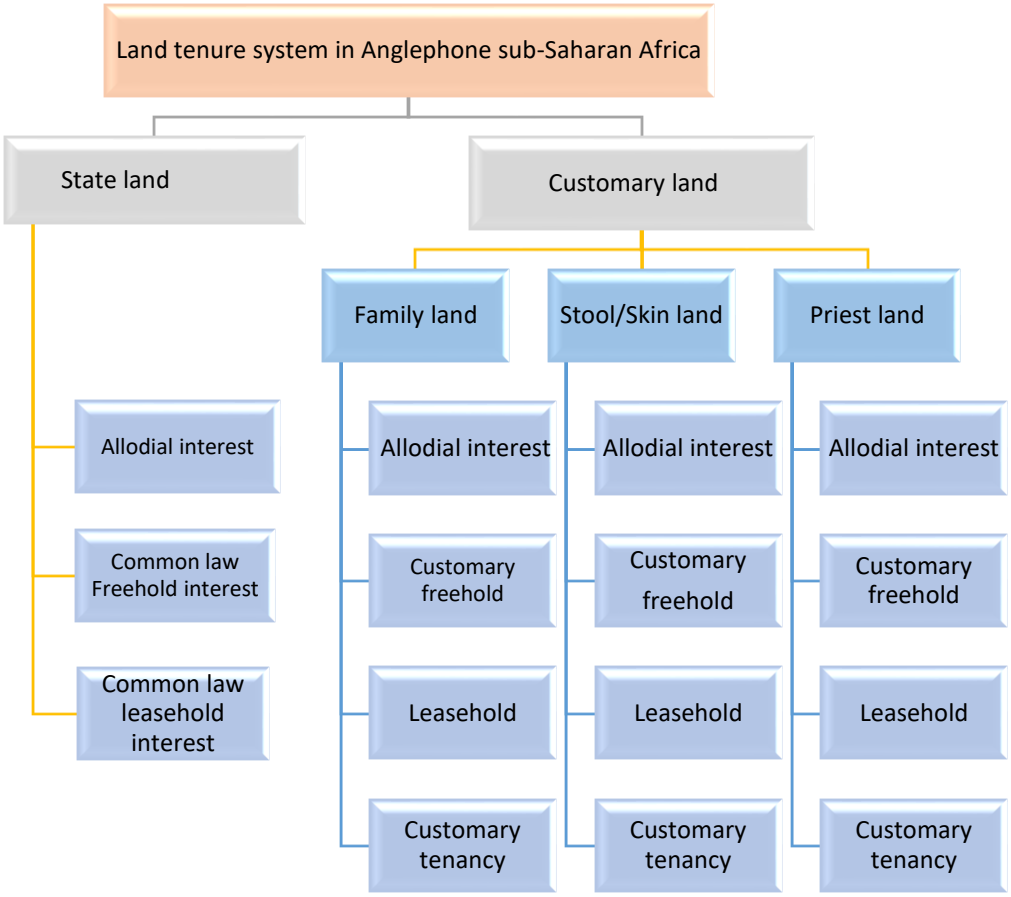

Figure 2:Land tenure system in Anglophone sub-Saharan Africa

3.1.3 Land Administration in Africa

In ASA, the method of land administration depends on whether land is state or customary land. If the former (which applies to only a limited part of the total land area and population), for the structure and processes for ascertaining, recording, and delivering land rights, and the systems for managing general oversight of the performance of the land sector, the modern

[234] Juliana Nnoko-Mawena, 'Zambia Should Protect Customary Land Rights' (Human Rights Watch 27 March 2018) <https://www.hrw.org/news/2018/03/27/zambia-should-protect-customary-land-rights> Accessed on 15th November 2021.

African states' ministries, departments, and agencies, which oversee land administration, have retained the land governance laws and systems bequeathed by the former colonial power.[235] The deed and land title registration systems, accompanied by the state survey and mapping system, are applied to state land.[236]

On the other hand, customary land in ASA is held and managed by the traditional authorities, such as the chief/head of the clan, lineage, or family, on trust for the people, to whom they are accountable.[237] These landholding institutions do not, in themselves, own land, but instead, hold it for, and on behalf of, the people, to whom they allocate it. In certain societies, however, in addition to their general allocation powers, these leaders wield huge power over the land, which is akin to resource ownership. These leaders and systems, ideally, assure lenders taking security over customary land of the nature of the interests and who owns them, the land's identity, and what is required by customary law for the perfection of the interest.

However, sceptics, pointing to reported cases of traditional leaders' illicit land sales and abuse of office, deny the significance and virtue of customary landholding.[238] It is, however, too harsh to deny customary landholding its intrinsic characteristic simply on the basis that some traditional leaders fall below the ideal level of conduct.

Nonetheless, the integrity of, and clarity on, the landowning authority, or, at least, the allocation and administrative powers of the customary landholding institutions over customary land, are crucial with regard to secured transactions over land in sub-Saharan Africa. Lenders should be in no doubt about who owns land or must consent to the granting of security over it. For, although ownership of land in Africa is not necessarily viewed in the classic Honorean terms of ownership,[239] but in terms of the rights which a person or social

[235] Robert Home, 'History and prospects for African land governance: institutions, technology and "land rights for all"' (2021) 10(3) *Land* 292.
[236] Para 3.1.1
[237] Abdulai and Antwi (n 214).
[238] Janine M Ubink, 'Tenure Security: Wishful Policy Thinking or Reality? A case from Peri-Urban Ghana' (2007) 51(2) Journal of African Law 215.
[239] According to Honore, the ownership of property refers to the ownership of a bundle of 12 distinct elements of individual rights, including: the right to use, the right to manage, the right to income from the property, the right to security, and the right to transferability. He, however, acknowledges ownership in various restricted senses, which omit any one or more of these incidents. See Anthony M. Honore, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (First Series, Oxford Clarendon Press 1961) 107.

group has over land[240] ("who has what interest over what land"),[241] certainty and security are vital, especially with regard to accessing credit with land as security.

3.1.4 Security Interests over land in ASA

This sub-section considers the taking of security over land in ASA, focusing on the main devices for doing so under the state/statutory law and customary law.

It is striking that Africa's pluralist legal regimes also shape the nature of the law regarding the taking of land security interests over land. Thus, the common law/statutory mortgage and indigenous security devices are the most relevant legal devices here.

3.1.4.1 Common Law/Statutory Mortgage

Legal and equitable mortgages in common law are applicable in these countries.

The form of mortgages at common law (that is, the conveyance of the legal estate (freehold or leasehold) with a proviso for the re-conveyance by the mortgagee on repayment by the appointed date[242], was the English law of legal mortgages that these countries inherited. Nonetheless, typically, legal mortgages are now created in these countries by (i) a sub-demise for a term of years absolute, for at least one day less than the term vested in the mortgagor, and subject to a provision for a cesser on redemption; or (ii) a charge by deed expressed to be by way of a legal mortgage. These methods are in line with the changes produced by the Law of Property Act 1925 in England,[243] which removes the previous right to assign a freehold or leasehold to a mortgagee. Equitable mortgages in these countries were (and remain) understood as lying under English/common law. An equitable mortgage may arise where a legal estate's owner in land executes an informal or imperfect charge over the estate or the chargee fails to comply with the legal requirements.[244] One might also be created from the mortgage of an equitable interest, such as the use of a beneficial interest under a trust or equity of redemption.[245]

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[240] Gluckman (n 211) 1
[241] Kwamena Bentsi-Enchill, 'Do African Systems of Landholding Require a Special Terminology" (1965) 9 Journal of African Law 116.[241]
[242] Robert Megarry and William Wade, *The Law of Real Property* (6th edn, Sweet and Maxwell, 2000) 1172.
[243] These are now the only forms of legal mortgage (provided under section 85 (1)) capable of being created under English Law.
[244] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (3rd edn, Butterworths, 2001), 598.
[245] Megarry and Wade (n 242) 1174.

The deposit of title deeds can also create an equitable mortgage.[246]

3.1.4.2 Indigenous security devices

In ASA, there exist indigenous devices for security interests over land. This device has been known as 'pawning,' 'pledging,' 'secured agreement,' or 'promising', and serves as an important credit source.[247] Through this device, a borrower gives another the right to use his/her land until a loan has been fully repaid or a secured obligation fully discharged. This indigenous financing device's details vary widely, depending on factors such as customary land rights, social attitudes towards open-ended loans, the credit parties' interpersonal relations, the landed resources' use rights, and the urgency of the credit needs.[248] However, in some cases, the device illegitimately disguises land sales.[249] In Zambia, for example, such a device is unknown, as land cannot be sold or money made from it, although there exist instances of land sales and land-related financial transactions caused by modern pressures on land as a resource. Thus, this indigenous finance device's meaning and function should be conceptualized within the historical, socio-economic, and institutional contexts of the societies concerned.[250]

3.2 Land in Ghana

This section discusses the legal and institutional contexts of land rights and governance in Ghana, as well as the taking of security over land.

3.2.1 General overview of interests

Approximately 80-90% of Ghana's landholding is private (as opposed to public or state land).[251] The tendency to combine purely English concepts with indigenous Ghanian ideas

[246] Gray and Gray (n 244) 601. In Russel v Russel (1783) 1 Bro CC 269, where title deeds were deposited with the intention that the recipient shall hold them as security, it was held that an equitable mortgage had been created.
[247] Philippe Lavigne Delville and others, 'Negotiating Access to Land in West Africa: A Synthesis of Findings from Research on Derived Rights to Land' (International Institute for Environment and Development 2002) < https://www.iied.org/9072iied> Accessed on 10th June 2021
[248] Ibid.
[249] Daivi Rodima-Taylor and Parker Shipton, *Mortgage across Cultures: Land, Finance, and Epistemology* (Boston University 2017) 1, citing Vidrovitch CC *Le régime foncier rural en Afrique Noire* (1982) and Le Bris E and others (1982) *Enjeux fonciers en Afrique noire* (1982) 65
[250] Delville (n 247).
[251] Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana: Building on Tradition and Modernity* (International Institute for Environment and Development 2001).

meant that different parties described the various interests in land by different ways. This led the Ghana Law Reform Commission (in a bid to promote clarity) to recommend the adoption of the provisions now contained in Section 1 of the Land Act, 2020 (Act 1036), setting out the interests in land which can exist in Ghana. This was merely a statutory recognition of what existed within customary law, which forms the basis of Ghana's land law. These interests are: (a) the allodial title,[252] (b) customary freehold,[253] which is sometimes distinguished from the usufruct,[254] (c) common law freehold,[255] (d) leasehold,[256] and (e) lesser interests created by virtue of any rights under contractual, sharecropping or other customary tenancy arrangements.[257]

These interests are largely understood in Ghanaian law as they are in ASA,[258] including their modes of acquisition. For reasons of space, therefore, they will not be discussed individually here, but cross-referenced with their treatment above. These interests are steeped in customary law, with few legislative interventions.

3.2.1.1 Public and Private Land

Land ownership in Ghana can be divided into two groups: public land and private land.

3.2.1.1.1 Public land

Public land itself falls into two main categories: (1) land which has been compulsorily acquired for a public purpose or in the public interest under the relevant statute (state land). Such land may be owned by any level of government, such as local, urban, departments, and state corporations. The President can acquire an absolute interest in any piece of land in Ghana in the public interest and upon payment of appropriate compensation; (2) land vested in the President in trust for the landholding community (vested land). Creating dual ownership, vested land transfers the land's legal title to the state, whilst the beneficial interest remains with the community/stool. Unlike in the case of state land acquisition, no compensation is paid in the event of land being vested in the state, although the land's

[252] Land Act 2020 (Act 1036), s. 2; Para 3.1.2.1
[253] Act 1036, s.3; Para 3.1.2.1
[254] Act 1036, s.5
[255] Act 1036, s. 4; Para 3.1.2.4
[256] Act 1036, s. 6; Para 3.1.2.4
[257] Act 1036, s. 7; Para 3.1.2.3
[258] Para 3.1

beneficial owners receive an income that may arise from the alienation (or any other use) of the land made by the President (state).[259]

Here, the term 'state land' is used to refer to public land (either state or vested) over which the state law (as distinct from customary law) applies.[260]

3.2.1.1.2 Private Land

The rest of Ghana's land is private, which consists, apart from a few common law interests, primarily of 'communal ownership estates. Thus, the customary fold is believed to hold the overwhelming bulk of Ghana's land (approximately 90% of all landholding). Different types of customary land are identifiable, depending on where the land's ultimate ownership can be located in the community.

3.2.1.1.2.1 Stool/Skin land[261] – This is customary land held by a traditional chief or other community leaders, on behalf of and in trust for the tribe (stool/skin), under customary law and practices. This land includes all land at the local communities' disposal.

3.2.1.1.2.2 Tendana Land – This land, akin to stool land, is managed by the first settler in the community's descendants, who is usually seen as a traditional priest and the custodian of all land.

3.2.1.1.2.3 Family land – This is land in the customary fold that is owned by families or clans who share a common patrilineal or matrilineal ancestor, who may have acquired it through conquest, occupation, or other means, including purchase.

3.2.1.1.2.4 Individual/private land – This is land in which individuals have acquired the ultimate interest as private property, with no reversionary interest in anyone. It may be acquired by purchase or other means of obtaining the allodial interest. Due to the rarity of customary land's ultimate interest being located in an individual, where an individual's land is free of all family sanctions or restrictions, such a holder's land (even a freehold right over customary lands) has been described as individual or private land.[262]

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[259] Anthony Arko-Adjei, *Adapting land administration to the institutional framework of customary tenure: The case of peri-urban Ghana* (No. 184, IOS Press 2011).
[260] Para 3.1.1
[261] The 'Stool' is a carved wooden stool, which is the traditional symbol of kingship or chieftainship in Southern Ghana. Its equivalent in Northern Ghana is the 'Skin', which is the leather of a wild animal with fur, on which the chief sits in state. The stool or skin is consecrated and believed to contain the spirits and souls of the ancestors, and the entire community for that matter. The customary community or its chief could be referred to as the 'stool' or 'skin', depending on the context.
[262] Arko-Adjei (n 259).

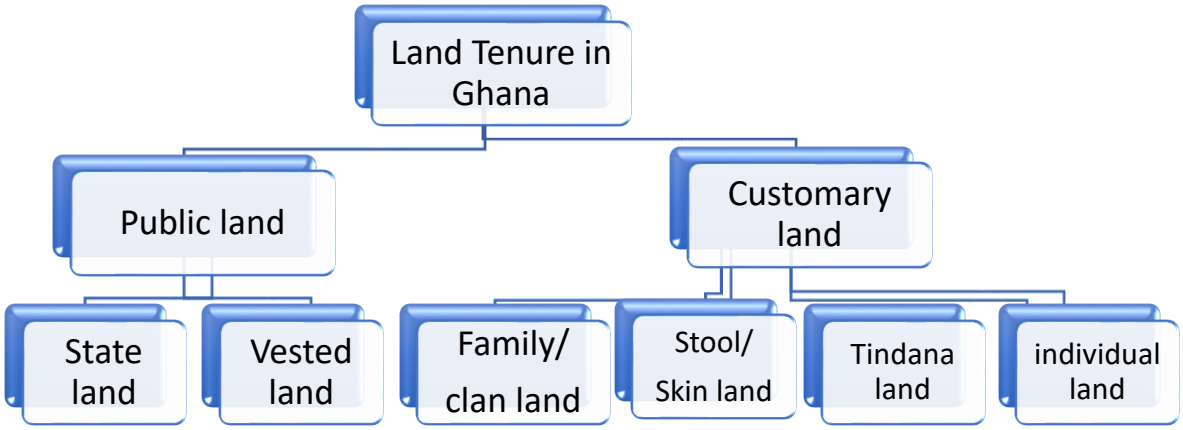

Figure 3:Diagram showing land tenure in Ghana.

The two diagrams in this chapter are adapted from other authors.[263]

[263] Kwabena O Asiama and others, 'Responsible consolidation of customary lands: A framework for land reallocation' (2019) 83 Land Use Policy 412; Kwabena Mintah and others, 'Skin lands in Ghana and application of blockchain technology for acquisition and title registration' (2020) 12(2) Journal of Property, Planning and Environmental Law 147.

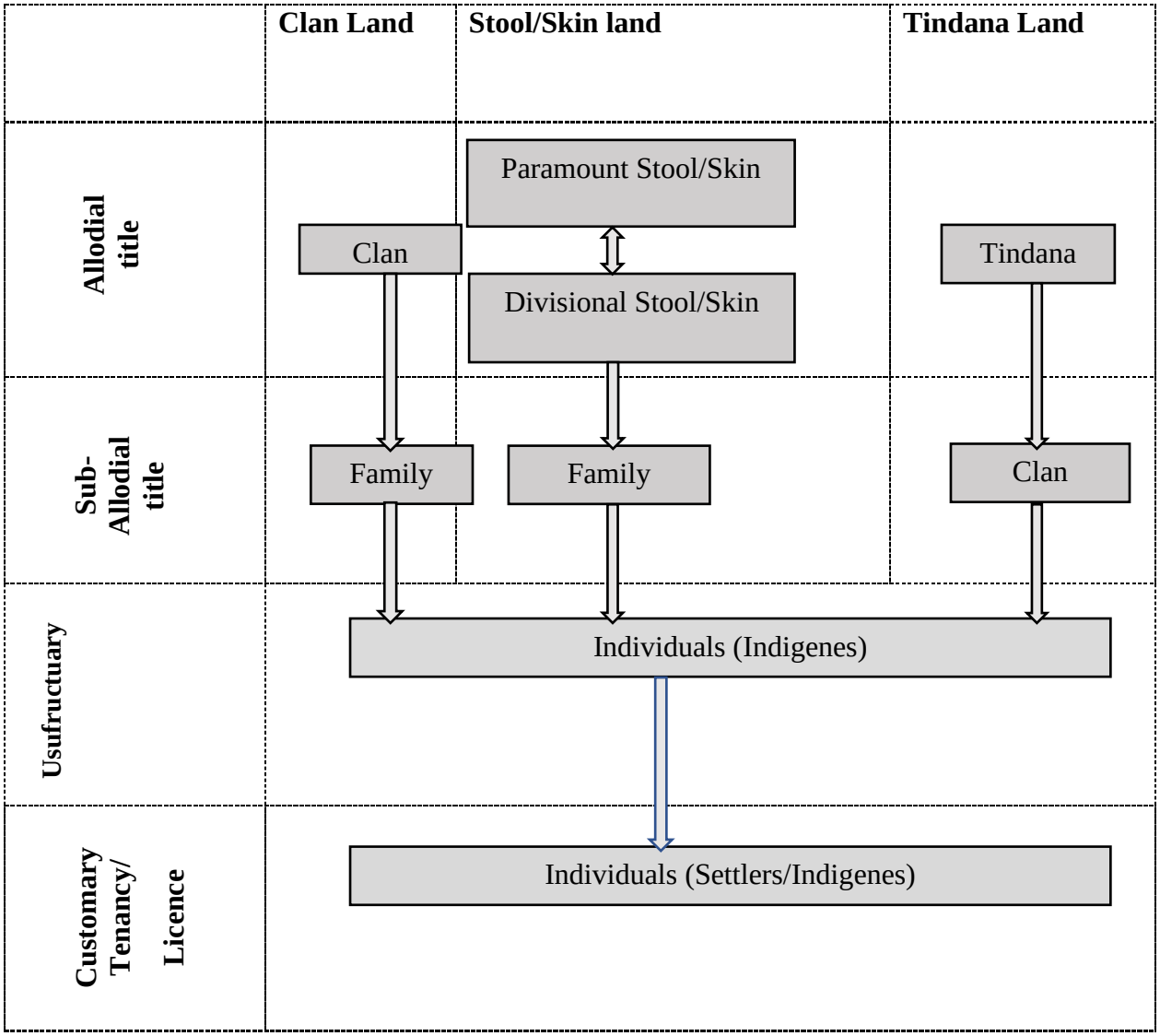

Figure 4:Diagram showing customary land's types (horizontal) and interests (vertical).

3.2.1.2 History of Customary Interests

Customary law interests in land in Ghana have a relatively complicated history.

First, it was argued, in fervent defense of pristine customary law, that selling land is not simply a question of selling realty but also of selling a spiritual heritage and betraying the ancestral trust as well as harming posterity.[264] However, the fact that vast land tracts were sold by chiefs in southern Ghana during the nineteenth cocoa and mining booms would challenge this view. Additionally, the West African Court of Appeal held, in one case,[265] that

[264] Joseph B Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (Routledge 1928).
[265] *Sasraku v David* (1930) 1 WACA 49.

a stool could sell land and, in another[266], the court affirmed that a stool[267] could sell the allodial interest and retain nothing of the land apart from the remote possibility of a reversion, which occurs if the purchaser dies without a successor.[268]

Second, during the early colonial rule of the Gold Coast (now Ghana), the customary law interests in land were mischaracterized as simply communal and thus non-proprietary. This view informed the colonial policy and the majority of the expert advice on case law on the then Gold Coast (Ghana).[269]

The Gold Coast courts held this erroneous view of customary interests for a long time. A progressive opinion of the court on the interests, which acknowledged that the social changes within customary societies had transformed the usufruct (for example),[270] was however seriously criticized for effectively converting community land into private land.[271]

It took Lord Denning in a Privy Council case[272] to clarify the position on customary interests' proprietary nature, as follows:

"Native law or custom in Ghana has progressed so far as transform the usufructuary right, once it has been reduced into possession, to an estate or interest in land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount stool to its customary services. He can alienate it to a stranger so long as proper provision is made for commuting the customary services. On his death it will descend to his family as family land except in so far as he has disposed of it by will, which in some circumstances he lawfully may do".

This quotation shows that a subject of a stool or family member now acquires a proprietary usufruct when he takes possession of (or in any lawful manner acquires) an unoccupied parcel of stool or family land (as the case may be).[273]

[266] *Boateng v Adjei* (1963) 1 GLR 79.
[267] See Footnote 261.
[268] Para 3.1.2.1
[269] Charles Kingsley Meek, *Land law and Customs in the Colonies* (OUP 1946).
[270] *Lokko v Konklofi* (1907) Ren 450, cited in Samuel KB Asante, 'Interests in Land in the Customary Law of Ghana: A New Appraisal' (1965) 74(5) Yale Law Journal 848.
[271] *Tijani v Secretary, Southern Nigeria* (1912) AC 399, 404 (Privy Council)
[272] *Kotei v Asere Stool* (1961) GLR 492 (Privy Council).
[273] Para 3.1.2.2

3.2.2 Section B: The Management of Interests in Land

This section focuses on the regime for land administration or management in Ghana. It considers the institutional and legal framework (under state and customary law) that is central to managing the various land interests identified.

3.2.2.1 State Institutions

The state land administration has its roots in the colonial and post-independence eras. Under this system, the institutions regulating and supervising land allocation are largely centralized, despite the recent Land Administration Project (LAP).[274] The Ministry of Lands and Natural Resources is the main political umbrella under which the other institutions operate. These are: the Land Commission, which comprises the survey and mapping division; the land valuation division; the land registration division; and the public and vested land division.[275] An integral part of Ghana's land administration is land registration, which is a component of land management that has attracted equally resources, controversy, and problems. It has been central to the title and security of the ownership discourses, especially in the context of access to credit. The deeds and title registration systems are the two land recording systems.

These state institutions' mandate (at least on paper) also covers customary land, particularly with respect to the formalization of interest within it, regarding which they have largely proved unsuccessful. Their services have been very expensive for the ordinary person and characterized by delays, bureaucracy, and unresponsiveness, which has had dire repercussions for access to finance. These state institutions have largely been absent in the rural areas and failed to win the ordinary people's trust.

This is regrettable because it was the customary ownership and management system's perceived inability to provide reliable land transaction records that necessitated the state land registry system's mandate—to guarantee certainty and security of title[276].

[274] This project was initiated in 2003 in Ghana by the World Bank to realize land policy and institutional reforms and key land administration pilots in order to pave the way for a sustainable, decentralized land administration system that is fair, efficient, and cost effective and ensures land tenure security. The decentralization of the land registration services is a core objective of this project, but it remains the responsibility of the state to formulate and enforce the rules on land ownership and use.
[275] Land Commission Act 2008
[276] Kasanga and Kotey (n 251).

3.2.2.2 Customary Institutions

The Constitution of Ghana recognizes traditional institutions and customary law.[277] Under customary law, the chief/family head can only alienate or exercise any proprietary right over land with the councillors of the stool[278] or principal family elders' consent and concurrence, without which any land dealing is voidable, because, although the chief is the political leader in the traditional state, he does not own the land personally, merely holding it in trust for the community. He is simply a custodian, although he can own private property (whether acquired before or after his accession to the stool).[279]

The grant of stool land by the stool is now subject to Land Commission's consent.[280] Such consent is expected to be granted where the Lands Commission is satisfied that the disposition or development is consistent with the development plan that the planning authority drew up or approved for the area concerned.

Chiefs, and the traditional structures in general, nowadays, administer customary land with the CLSs' assistance.[281] The CLSs are decentralized administrative units of customary land administration that oversee the customary landholding management within their respective communities. [282] Their functions, among other things, facilitate the taking of security interests over land.[283] Lenders' acceptance of the allocation papers that the chiefs issue as evidence of the grantees' interests, has improved recently, partly due to the CLSs' work.

3.2.3 Legislative Intervention: The Land Act 2020

In addition to the 1992 Constitution of Ghana, the new Land Act, 2020 (Act 1036), which was enacted to revise the land laws,[284] makes significant interventions into the law's corpus relating to land in Ghana. Some of this Act's provisions have sparked substantial controversy, leading to protests by prominent traditional rulers, including the Asantehene, who, for

[277] Article 11, Constitution of Ghana (1992). Assembly Press, Accra on the laws of Ghana. Customary law is an integral part of the laws of Ghana. Article 270(1) also guarantees the institution of chieftaincy.
[278] *Amodu Tijani v Secretary, Government of Southern Nigeria* (1921) 2 AC 399.
[279] *Boateng v Adjei* (1963) 1 GLR.
[280] Para 3.2.2.1; Article 267(3), Constitution of Ghana (1992) Assembly Press, Accra, Ghana.
[281] Customary Land Secretariats
[282] Samuel B. Biitir and others, 'Integrating Decentralization and Administration Systems with Traditional Land Governance in Ghana: Policy and Praxis' (2017) 68 Land Use Policy 402; also see John Bugri, *Sustaining Land Secretariats for Improved Interactive Land Governance in Ghana* (World Bank 2012).
[283] For a discussion of the CLS, see Para 5.2.2.1.3
[284] The Long Title of Land Act 2020: AN ACT to revise, harmonise and consolidate the laws on land to ensure sustainable land administration and management, effective and efficient land tenure and to provide for related matters.

instance, repudiates some of the law's provisions[285] including the sections that deem traditional rulers as fiduciaries who are saddled with an obligation to account or criminal sanctions may apply.[286]

The following discussion, however, focuses on the Act's interventions that impinge directly on the issues of relevance to this thesis. First, the usufructuary interest holder can no longer alienate any land interest to an individual who is not entitled to such, without obtaining the written consent of and making adequate payment to the allodial owner, which consent shall not be unreasonably withheld.[287] This constitutes a further weakening of the true incidents of the customary usufruct in Ghanaian customary law but might improve the certainty of land titles that are presented as collateral for credit.[288] Second, the proscription of the grant of the freehold interest in, or right over any stool land, under article 267(5) of the 1992 Constitution appears to have been extended to include clan or family land.[289] This appears curious since it could be argued to amount to the emendation of a provision of the Constitution by an Act of Parliament. Third, under the new law, an individual must obtain written consent from his/her spouse before selling, exchanging, transferring, mortgaging, or leasing land, or a right to or interest in it, or entering into a contract for land sale, exchange, or transfer, but that consent should not be unreasonably withheld.[290]

One of the Land Act 2020's positive interventions is its signalling of the state's intention to progress land administration. Under this law, no alienation of an interest in allodial land will be processed unless the land has been registered,[291] provided that it lies within a registration district.[292]

[285] Voice Magazine, 'Ghana: Asantehene rejects section of New Lands Act that demands accountability' <https://thevoicenewsmagazine.com/ghana-asantehene-rejects-section-of-new-lands-act-that-demands-accountability/#:~:text=The%20Asantehene%2C%20Otumfuo%20Osei%20Tutu%20II%20has%20rejected,over%20the%20use%20of%20proceeds%20from%20land%20sale.> Accessed on 10th December 2022
[286] Act 1036, s. 13. The Asantehene, the King of the Asantes of Ghana, is believed to own all of the land in the kingdom. Although in theory he holds the land on trust for the people, he exercises absolute authority over it and does not account in practice to his subjects in the manner contemplated by Act 1036. Accountability is not necessarily denied, but is exercised differently in the Kingdom.
[287] Act 1036, s. 50(20)
[288] Para 5.4.3
[289] Act 1036, s. 9(2)
[290] Act 1036, s. 47
[291] Act 1036, s. 182(4); Para 5.2.2.2.4
[292] Act 1036, s. 182; Para 5.2.2.1.2

Also, the Act grants statutory recognition to the CLSs, which are to be established by the customary landowners to manage stool, skin, clan or family land. The CLS is required to keep records on customary land transactions, either oral or documentary.[293]

3.2.4 The Pre-B&L Act regime for taking security interest over land in Ghana

This section examines the legal regime that governed security interests over land in Ghana prior to the introduction of the B&L Act. It, among others, provides a context to some of the discussions in chapters V and VI.

3.2.4.1 The Mortgage

The mortgage is the better known of the Pre- B&L Act legal devices for the creation of security interests in land within Ghana's formal economy. This section discusses the mortgage before 2008, focusing on its creation and attachment, perfection, priorities, and enforcement, together with their associated problems. The mortgage as a security device can apply to both customary and state land. Where the credit parties use a mortgage to take security interests over customary land, it is the statutory/common law of mortgages that applies to the transaction but this does not convert the burdened land into state land.

3.2.4.1.1 Background

The Mortgages Decree, 1972 is authoritative on the Ghanaian law of mortgages. The Decree was enacted to simplify the Ghanaian law of mortgages by codifying with modifications the common law on mortgages.

3.2.4.1.2 Mortgages Decree, 1972.

Prior to the Mortgages Decree, it was necessary (as across ASA, where the device was transplanted from England)[294] to convey the legal title to create a legal mortgage in Ghana. However, the Mortgages Decree defines a mortgage under Section 1 as a security for the payment of a debt or performance of an obligation that merely constituted an encumbrance on the mortgagor's property. This encumbrance did not change the right to possession, ownership and other interests in the property, so the mortgagor retained ownership. Consequently, a legal charge could be created in the same property by a mortgagor who had already created an earlier one in the same property in favor of a mortgagee, except that the first mortgagee (in such a case) had priority in the event of default. This was impossible

[293] Act 1036, ss. 14 to 18.; See Para 5.2.2.1.3
[294] Para 3.1.4.1

under the Pre1972 law of mortgages—an equitable mortgage would have been what, if anything, was available to a mortgagor who wished to access credit using the same property, because ownership would have been conveyed to the first mortgagee. This legal title in the mortgagee enabled him or her, for instance, to manage the property, grant leases, sue for rent and give good title to the purchaser on the realization of the security.[295] The legal title made the mortgagee virtually the owner of the property although equity intervened to preserve the essence of the mortgage as merely a security. The mortgagor's equity of redemption and the equitable right to redeem were always championed by equity which imposed strict rules of obligations and liabilities to prevent the mortgagee in possession from gaining from the mortgage beyond the fact of it being a security.

Under the Mortgages Decree, however, the legal title now remains with the mortgagor, despite the number of charges that might be created on the same property.

3.2.4.1.1 Essentials of the Pre-B&L Act Mortgage

Using the essential features or terminology of modern secured transactions for the analysis, the following sections briefly discuss how the mortgage in the Pre-B&L Act framework was created, attached, perfected and enforced, as well as how priority was determined.

The treatment of the mortgage was not comprehensive under this regime. For example, out of 139 sections of the Land Title Registry Act 1986, only seven were devoted to discussing the mortgage. This lack of comprehensiveness did not help secure transactions over land generally, including leaving gaps in the regime, for instance, on issues related to the priority of mortgages.

3.2.4.1.1.1 Creation or Attachment

A mortgage under this framework could be created verbally. Despite the benefits of this informality of the Ghanaian mortgage for the illiterate mass of people, it was a source of uncertainty and dispute in the framework and, in the long run, proved inimical to the economy. It thus became one of the main areas of focus of the B&L Act regime.

The mortgage could be written[296] (and processed in the prescribed form of a deed and registered at the land registry)[297] or unwritten (when the requirement for writing was

[295] Anselmus KP Kludze, 'Modern Ghanaian Law of Mortgages' (1974) 11 University of Ghana Law Journal 1.
[296] See Mortgages Decree, ss 1 and 3(1) (a) requiring a mortgage contract to be in writing for enforceability.
[297] See Mortgages Decree, ss 3(2) and (3) in the case of unregistered land and LTRA, 19, s 72 in the case of registered land.

dispensed with, as in the case of customary law transactions over land).[298] This character of the Ghanaian mortgage was, and remains, markedly different from the current position in English law, where an agreement to mortgage a piece of land is devoid of any legal effect, and incapable of creating a security interest in the land, unless that agreement and all of the related documents were available in written form and signed by or on behalf of the parties.[299] Da Rocha and Lodoh[300] maintain that the non-insistence on writing under Section 3(1) (b) of the Decree also contemplated the creation of an equitable mortgage through the depositing of one's title deed with the creditor.[301] However, a deposit of title deed over registered land had to be notified to the Land Registrar, even though the transaction was unwritten. This was by virtue of paragraph 81 (1) of the Land Title Registration Regulation, 1986 (L. I. 1341), passed pursuant to the Land Title Registration Act 1986. It was, however, unclear whether such a notice amounted to registration or affected the determination of priorities.

3.2.4.1.1.2. Perfection

Under the Pre- B&L Act regime, the mode of perfection of a security interest in mortgages of land (customary or state land) was dependent on whether the property was situated in a 'registration district'[302] or otherwise. Registration of charges on land was done using manual or non-electronic processes, by which a note of the encumbrance was made on the relevant pages of the land certificate. These distinct regimes—each with its peculiar challenges – exposed the inefficiencies and complexities within the framework.

3.2.4.1.1.2.1 Perfection of a mortgage over registered land.

Mortgages or security interests in land in registration districts were perfected by registration at the Land Title Registry under Section 72 of the Land Title Registration Act, 1986. This section made it uncertain whether a mortgage by way of the deposit of title documents over land in a registration district could be perfected and protected in terms of priorities, despite the requirement to notify the Registrar of such a deposit.[303] Notice is not registration and perhaps only became useful when the equities of encumbrancers were being determined.

[298] Section 34 of the Land Act 2020 validates the oral granting of interests in land in Ghana. See Para 6.2.2.2.1 for a discussion of the treatment of oral grant and interests.
[299] See Royston Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (7th edn, Sweet & Maxwell 2023) para 2-04 citing Law of Property (Miscellaneous Provisions) Act 1989, s 2.
[300] Da Rocha and Lodoh (n 217).
[301] In *Russel v Russel* (1783) 1 Bro CC 269, where title deeds were deposited with the intention that the recipient shall hold them as security, and it was held that an equitable mortgage was created.
[302] See Paragraph 81(1) of Land Title Registration Regulations.
[303] See 3.2.1

Such doubts, and also the fact that large swathes of land in Ghana lie outside the registration district, inhibited access to credit in this regime and made reforms desirable.

Company charges

According to paragraph 65 of the Land Title Registration Regulations, 1986 (L.I. 1341), where a charge was created over registered land belonging to a company, it was to be registered first at the Companies registry and subsequently at the Land Title Registry. Often, the applicable rules of priority were unclear.

Process of registration

The process of registration (of both interests in land and mortgages) was intended to be a mirror that reflected the current facts material to the title of a particular parcel of land and whose integrity was guaranteed by the state. However, bureaucracy, delays, inefficiency and corruption rendered these goals unachievable.[304]

Registration was undertaken by entering the details of the mortgage transaction specified on the relevant form,[305] including the amounts to be paid, the dates of the repayments, the interest rates, etc., on the register. Subsequent transactions connected to the mortgage, such as a discharge (full or partial), transfer of the mortgage, and disposition of the land were all effected on the register manually, using the appropriate forms. These could take weeks and involve a considerable cost.

3.2.4.1.1.2.2 Perfection of a mortgage over unregistered land

Prior to the B&L Act,[306] where the mortgage is over land outside a registration district, the Mortgages Decree appears to permit perfection by registration[307], or possession of title deeds[308], or no perfection at all. This created complexities and uncertainties within the framework.

The perfection of security interests over unregistered land could be by registration at the deed registry, whose services are manual, and absent in most of the rural areas where the bulk of unregistered land is located.[309] The few parcels of land that were registered were difficult to

[304] Richmond J Ehwi and Lewis A Asante, 'Ex-Post Analysis of Land Title Registration in Ghana Since 2008 Merger: Accra Lands Commission in Perspective' (2016) 6(2) SAGE Open.
[305] Form 40 of the Land Title Registration Regulations, 1986(L. I. 1341)
[306] Since the prior law was never repealed, the following discussion is still current.
[307] Mortgages Decree ss 3(2), (4) and (5)
[308] Under Mortgages Decree s. 10
[309] See Land Registry Act, s 3; para 2.3.3.1.

search and locate. Registration (when searchable and discoverable) only gave notice of the prior charges on the land. Indeed, the registration of a mortgage over unregistered land appeared to have little consequence because what seemed most important was the date of the creation of the mortgage[310] (however proven). In any case, registration at the deed registry did not confirm a legal interest in the land, merely, at best, evidence of an equitable interest.[311]

The second possible form of perfection is taking possession of title documents over state or customary land. This became good evidence of a security interest, given the unreliable nature of registration and the land registry system. The problem, however, was that it only conferred an equitable interest in the property and did not prevent the mortgagor, who had a legal title and possession at the same time, from creating further charges on the same property. Where the perfection of the mortgage was through the deposit of a title deed (which was without the underlying mortgage agreement that already might have created a legal charge), the mortgagee, being an equitable charge holder, could lose out to a bonafide purchaser of the legal interest (absolute or by way of a charge), without notice. This introduced title insecurity and confusion, which the courts were forced to settle at great cost. A negative impact on access to credit was the eventual outcome.

Thirdly, there could also be non-perfection of a security interest in unregistered land. Indeed, unlike other 'instruments affecting land', the non-registered written mortgages escaped the invalidity or 'no effect' fate[312] (arising from a failure to register at the land registry). In other words, a mortgage remained effective even though it was an instrument affecting land, but which was not registered as expected of instruments. Apart from a company that was supposed to register a charge over its land which lay outside a registration district under section 107 of the Companies Act 1960, the non-perfection of a charge over unregistered land did not have any real consequence, provided that the date of its creation could be ascertained. Even in the case of the company, there is no indication regarding its effect. Litigation over security interests over unregistered land appeared inevitable.

Additionally, there was no means of recording oral transactions over land, which were common in rural areas.[313]

[310] See Mortgages Decree, s 19.
[311] See Land Registry Act, s 24(1).
[312] See the combined effect of the Land Registry Act s 24 and the Mortgages Decree s 3(2).
[313] See Para 6.0

It is therefore evident that there were real challenges within the Pre-B&L Act framework for the perfection of security interests over unregistered land.

3.2.4.1.1.3. Priority

The Mortgages Decree sets out the rules on priority between charges over land, which largely preserve those of the common law. What was markedly different was that the subsequent mortgages under the Decree were all legal, so the circumstances under which the order of priorities might be reversed by the application of the doctrine of a *'bona fide purchaser for value'* were minimal.

However, the nature of the relationship between the land registries and other registries was unclear.

Section 19 of the Decree, therefore, provided the basic rule of priority as 'the first in time prevails'. This was, however, subject to some exceptions, including (a) where the priority rules of the Decree run contrary to the provisions in other enactments; (b) where the encumbrancers agreed to different priority rules among themselves; and (c) rules of equity relating to fraud, a bonafide purchaser without notice, the priority of legal over equitable interest, and estoppel for gross negligence.

These showed the unfortunate dependence of the Ghanaian law of mortgages on English law on a matter as difficult to grasp, even in English law, as the priority of security interests.[314]

The Decree, however, attempted to simplify other complicated common law and equity priority concepts by abolishing consolidation[315] and tacking (except where a mortgage is expressed to secure further advances).[316]

3.2.4.1.1.4. Enforcement

The Decree provided for the enforcement right and obligations of the parties to a mortgage upon the default of the mortgagee. All of the available mechanisms for enforcement required the courts mandatorily to play a role. They included the entry of possession of the mortgaged

[314] See Goode and Gullifer (n 299) para 5-01.
[315] See Mortgages Decree s 19(4);
[316] Mortgages Decree, s 19(3), The *tabula in naufragio*, whereby a subsequent mortgagee acquired priority due to the later acquisition of a superior legal estate, has been abolished. However, the tacking of further advances is preserved.

property,[317] the judicial sale of burdened land,[318] and the appointment of a receiver or manager.[319] Delays in the realization of security were thus common.

3.2.4.2 Customary Law Pledge

The pledge[320] under Ghanaian customary law gave the creditor (the pledgee) the right of possession and use of the borrower's (pledgor's) property (surrendered to the creditor by the debtor) until either the debt due had been paid, or the obligation discharged.[321] This indigenous security device has counterparts in other Anglophone sub-Saharan African countries.[322] The pledge co-exited the mortgage, but was very popular in the rural areas.

As when discussing the mortgage, secured transactions terminology is used in the consideration of the pledge.

The following paragraphs highlight several of the incidents of the pledge which became the subject of statutory interventions. These interventions contributed to the decline in reputation and use of the pledge in the rural economy, and negatively affected access to credit.

3.2.4.2.1 Creation

A pledge was created by an agreement, oral or written, between the debtor (the pledgor) and the creditor (the pledgee), which identified a specific landed property as security for a loan or an obligation owed. Section 1 of the Conveyancing Decree required all contracts for the transfer of interests in land to be in written form, except for oral grants or devices under customary law.[323]

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[317] Ibid. s 17(1)
[318] Ibid. s 18(9)
[319] Ibid. s 16(1)
[320] Commentaries on pledges in Ghana include: Emmanuel VO Dankwa, 'The End of Pledges in Ghana?' (1989) 33 Journal of African Law 185; NA Ollenu, *Principles of Customary Land Law in Ghana* (Law in Africa Series 2, Sweet and Maxwell 1962) 94, 122; Kwamena Bensti-Enchill, *Ghana Land Law: An Exposition, Analysis and Critique* (Law in Africa Series 10, Sweet and Maxwell, 1964) 372; Gordon R. Woodman, *Customary Land Law in the Ghanaian Courts* (Ghana Universities Press, 1996), 148
[321] Ollenu (n 320); Restricting it to land, Pogucki described it as follows: A popular transaction is a well-known dealing in which the debtor retains ownership, but the creditor obtains possession and use of the land. The dealing is referred to usually as 'the pledging of land'.
[322] Para 3.1.4.2
[323] Conveyancing Decree 1973, s 3 (1) (h). Although this provision made an exception for customary law grants, under s 4 of the same statute, customary grants were to be recorded in a prescribed form under the First Schedule of that Decree. This, together with ss 5-7 of the Decree, clawed back the dispensation made for customary transactions and made oral transactions virtually impossible under the regime. In acknowledgement of this difficulty, s 138 of the LRTA, 1986 repealed ss 4-7 of the Conveyancing Decree 1973 and made oral transactions over land possible.

3.2.4.2.2 Perfection

The perfection and publication of the pledge were effected by possession. The pledgor put the pledgee in possession upon the performance of customary rights such as the pouring of libation to signify the consummation of the transaction. So fundamental was possession to the pledge that it has been argued that the pledgee's essential purpose was less to hold the pledged property as security, than have its use as interest on the amount borrowed, and in respect of which profit the pledgee does not account.[324] In some cases, the use of the land would be the repayment for the principal and interest on the debt, or the obligation owed at the due date. Notwithstanding this, while in possession, the pledgee was not permitted to commit waste such as felling economic trees on the land or defacing a house.[325] Any transaction that left the borrower in possession of the pledged land was not characterized as a pledge.[326] Dankwa,[327] however, cites pledges where the possession did not change depending on the agreement of the parties including situations where the pledgee and pledgor enjoyed joint possession.[328]

3.2.4.2.3 Priority

During the subsistence of the pledge, the pledgee enjoyed the exclusive use and possession of the land, even against all other creditors of the pledgor. A pledgor who came onto the pledged land in a manner that rivaled the pledgee's possession could even be sued for trespass.[329] Although the pledgor's title could always be asserted, he or she was not entitled to damages for trespass.[330]

3.2.4.2.4 Enforcement

In the event of default, as Woodman[331] states, the pledgee (perhaps depending on the terms of the agreement)[332] had the power of sale or foreclosure of the pledged property free of the pledgor's right of redemption. But the pledge could also be deemed enforced, in some cases, by the pledgee's use of the land, which self-liquidates the debt (i.e. is the repayment for the

[324] *Kwansa v Brahima* (1966) GLR 784 (HC).
[325] *Clarke v Nkrumah* (1948) D.C. (Land) '48-'51, 143.
[326] Dankwa (n 320); *Moses Asafu-Adjei v Yaw Dabankwa* (1930) 1 WACA 63.
[327] Ibid., citing RJH Pugucki, 2 Gold Coast Land Tenure (1950) 90
[328] *Amonoo v Abbakuma* (1871) Sar. F.C.L.
[329] Woodman (n 320) *citing Gblonyo v Gordor II* (1949) D.C (Land) 48-51, 143.
[330] *Kuma v Hima* (1977) 1 GLR 204.
[331] Woodman (n 320) 148, citing Sarbah (n 332)
[332] John Mensah Sarbah, *Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Sections of the Gold Coast with a Selection of Cases Thereon Decided in the Law Courts* (William Clowes and Sons, 1897) 82 (Sar. F.C.L.pp 82-83)

principal and the interest), or the obligation owed by the due date. Indeed, in this arrangement the pledgee does not (and did not in the past) account for profit from the land.[333]

However, it must be emphasized that the pledgor's right of redemption at customary law did not lapse with the passage of time. Thus, subject to the agreement of the parties, the pledgor could exercise his right to redeem the pledged property at any time.[334] Where the parties agreed on a minimum period for the transaction, however, the pledgor could redeem earlier than the agreed period only upon the payment of an appropriate compensation that reflected the profit which the pledgee could have generated had the transaction lasted full-term.[335] This principle appears to accord with sound commercial practice and the sanctity of contracts. Consequently, a pledgee who substantially improved pledged land risked his investment going bad upon an earlier-than-anticipated redemption by the pledgor, although in such cases the court made appropriate orders to protect the pledgee.[336] Where this happened, an amicable settlement regarding appropriate compensation was attempted by the parties.[337]

3.3 Conclusion

This chapter focused on land as a subject of security interests in ASA in general, and Ghana, in particular.[338] It explored interests in land, their administration, and the taking of security interests over land. These considerations, beyond providing a background for the qualitative study of the Ghanaian inclusion reform, enable a general observation to be made regarding the feasibility of land's inclusion in ASA countries' secured transactions laws.

It has been emphasized that, in Ghana, the bundle of rights existing over land and its administration, and the regime for taking security interest over land, are typical of ASA countries, where the regime is dualist in nature—the common/statutory law that had been transplanted from Great Britain, and indigenous African customary law which governs approximately 90% of the land in the region.[339] There exist, however, a few striking and

[333] *Kwansa v Brahima* (1966) GLR 784 (HC). It was also not uncommon to see the pledged enforced by the use of the processes for encforcing the mortgage, see Para 8.3.1
[334] *Kofi v Kofi* (1933) 1 WACA 284.
[335] *Kwansa v Brahima* (1966) GLR 784 (HC).
[336] Ibid.
[337] *Dzanku v Kwadwo* (1960) GLR 31 (C.A)
[338] Para 3.0
[339] Para 3.1

significant aberrations in this region, for example, the difference related to secured transactions over customary land in Zambia.[340]

It has been shown that land administration in Ghana (as in many other ASA countries) is bedeviled with fundamental problems, which make the taking of security interest over land extremely challenging, if not impossible. About 90% of the land in Ghana and the region of interest is customary land, located largely in the rural areas and unregistered. This is private land owned by private citizens,[341] who constitute the customary communities in the country (in contrast to the government-owned public land).

This lack of title registration (and, for that matter, difficulty in proving a title to land) effectively renders this land dead capital, because it is rarely accepted as security for significant credit from financiers, apart from the small amount that the community's informal credit sources are able to risk.

In addition, this chapter has outlined the serious problems with the traditional legal regime for the taking of security interests over land in Ghana, including: (i) the lack of comprehensiveness in the treatment of security interests over land, as the existing law[342] pays scant attention to security interests in land; [343] (ii) the inefficient regime, based on manual filing and recordation, with the attendant imperfections and risks;[344] (iii) the regime's failure to provide detailed guidance on important issues such as priority rules;[345] (iv) the unclear nature of the relationship between the land registries and the other asset registries, particularly the companies registries;[346] (v) the absence of an effective, comprehensive mechanism from the framework for recording oral or informal customary transactions;[347] (vi) the costly, time-consuming process of registering security interests, during which informal middlemen extorted money from the applicants under the guise of processing their documents

[340] Para 3.1.2.5
[341] This is despite the fact that, in some countries, the land is vested in the head of state, who merely holds it in trust for the people. In these states, such as Zambia, practical land ownership by the people is not in doubt, even though an academic or theoretical debate can be made about the true location of the allodial interests in land in such states. This is reinforced by the fact that a portion of the land (about 10%) is truly owned by the state (as public land)
[342] The Mortgage Decree
[343] Para 3.2.4.1.1
[344] Para 3.2.4.1.1.2.1. Locating or retrieving a record from the system took days, if it was achievable at all.
[345] Para 3.2.4.1.1.3. The rules of equity, and the common law on which it purported to rely, had themselves been modified in English law to make them more meaningful to the modern economy, but remained unchanged in Ghana.
[346] Ibid. For example, there was no clarity regarding the priority of the charges over company land registerable on the companies' register.
[347] 3.2.4.1.1.2.2. This constrained the majority of the rural-dwellers (mostly farmers), who owned about 80% of the land, from accessing credit.

quickly; (vii) some of the worst enforcement mechanisms in the world.[348] The imposition of court proceedings in almost every enforcement process meant that simple realization actions now required lengthy court proceedings;[349] and (viii) the various interventions in the customary law security device (the pledge) that made it unpopular among its main users, thus undermining rural dwellers' access to finance.[350] It was in this milieu that land was included within a PPSA framework of secured transactions.

The next chapter will consider the foundations of the reform to include land within a PPSA framework in Ghana.

[348] Stephen Butler and others, 'Mortgage Registration and Foreclosure around the Globe: Evidence from 42 Countries' (2009) 23(4) Housing Finance International 19.
[349] Para 3.2.4.1.1.4
[350] Para 3.2.4.2

Chapter IV

Foundations of Reform to Include Land in a PPSA Framework in Ghana

4.0 Introduction

This chapter considers the reform to include land in a PPSA framework of modern secured transactions in Ghana. It examines the reform's underpinnings, along with the relevant enactments and administrative interventions.

The purpose of this chapter is threefold. First, it provides a context for the empirical findings and participants' responses presented in Chapters 5-9. Second, it demonstrates the reformers' motivations and technique and evaluates the implementation of the reform. Third, it provides insights into the challenges that might arise when enacting the reforms in other parts of ASA, particularly those related to entrenched common law concepts, such as the mortgage, and also emotive topics such as land.[351]

The chapter argues that Act 773 did not properly enact the original reformers' intentions, and that most of their ideas were only included in the more recent Act 1052.

In this chapter, Section 4.1 discusses the original reformers' conception of the inclusion of land within a modern secured transactions framework and the broad principles underpinning the reform. This discussion includes a brief summary of the concept of the PPSA, on which the reform was modelled, to clarify the reformers' intentions. Section 4.2 briefly considers the Borrowers and Lenders Act, 2008 (Act 773), which was the first attempt to enact the reform, and discusses how far its provisions reflect the original reformers' ideas. It also outlines the context within which Act 1052 was drafted.

In Section 4.3, the Borrowers and Lender Act 2020 (Act 1052) is similarly discussed. Section 4.4 focuses on the Ghanaian reform's enactment, including the inherent challenges and how these were handled. Section 4.5 concludes the chapter.

[351] Anis Karodia, 'The land question in Africa: Reinventing exploitation, engendering displacement and foreboding catastrophe' (2013) 4(2) International Journal of Afro-Asian Studies 12.

4.1 Reform architecture for inclusion of land in a PPSA

4.1.1 General overview

The original reformers[352] of Ghana's secured transactions conceived the inclusion of land within a PPSA reform framework[353] in the belief that doing so might offer certain benefits, including efficiency gains over the traditional legal arrangement for the taking of security over land. The benefits envisaged (as the reform's drivers) included using land's inclusion to (a) fill the gaps in Ghana's real mortgage property laws, particularly by enabling the registration of customary law interests in land, which were unregistrable and therefore it was difficult to take security interest over them under the Pre-B&L Act Framework;[354] (b) compensate for the land administration's failures by functionally abolishing the distinction between registered and unregistered land[355] which, combined with other problems, including the poor attention to the mortgage in the Pre-B&L Act regime, had excluded the majority from accessing credit, using their vast amount of land; (c) introduce efficiency in secured transactions over land through the contemplated secured transactions registry's inherently electronic and web-based systems; (d) accommodate oral security interests over land and allow untitled land to be leveraged for credit, thereby making capital of the vast tracts of land which were "dead capital",[356] (e) enable the application of some of the best practices in personal property secured transactions law to land (such as extrajudicial enforcement and comprehensive priority rules), thereby encouraging lending using land as security.

It was considered desirable for a person or business to use all of its assets, including land, for credit in a single, simple, efficient and cost-effective framework instead of having to deal with distinct/separate regimes. Creating a one-stop shop for security interest was, therefore, a goal of the reform.[357] Thus, the centralization of secured transactions over land centralization, which would enable credit parties to avoid having to deal with three different land registries under the Pre-B&L Act framework, with the associated cost and inefficiencies, was a first step towards this efficiency gain.

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[352] The Management of the Bank of Ghana, working with the Ministry of Finance, gave primary responsibility for the reform to the Legal Department of the Bank, at that time headed by Dr Kwaku Addeah. Dr Addeah undertook the majority of the preparatory work for the reform, including its conceptual foundations. He appointed the author the Parliamentary Liaison Officer in 2006, in addition to duties at the Law Review Office of the legal department, which brought the author into direct personal contact with the reform.
[353] See Paras 1.0 and 4.1.2 for a brief explanation of the PPSAs.
[354] Abubakari and others (n 221). Also see Paras 3.2.4.1.1.2.2, 6.1.6
[355] Para 3.0
[356] Para 1.0
[357] A copy of the *travaux preparatoire*, articulating the objectives and broad principles of the reform, is on file with the author.

In the reformers' conception, therefore, the PPSAs' core principles (perhaps with appropriate modifications) were the key to achieving the envisioned reform. Such principles, ideally, were to be enacted into law, and were centred around creation, perfection, priority, and enforcement of security over land. Certain miscellaneous or incidental issues, including transitional provisions and the appropriate definition of the relationship between the prior and new regimes, were also considered.

At this juncture, it might be useful to describe briefly the PPSAs' principles, which the reformers had in mind.

4.1.2 The PPSA framework

The PPSAs[358] share similar roots—Article 9 of the UCC—but are not identical. There are different forms, which could be adopted, or modified, and fitted to different countries' needs, either by introducing new rules, or adapting the PPSA rules,[359] but these forms (known as templates) are all based on Article 9, with a few additional or absent (peculiar) rules, which markedly distinguish that template from others.

Since, in reforming Ghana's secured transactions to include land, the reformers were only interested in the common principles of all of the PPSAs, this thesis only highlights these, and briefly mentions the PPSA templates.[360]

4.1.2.1 Common Principles

Of the many key features of the PPSA, the unitary and functional conception of security interests appears to be a distinguishing fundamental principle.[361] Security interest is defined in terms of transactions with the purpose (or substance) of securing payment or credit obligations, regardless of their form.

The other principles of this model, providing its base or substructure, as Roderick Wood identified,[362] include (i) rules that outline the conditions needed for a security interest to be enforceable against third parties, eliminating pointless formalities; (ii) rules allowing for the taking of security over future obligations as well as future assets; (iii) a restriction on the application of anti-assignment provisions to accounts; (iv) a registry built around the idea of

[358] See Para 4.1.2.1 for a discussion of the PPSA. Also, see Wood (n 1)
[359] Roderick MacDonald, 'A Model Law on Secured Transactions: A Representation of Structure—An Object of Idealized Imitation—A Type, Template or Design' (2010) 15 Uniform Law Review 419.
[360] For a detailed discussion of the templates, see Wood (n 1).
[361] Charles W Mooney Jr, 'Lost in Transplantation? Modern Principles of Secured Transactions Law as Legal Transplants' in Louise Gullifer and Dora Neo (eds), *Secured Transactions Law in Asia* (Hart Publishing 2021).
[362] Wood (n 1).

notice registration;(v) rules governing when a security interest becomes enforceable against other parties, usually by making it publicly known that a security interest may exist.; (vi) a general rule of priority that places security interests in ascending order, based on the date of registration or another step of perfection; (vii) a particular priority rule that applies to a security interest—also known as a purchase money security interest or acquisition security right—that protects the credit extension and permits a debtor to purchase a new asset; (viii) the transferees of encumbered assets are subject to particular priority rules (the taking free or extinction rules); (ix) a concept of proceeds that extends a security interest to property that is obtained by dealing with collateral; (x) extra rules that prevent a security interest's extinction in circumstances when it would otherwise happen due to affixation to land, accession, or commingling; (xii) extra-judicial or expeditious enforcement remedies available to a secured party on default; and (xiii) a set of choices of law provisions that, in some cases, deviate from private international law principles that would normally apply to them.

4.1.2.2 Templates

Despite the common principles across all of the PPSAs, three basic categories, to which the various rules in the numerous PPSAs around the world could be traced, may be identified.[363] These are: the Article 9 template, Canada/New Zealand template and UNCITRAL template.

4.1.2.2.1 The Article 9 Template

This template contains comprehensive provisions on essential aspects of secured transactions related to movable property. Wood maintains that using Article 9 as a template requires its extrication from the UCC web, as it is an integral part of the larger codification of US commercial law undertaken by the UCC.[364]

4.1.2.2.2 The Canada/New Zealand Template

From the Article 9 Template developed the Canada/New Zealand Template, which adopted and adapted Article 9 to suit the enacting states' needs. The Canadian PPSA, or Canadian Conference on Personal Property Security Law (CCPPSL) model,[365] is more understood in terms of the Saskatchewan PPSA, from which the New Zealand PPSA borrowed heavily.[366]

[363] Ibid.
[364] Wood (n 1).
[365] Catherine Walsh explains that this basic template was used in all of the common law provinces in Canada except for Ontario. See Catherine Walsh, 'Transplanting Article 9: The Canadian PPSA Experience' in Gullifer and Akseli (n 20), 53.
[366] Wood (n 1).

4.1.2.2.3 The UNCITRAL Template

The UNCITRAL Model Law is the most recent template.[367] This model uses simple language to discuss the alternative approaches that have been adopted by reforming jurisdictions.

Since all the identifiable peculiarities of the templates merge into the key principles identified above, our focus will end here.

4.1.3 Reformers' Principles

It was on these PPSA principles[368] that the reformers based their prescriptions for the Ghanaian reforms. The PPSA principles and rules were essentially formulated for movable property, but in Ghana were largely to be applied to land also. Moreover, some of the rules and principles were adapted or re-invented to suit the envisioned reform. For example, a security interest in land (under the contemplated reform) could be created (and attach) through an oral agreement.[369] In that case, the rules of creation/attachment and perfection[370] were merged. The registration of the oral agreement (made possible under the contemplated reform regime) through the electronic templates of the secured transaction registry constituted, thus, a constitutive act.

It was therefore not lost on the reformers that the PPSA rules' application to land could involve difficulties. Where this occurred, designing special rules to accommodate these difficulties would not be inconsistent with the reformers' principles, in line with legal transplant theory.[371]

In the following, the original reformers' principles regarding the reforms in Ghana, are briefly considered in turn, and in the particular context of land security (as envisioned by the reformers). It should be noted that comprehensive rules or regulations were intended to detail these broad principles, for the purpose of implementing the reform. These details are not explored here but, where necessary, how Act 773 and Act 1052 were implemented is briefly noted.

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[367] It was completed in 2016, with the necessary processes having started in 2002. The Model Law works better in combination with the UNCITRAL Legislative Guide on Secured Transactions.
[368] Para 4.1.2.1
[369] A security agreement under a typical PPSA framework or the Model Law must be in writing. See Para 4.1.3.2
[370] Para 4.1.2.1. Under the PPSAs, creation, attachment and perfection are distinct components of a security interest.
[371] Para 1.2.2

4.1.3.1 Land as security

Aware of the land administration challenges, as well as the inadequacies within Ghana's real property mortgage law, the reformers considered, and offered guidance on, land as a subject of security under a PPSA framework as follows:[372]

I. Any alienable interest in land can be a subject of security for credit.

II. The interest in land to be burdened can concern registered or unregistered land.

III. Where land, the subject of the security interest, is unregistered, the parcel's geographical coordinates may be used. Close engagements were however anticipated between the relevant authorities, including the Bank of Ghana, customary structures (The Customary Land Secretariat) and the Land Commission, to determine the most reliable, yet liberal, means of describing unregistered land, for the purpose of taking of security interests over it.

IV. The reformers' failure, however, to offer guidance[373] on how to describe the specific interest burdened is regrettable, since different interests in land can co-exist on a parcel and run concurrently. Therefore, to avoid confusion and the possibility of charging and realizing the wrong interest, clarity is important, particularly as interest in land in Africa is sometimes controversial.[374]

4.1.3.2 Creation/Attachment

With respect to the creation and attachment of a security interest over land, the following broad principles were intended:

I. The creation of security interest in land was to be by agreement: oral or written.

II. The recognition given to oral transactions over land was intended to reflect the society's largely informal nature and acknowledge Ghana's (unwritten) customary law.

III. Written security agreements required neither notarial approval nor stamps, and were not required to be in any particular prescribed form.

4.1.3.3 Perfection

To make security effective against third parties, the original reformers planned the following measures:

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[372] The *travaux preparatoire* establishes this background.
[373] There was a lack of guidance in the intended reform architecture.
[374] Paras 10.2.5, 3.2.1.2

I. Perfection of security was to be by registration only, at the secured transactions registry, provided in the reform, and this registration was to be the priority point.

II. The essential features of any oral or unwritten transaction (for example, the customary pledge) were to be reducible to the electronic facility that the registry would provide in order to record security transactions.

III. There was to be no submission of any charge document for registration, nor any need for stamping, notarial approval, or consent, prior to the registration of security interests.

IV. A financing statement containing (1) the borrower/debtor's details; (2) creditor information; and (3) brief particulars about the burdened land, was to be the subject of registration.

V. Registration under this notice filing system could precede or follow a security agreement's finalization. The possibility of advance registration was designed to enable the credit parties to navigate the priority scheme under the regime, which gave precedence to first registrations over subsequent ones, and primacy based on the order of registration.

VI. The registry's system was intended to distinguish between merely an advance registration and a consummated security agreement. Whenever the credit parties finalized and consummated a transaction subject to advance registration involving land, this was to be indicated appropriately on the registry's system, to enable the secured transactions registry to update the land and the companies' registries regarding land's actual and effective encumbrances, as the next paragraph explains.

VII. The secured transactions registry was to give notice (preferably in electronic form) of all encumbrances on registered land registered on its electronic platform to the Land Registry and Companies Registry (when land belonging to a company was charged). This notice was intended to be purely informational. Inter-agency collaboration was therefore envisaged.

There was no such notice requirement where the land was unregistered, since the land registry lacks records of that parcel according to their documentation standards.

VIII. The registry officials were intended to be unable to interfere or intervene in the submissions or registrations made via the registry's platform, to ensure the priority scheme's credibility, determined by the registration order, authenticated by the registry's electronic platform.

4.1.3.4 Priority

The reformers also contemplated rules that would resolve competing claims between two or more persons taking security over the same collateral and determine who would be paid first during enforcement of the security. The following were the applicable ideas:

I. The basic rule was that a registered interest was to take priority over other interests which had been registered subsequently.

II. Although various exceptions to the general/basic priority rule were appropriate with respect to movable assets, the purchase money security interest was readily conceivable in relation to land. This therefore was intended to be applicable under the reform framework. Thus, a lender who lent money to a borrower for the express purpose of financing of a particular parcel or property's acquisition was to be able to obtain a super-priority security interest in that property.

4.1.3.5 Enforcement

Given the problems associated with enforcement under the pre-reform regime, including the fact that all of the available enforcement mechanisms mandated the courts' intervention, with the associated delays in the realization of security, the reformers planned to introduce several radical changes, based on the PPSAs. The following are the broad guidelines for land security's enforcement:

I. Possession of the property, application of the property to the satisfaction of the secured obligation, and the appointment of a receiver/manager and sale of the burdened land were the enforcement mechanisms identified by the reformers in addition to any others that would be specified in the security agreement.

II. These mechanisms regarding the enforcement of security in movable property were to be applicable extrajudicially and judicially for land security under the reform framework. Thus, secured parties would be able to use any of these enforcement options, with or without the court's assistance.

III. Thus, with notice to the borrower and the secured transactions registry (details of which were to be worked out in the implementing statute), a lender would be able to enforce a security agreement without a court order.

IV. A Borrowers and Lenders Court (as a High Court division paralleling the Commercial Court) was to be established to handle cases expeditiously, using purposefully crafted rules. To date, this has not yet been achieved.[375]

V. Any relief that a credit party seeks from the court, unless otherwise provided, shall be via an application on notice to the other party. Act 1052 waters this down, simply stating that recourse to the court for any remedy shall be "in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I.47) or the District Court Rules (C.I. 59)."[376] This is vague, unhelpful guidance, since there are many processes under the High Court rules by which the courts' jurisdiction may be invoked. Some of these are undesirable for matters requiring expedition, such as matters under the B&L Act framework.

VI. There were to be purposefully crafted rules guiding the circumstances under which a party could access the court for various reliefs, including timelines within which matters could be pending in court. This remains outstanding, although improvisations have been made.

VII. However, where a lender seeks the police's assistance to aid a lender to take possession of burdened land, the police (rather than the lender) may apply to the court *ex parte* for a warrant for that purpose. The police only require evidence that the necessary notices have been served. Act 1052 modified this by requiring the lender instead to apply to the court for a warrant to enable the police to assist the efforts to take possession.

4.1.3.6 The Relationship between the reform and the prior framework

Given that the reform was designed to interfere with an existing law and legal framework, certain guiding principles to govern the appropriate relationship were designed, including:

I. In the reformers' view, the reform framework was to be the only applicable framework for the taking of security over land. The prior framework was to be largely repealed.

II. However, the registries existing under the prior framework with mandates over security interests in land (the companies and land registries) would be allowed to exist, albeit stripped of those mandates. The secured transactions registry was however to send electronic copies of registrations to these other registries.[377]

[375] Para 10.2.2.1
[376] Act 1052 s.84
[377] Para 4.1.3.3, VII.

III. No conflict of laws was anticipated, given the repeal of the prior framework on land security. However, in the unlikely event of a conflict arising between the reform framework and any other law on any aspect of land security, the reform framework would prevail.

IV. Although not necessarily provided for by the reformers, as in the PPSAs with respect to movable property, the common law and equitable principles (where consistent with the reforming statute) would supplement the reform enactment, including, for instance, filling identified gaps in the priority rules.[378]

4.1.3.7 Secured Transactions Registry

A secured transaction registry to register security interests under the reform framework was conceived as follows:

I. The reformers envisaged a single, unified database for all land security and indeed security interests in movable property also, to make information, transparent, easily accessible or retrievable, and so aid decision-making.

II. Registration on, and the searching of, the registry should not require the application of human discretion. Indeed, the information should be secure since it determines questions of priorities, among other factors.

III. The registrants were to be responsible for the data entered on the registry's database in order to eliminate the registry staff making potential data entry errors.

IV. The registry was to be web-based, and use simple systems to enable security agreements' essentials, including the burdened land's description, to be captured.

V. Two different types of registry users were conceived: regular users such as banks, and one-off users, such as individuals giving credit, secured by land.

VI. It was hoped that the Bank of Ghana would be responsible for the registry, given its relative resourcefulness, its mandate in the economy, as well as its credibility and independence.

[378] Roderick Wood discusses the supplementary role of common law in the PPSAs. See Roderick J Wood, 'Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles' (2014) 56(1) Canadian Business Law Journal, 31.

4.1.4 Conclusion

The foregoing demonstrates that the reformers conceived a framework which, in their view, would enhance the taking of security interests over land. It however remained to be seen how such a framework would be enacted and implemented. The following section considers the enactment and implementation of the reformers' principles.

4.2 Borrowers and Lenders Act (Act 773)

4.2.1 General overview

This section explores the extent to which Act 773 implemented the reformers' original ideas, as set out above, and shows the context within which Act 1052 intervened.

The provisions of the Act 773 framework on the creation, perfection, priority and enforcement of security interests over land were radical, but insufficient to effect the reform intended. The relationship between the prior regime and Act 773 frameworks, as well as the provisions on the secured transactions registry, and security interests over land in general, were also inadequate.

Consequently, in the ostensible exercise of its powers to make rules for the effective implementation of Act 773, the Bank of Ghana (through the Collateral Registry Rules)[379] worked into Act 773 far-reaching policies, and implemented a PPSA framework of modern secured transactions in Ghana. Nevertheless, the Bank's delegated legislative powers, properly construed, could only apply to issues contemplated by Act 773 itself, which needed fleshing out to take full effect. They could, and should, not have covered matters that radically differed from the legislature's intention, as did the Registry Rules and the actual content (the implementing system), thus posing significant legal risks. Nonetheless, it was through these potential or actual breaches of Act 773 (in the form of the Registry Rules 2012, and the actual system) that some meaning could be made of the reform introduced by Act 773. However, even when combined with the actual system and the Registry Rules 2012, Act 773 was insufficient to realize the original reformers' principles.[380]

[379] Public Notice Number BG/GOV/SEC/2012/08 dated 1st June, 2012. A copy is with the author.
[380] Para 4.1.3

4.2.2 Land security interest

Act 773 described a security interest under the framework as a 'charge', including the mortgage, pledge and any other encumbrance of any nature other than liens arising through the operation of the law. These charges could be created over all alienable interests in land under Ghanaian law.[381]

4.2.3 Creation/Attachment

Second, a security interest in land under the Act 773 regime was created by a simple agreement between the parties. The creation/attachment and perfection of a security interest over an asset (land) were merged by Section 25, which primarily focused on registration, but also affected attachment and perfection.

4.2.4 Perfection

Act 773 established a collateral Registry[382] which had a single, unified database.[383] Section 25 required the registration of a security interest within 28 days of its creation, failing which it became "of no effect as security for a borrower's obligation for repayment of the money secured and the money secured shall immediately become payable despite any provision to the contrary in any contract". However, registration, in the original reformers' conception, was not to be mandatory, nor required to be completed within any specified period after the creation of a security agreement.[384]

The tenor of Act 773 presented the registry as manual in nature,[385] but the Registry Rules implemented an electronic platform via which the registry would function.[386] This platform used electronic templates and web-based systems that could even accept oral agreements and unregistered land.[387] A simple description of the burdened land, using its coordinates as well

[381] Allodial, Customary Freehold, Common Law Freehold, Customary Tenancies and others.
[382] https://www.bog.gov.gh/wp-content/uploads/2019/05/Collateral-Reg-All-You-Need-to-Know_Updated.pdf. Accessed 15 January 2022.
[383] Act 773, ss. 21 and 22
[384] Para 4.1.3.3
[385] See Act 773, ss 25(1) and 26. Contrary to the intention of the original reformers, Act 773 anticipated the registration of security interest by the submission of paper documents (a certified copy of the charge)
[386] Registry Rules 2012, Paras 3 and 4.
[387] See Para 4 (2) of the Registry Rules 2012, fleshed out in training manuals on the features and functions of the Registry's electronic platform.

as any available photos, could be uploaded to the registry's platform (using the template) together with the security agreement's salient terms.[388]

Although the system's centralized, electronic features were in accord with the original reformers' envisaged architecture,[389] the Registry Rules from which they originated had a doubtful legal foundation.[390]

Further, the Registrar, in a violent departure from the reformers' plan,[391] had the discretion (exercisable with unclear guidance) to allow registrations beyond the statutorily stipulated 28 days.[392] This had the potential to expose the Registry (and indeed the Bank of Ghana) to additional legal risks.

4.2.5 Priority

Again, Act 773 contained no express provisions of its own regarding the priority of security interests over land. The priority scheme applied under the regime was largely introduced by the Registry Rules which were informed by the reform's policy intent: to model the regime on the PPSAs. The scheme, thus, was of dubious legal validity, given the provisions (or omissions) of Act 773.

Also, the combined effect of sections 25(1) and 28 of Act 773 created a priority point which was not registration but related back to the date of the creation, contrary to the reformers' ideas.[393]

4.2.6 Enforcement

With respect to the possible means of enforcing security interests over land, Act 773 offered little guidance under the framework. A few judicial and extrajudicial mechanisms could, however, be deduced, including novel extrajudicial mechanisms meant to constitute summary procedures, but which were frequently overreached, with the courts' unwitting or tacit approval.[394]

[388] Registry Rules 2012, Para. 4 (2) read together with Para 8, as complemented by training materials on the registry's electronic system.
[389] Para 4.1.3.7; 4.1.3.3
[390] Para 4.2.1
[391] Para 4.1.3.7
[392] Act 773, s.28
[393] Para 4.1.3.3
[394] Para 8.4.3

4.2.7 Relationship with the prior regime

Furthermore, of Act 773's many inadequacies, the relationship between the B&L Act framework and the Pre-B&L Act regime for security interests in land was the most glaring and confusing. The pre-reform regime was not repealed. Act 773, thus, appeared to create an additional layer of regime for land security, with no clear, comprehensive provisions regarding the relationship between the two systems.[395]

4.2.8 Conclusion

The Act 773 regime represented the most significant reform of not only Ghana's secured transactions since the 1970s, but also its general credit environment. It exemplified land's inclusion within a typical PPSA framework of modern secured transactions by applying finance and commercial law efficiencies, usually associated with secured transactions over movable assets, to land transactions. Act 773, however, failed to achieve its full potential, as an overwhelming number of the original reformers' ideals were not enacted. The Registry Rules, which were used to implement the original reformers' ideals, exposed the reform to legal risks in addition to its own inadequacies. Act 1052, therefore, faced a considerable task.

4.3 Borrowers and Lenders Act 2020 (Act 1052)

This section discusses Act 1052, which repealed[396] and replaced Act 773, but saved the rules, regulations and administrative acts lawfully made under it.[397] The extent to which Act 1052 improves upon Act 773 (if at all) will be discussed, and also how adequately, or otherwise, it reflects the reformers' original principles regarding land's inclusion within a PPSA framework of modern secured transactions.[398]

4.3.1 Creation

The creation/attachment of a security interest in land under Act 1052 is by a simple written agreement between the parties, but writing is expressed by the Act to include "electronic records which taken together establish the intent of the parties".[399] This statutorily endorses the Collateral Registry's mechanism for registering credit parties' oral or informal

[395] World Bank (n 4).
[396] Borrowers and Lenders Act 2020 (Act 1052), s. 88 (1)
[397] Ibid, s. 88(2)
[398] Para 4.1.3
[399] See Act 1052, s. 5

agreements, devised in the Registry Rules under Act 773, [400]compared to which it is an improvement which comes close to the original reformers' ideas. Nevertheless, the Act could have expressly mentioned, rather than merely implying (however sufficiently), oral transactions.

4.3.2 Perfection

Under Act 1052, the perfection of security interests in land is only through registration at the Collateral Registry,[401] and is crucial for third-party effectiveness.[402] Electronic templates and web-based systems that could even accept oral agreements and unregistered land, were used for perfection of security interests.

Registration is mandatory within 28 days of the security interest's creation.[403] The Registrar, unlike under Act 773,[404] lacks the power to allow a security interest to be registered beyond this 28-day grace period, although this is merely a regulatory tool for the Bank of Ghana to ensure that the regulated entities under its supervision who give credit do not potentially jeopardize depositors' funds. This grace period does not seem to create hidden liens, since security interests only take effect at the date and time of registration.[405]

The regime for the registration of security interests over land established by Act 1052 is similar to, but improves on, Act 773 in the following respects:

First, the Act makes express provision for the possibility, for instance, of the deferral of payment of stamp duty to any time post-registration,[406] but prior to the security interest's enforcement.[407] This enables the registration of security immediately post-creation to deal with priority concerns. Although Act 773 somewhat encouraged this, it had a weak legal foundation, as it could only be canvassed through the Registry's training efforts. This therefore created some uncertainty, and also delays for those who decided to avoid the legal risk it posed. This element of the rules on the perfection of land security under Act 1052

[400] Para 4.2.1; Para 4.2.3
[401] Act 1052 s.22
[402] Act 1052, s 14(1)
[403] Act 1052, s 22(1).
[404] Act 773, s 28(1).
[405] See Act 1052 s.25(1)
[406] Act 1052, s.22 (5). Making official payments like stamp duty is always caught up in bureaucracy and delays.
[407] Act 1052, s.22 (6).

reflects what the original reformers envisaged—the perfection of land security interests without delay.[408]

Secondly, Act 1052 does not make registration compulsory in the sense of it being necessary to validate a security agreement, as Act 773 did.[409] Registration is only necessary under Act 1052 for third party effectiveness,[410] but the parties' credit agreement is protected, if it is unregistered (unlike Act 773).[411] This feature of Act 1052's perfection accords with both best practice[412] and the original reformers' intentions.[413]

Third, Act 1052 changed the registration of security interest under Act 773 through the submission of a certified copy of the charge[414] (which was replaced by the use of electronic templates during implementation),[415] giving legal backing to the use of electronic templates which was curiously adopted eventually under Act 773. This intervention by Act 1052 conforms with the original reformers' ideas.[416]

On the whole, Act 1052, in improving Act 733, comes close to what the original reformers intended regarding the perfection of security interests in land under the reform. However, the legitimization of (and subtle advice for) the additional registration of land security in other registries[417] marks a huge departure from the reformers' originally intention.[418]

4.3.3 Priority

Act 1052 contains provisions on the priority of land security interests, including rules for different scenarios.

4.3.3.1 Basic rule

First, the order of registration of security interests determines their order of priority, as the basic rule.[419] An equivalent of this may be found in the Registry Rules issued under Act 773,[420] but the scheme within which that operated supported hidden liens, and also made the

[408] Para 4.1.3.3
[409] Act 773, s.25 (3)
[410] Act 1052, s.14
[411] Act 773, s. 25 (3)
[412] Para 4.1.2.1
[413] Para 4.1.3.3
[414] Act 773 s. 25(1)
[415] Act 1052, ss. 19 and 85; Registry Rules 2021, Para 1(11)
[416] Para 4.1.3.3
[417] Act 1052, s. 17
[418] Para 4.1.3.3
[419] Act 1052, s. 34
[420] See paragraph 16 of the Registry Rules.

security's creation date the priority point, rather than registration.[421] However, the priority point under Act 1052 is the time of the security's registration, and priority is unrelated to the creation date, despite there being 28 days within which to register.[422] Second, by expanding the basic priority rule, Act 1052 provides that the priority of security interests in the original collateral extends to the proceeds from that collateral.[423] Additionally, Act 1052 provides for the priority of future advances based on the maximum amount stated in the registered financing statement.[424]

These general priority rules found in Act 1052 all reflect the original reformers' broad principles regarding the priority of land security interests,[425] which were, unfortunately, inadequately expressed in both Act 773 and in the Registry Rules 2012.

4.3.3.2 Exceptions

Unlike Act 773 and the Registry Rules 2012, there are comprehensive provisions on exceptions to the general priority rule under the reform framework. Given this thesis' focus, one exception concerning land will now be discussed.

Section 38 of Act 1052 stipulates a purchase money security interest's super-priority over assets (including land). This legal claim enables third-party lenders who lends money to borrowers for the express purpose of financing a specified good's purchase to obtain a super-priority security interest in that particular good.[426] Although this is usually applicable to the case of movable property, it could be applicable to land in order, for instance, to cause the market value of a piece of land to increase significantly through the addition of another parcel procured through additional credit. For example, where a loan is made to a real estate business to construct a social amenity in the heart of its gated estate, this new amenity could improve house prices in that gated community, and so be the subject of a purchase money security interest.

The reformers contemplated this particular exception,[427] although it was not expressed in Act 773.

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[421] Para 4.2.5. This was because the charge, once created, could be registered within 28 days, at which point priority would relate back to the date of creation
[422] Act 1052, s. 22
[423] Act 1052, s. 35
[424] Act 1052, s Section 37
[425] Para 4.1.3.4
[426] Keith G Meyer, 'A Primer on Purchase Money Security Interests under Revised Article 9 of the Uniform Commercial Code' (2001) 50 University of Kansas Law Review 143; See s. 85 of Act 1052
[427] Para 4.1.3.4

4.3.4 Enforcement

Act 1052 contains useful provisions regarding security interest's enforcement over land in the event of borrower default. The available mechanisms for the enforcement of security are grouped into judicial[428] and extrajudicial methods,[429] as well as the appointment of a receiver /manager to realise the asset, with or without the courts' intervention.[430] Both of the judicial or extrajudicial enforcement methods are exercisable after 30 days' notice of default to the debtor,[431] within which period the debtor could cure the default.

Overall, Act 1052 markedly improves upon Act 773's enforcement regime for land security by clarifying the available mechanisms for enforcement. However, in some cases, including the process for seeking police assistance for extrajudicial enforcement, Act 1052 complicates the enforcement of security interests.[432] Ultimately, significant aspects of the reformers' principles remain outstanding. There remain no specialized courts, which apply specially-crafted rules for the reform. The provisions for judicial enforcement made by Act 1052 are, thus, far from the reformer's ideals.[433]

4.3.5 Relationship with the prior regime

The Act 1052 framework for security interest over land runs concurrently with any regime under any prior enactment on land security.[434] As a consequence, the registration of security interests in other registries is not only allowed, but advisable. [435]

Anticipating that potential conflicts may arise from this concurrence, Act 1052 attempts to clarify the relationship between the prior and the reform frameworks by stating that, where a conflict exists between Act 1052 and any other enactment regarding the security interest's creation, perfection, priority and enforcement, Act 1052 shall prevail.[436]

Although the provision of rules on precedence in Act 1052 is a marked improvement on Act 773 (under which it was poor, if existing at all), there remains some confusion, making it inadequate.[437] For example, the overlap between the (unrepealed) Company charges

[428] Para 8.3.2.3
[429] Para 8.3.2.2
[430] Act 1052 s. 61 (1)
[431] Act 1052, s 60.
[432] Para 8.3.2.2.1
[433] Para 4.1.3.5
[434] Act 1052, s. 17
[435] Act 1052, s. 17
[436] Act 1052, s. 86
[437] Para 4.2.7

registration regime and the B&L Act is a real burden for company finance. Moreover, the prior regime for security interests over land should have been repealed, rather than allowed to run concurrently.[438]

4.3.6 Collateral Registry

The Bank of Ghana operationalizes the Collateral Registry, established by Act 1052,[439] and appoints its Registrar[440] who, in performing his/her functions,[441] bears responsibility for scrutinizing the information provided by the registrants to the electronic platform.[442] This is contrary to the nature of the functions of the registry envisaged by the reformers. The registry staff were not intended to have borne such responsibilities.[443]

Act 1052 Registry is similar to what was in place under Act 773. It however has taken on an additional burden of scrutinizing the information provided on the registration form. Here, the Registry departs from the Reformers' broad principles. If the performance of legitimate duties, like certifying the realization process by issuing a CR7 in appropriate cases, can embroil the Bank in legal suits,[444] the assumption of an additional burden truly exposes the bank to excessive legal risks.

4.4 Challenges related to reform enactment

4.4.1 Introduction

Despite attempts spanning over 15 years, the key principles regarding land's inclusion within a PPSA framework, as envisioned by the reformers in Ghana, have not yet been enacted. Whereas this, on the one hand, might be unsurprising since secured transactions law reforms generally take time,[445] this sections explores: (1) the challenges to Ghana's law reform; (2) the general problems associated with legal transplantation; and (3) the difficulty of adapting a

[438] Para 4.1.3.6
[439] See s. 18 of Act 1052
[440] See s.20 of Act 1052
[441]See s.21; s.19 of Act 1052
[442] Act 1052, s. 21 (2) (b)
[443] Para 4.1.3.7
[444] See the case of *COB-A Industries Limited v Michael Tsigbe & Others* (unreported) Suit No: GJ/138/2020. HC Coram Rebecca Sittie J. Accra 28th July 2021. See also the unreported case of *Medilab Diagnostic Services Limited v Cal Bank Limited and Bank of Ghana*, HC, Coram Priscilla Dikro Ofori J. Dated 26th July 2021, Accra.
[445] See a review of Roy Goode's experience with the secured transactions law reform in Jersey in Louise Gullifer, 'Conclusions and Recommendations' in Gullifer and Akseli (n 20) 513.

legal transplant.[446] The section reflects on some of the factors that made it impossible to enact the reformers' original intent[447] which are complex, ranging from challenges related to law-making in general, to the more specific case of Ghana's experience. Also, whereas some factors emanate from outside parliament, others come from within it. Due to space considerations, only some of the general challenges will be discussed here, particularly those related to the specific Ghanaian experience.

4.4.2 General

The introduction of a parallel regime into an existing framework, with the inherent conflicts and costs due to duplication (as Acts 773 and 1052 cause), was certainly neither designed nor intended by the promoters of Act 773, much less the original reformers. They are accidental: the enacting process has gone awry.[448]

The sources of the discrepancies seen in Acts 773 and 1052 fall into two groups: (1) outside parliament; (2) inside parliament. The following briefly considers these.

4.4.3 Outside parliament.

It is striking that some of the failure to enact the original reformers' ideas can be traced to the processes in place before the enactment bills went before parliament. The following identifies various experiences which potentially affected the original reformers' ideas at that stage. An examination of these experiences reveals challenges become perceptible, which suggest lessons that could be drawn from this aspect of Ghana's reform process. These challenges arise from: (1) the absence of closer collaboration with consultants; (2) the risk that career drafters, steeped in their legal culture, may fail to comply with the drafting instructions; (3) the absence of reform champions; (4) the impact of the political process on reforms; and (5) the tendency not to be vigilant throughout the process, but to take things for granted. These reasons for the failure to enact the reformers' ideals are seen in the brief description of the experiences related to the Borrowers and Lenders Bills below.

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[446] Para 1.2.2

[447] The author has personal knowledge of most of the events and processes constituting the history of the Ghanaian reform. From 2006 to 2018, he was, among other things, an officer in the Bank of Ghana Legal Department Law Review Office, with additional responsibilities for legal matters relating to the Collateral Registry: (2010 to 2018). The pre-2006 experiences of the Legal Department with respect to the reform were relayed to the author by the then Head of the Legal Department of the Bank, Dr Kwaku Addeah. The Founder – Kwaku Addeah Law Office (kalolegal.com).

[448] Para 4.1.1. The reformers envisaged a comprehensive framework for land's inclusion within a PPSA framework of modern secured transactions.

4.4.3.1 Act 773

The Bank of Ghana, after conceiving the reform with the Ministry of Finance and other stakeholders' support, engaged an external consultant to assist the envisaged reform's enactment.[449] The reform's essentials were communicated to this Consultant, including the reformers' broad principles. While performing its tasks, including engaging with Draftsmen at the Ministry of Justice's Attorney General's Department, portions of the original reformers' principles were omitted from the draft proposal or bill, which underwent the 'Outside-parliament' stage of the reform process.[450] The bank, after commissioning the consultant, adopted a hands-off approach, leaving the challenging task of the law-making process to the consultant alone.[451]

Ultimately, a deficient Bill went before parliament.[452]

4.4.3.2 Act 1052

With respect to Act 1052, the story is slightly different. Lessons had been learnt from the challenges experienced during Act 773's enactment process, and it was determined to ensure the enactment of the original reformers' ideas with improvements, where possible.

The legal risks posed by the use of the registry rules (largely) in relation to implementing the envisioned reform[453] had to be eliminated. Accordingly, the Bank of Ghana created an implementation team and legal committee in 2010,[454] comprising international experts on the subject.[455] The team produced a draft bill after extensively engaging stakeholders,[456] which was submitted to the Attorney General's Department's drafting section for fine tuning.[457] A series of seminars was held with this office to explain the bills' provisions and underlying rationale. The drafters' attachment to the common law traditions proved hugely challenging

[449] A local law firm was engaged as the consultant for the reform. The potential benefits of this initiative include: reducing the time pressure due to the existing volume of work facing the central bank and government ministries; widening the range of talent available to the government and its agencies and departments; incorporating relevant specialist skills into the law reform for example; and providing fresh thinking regarding how laws should be drafted.
[450] Para 8.3.1.2.1. The former Head of Legal Department, Dr Addeah, recounted this pre-2007 experience to the author and his colleague. It is unclear whether the omission of priority rules in Act 773 could be traced to this stage of the process.
[451] It was explained that the competence and experience of the Consultant, coupled with the weak staff strength (numbers) of the Legal Department, motivated this.
[452] The deficiencies related to the contents of the reform as envisioned by the reformers. See Para 4.1.3
[453] Paras 4.2.1; 4.2.3
[454] The author was a member of the team and chair of the Legal Committee (until 2018) under the guidance of the IFC's legal expert on secured transactions: Dr. Marek Dubovec.
[455] The IFC's Secured Transactions Reforms Team was appointed to help to implement the Ghanaian reform.
[456] This included lenders, lawyers, judges, land administrators, the Attorney Generals Department, etc.
[457] To have the bill in the drafting format of the office.

during this stage[458] but, armed with the experiences related to Act 773, much was achieved. The bank's staff's retirement and reshuffling distracted attention from the draft bill's progress, as did the inertia which emerged during the period prior to the 2016 general elections in Ghana. The political environment stalled the drafting of the new law. The election ushered in a new government under a different political party. The Bank of Ghana, under new leadership, revived the reform project. The drafting section of the Attorney General's Department submitted a final draft of the bill to parliament.[459]

The difficulties with the drafters and other stakeholders, over the years,[460] meant that the original reformers' ideas were threatened, even before the bill reached parliament. It was thus going to require parliamentary diligence to enact the appropriate legislation.

4.4.4 Inside Parliament

This section examines the problems with parliament which led to the failure to enact the reformers' ideas.

First, the Ghanaian parliament, like many others worldwide, suffers from institutional weaknesses regarding the discharging of its mandate. Its capacity to scrutinize bills coming from the executive is limited by the fact that its members sometimes lack the resources and expertise required to carry out their work. In the absence of a well-resourced research department, the legislation introducing the reforms, and other laws coming out of the house, would lack the benefit of thoroughness. It appears that insufficient parliamentary scrutiny was applied to the bills, particularly Act 773.[461]

[458] All of the officers were trained in Ghana or other commonwealth country in which English law principles are the norm. Thus, drafting a law based on UCC Article 9, which departs from the English concept of security, was difficult.

[459] It is somewhat unclear which clauses in the bill were deleted or added by the drafting section of the Attorney General's Department or Parliament, but very clear that these additions or omissions happened during these two stages, and it is important that a great deal of vigilance is exercised at every stage of the process. Any additions or omissions in a bill must be founded on good reasons, rather than speculation, and less hard to trace than the experience with certain key provisions in Act 1052 shows.

[460] At a point, different officers from the promoter's institution, who could only devote odd hours and days as they could take off from their regular work schedules, worked on this bill at different times. There was, therefore, the potential to lose institutional memory, however talented and industrious these officers were. Career drafters at the Attorney General's Department could thus, either wittingly or unwittingly, depart substantially from the key drafting instructions unnoticed.

[461] A study of the parliamentary Hansard for the relevant period reveals that the contributions on the floor of the House on Act 773 were few. Whereas this might not be conclusive of MPs' lack of diligence, when considered in the context of the final product, it is indicative that a lack of attention was paid to the law, given that much could have been said about the provisions, including proposals about crucial amendments.

A related challenge is the issue of MPs' legal mindset and the legal culture. In addition to the fact that a PPSA secured transactions framework was itself a novelty to a country used to English law conceptions, land's inclusion in that PPSA framework (requiring a departure from the familiar real property mortgage law) proved bewildering. Thus, the patriotic attachment to the common law, partially but undoubtedly, contributed to the failure to enact the intended reform fully.[462] The deliberation and objectivity that were required for the enactment of the original reformers' ideas were absent, as MPs followed the line of least resistance, rejecting any ideas that seemed unfamiliar.

This situation was partly due to the fact that insufficient consultation was undertaken regarding the bill. Very few public comments were received on it.[463] Although the lawful process for law-making in parliament was used, it is contended that a fundamental reform, such as the introduction of the PPSA into Ghana's secured transaction law, and particularly land's inclusion within that reform, should have received more attention and publicity than usual. The public and other stakeholders were inadequately engaged by parliament,[464] denying the process of the associated benefit.[465]

Closely related to this is the fact that law-making is complex. Extracting the best from the numerous perspectives of different stakeholders requires skill. Extreme lobbying, motivated by the stakeholders' turf protection, can prevent parliament from enacting the optimum legislation.[466] A good example of this was the Land Registry's determination to retain the registration of security interests over land with itself, regardless of what this would mean for the reform.[467] To the extent that parliament consulted the Land Registry as a major stakeholder, it is unclear how much of the concurrence of the pre-reform regime with Act 1052 could be attributable to this turf protection and pressure by the Land Registry.

[462] Mooney identities attachment to legal culture as one obstacle to enacting modern secured transactions principles. See Mooney (n 361).
[463] Paras 9.3.1.2.2; 9.5.2
[464] ibid
[465] Para 9.1.2
[466] Mooney (n 361) also identifies lobbying by legal elites as an impediment to enacting modern secured transactions principles.
[467] See Para 9.4.1.2

4.5 Conclusion

This chapter focused on the Ghanaian reform's foundation, which was designed to include land within a PPSA framework of modern secured transactions, which the reformers considered an opportunity to tackle the land administration and real property mortgage law challenges in Ghana, in addition to achieving some identifiable efficiency gains over the traditional common law or statutory device for the taking of security over land. To achieve these goals, the chapter has shown that the reformers modelled the reform along the common principles of PPSAs, but with some adaptations to make the intended system viable. After the initial attempt to enact the reformers' ideal intentions in Act 773 failed, administrative rules, which arguably departed from the enabling statute, were used to implement the reformers' conceptions, but accompanied by enormous legal risks.

Based on the experiences with Act 773, Act 1052 significantly improved Act 773 with regard to achieving the original reformers' ideals, but fell short in a few material particulars.

The problems associated with enacting and implementing this law reform were mainly legal and practical in nature. Legally, for example, the reformed system was not adequately integrated into the existing regime for security interest over land. The legal transplantation was deficient, which led to the detrimental concurrence or co-existence of both the prior and the reformed systems. A repeal of the extant (prior) regime might have been the best approach.

In practical terms, there was also the challenge of how to draft and enact the reformers' ideas. Since the people involved were largely conservative and unfamiliar with the modern secured transactions principle, the best framework could not be enacted.

Chapter V

Certainty of Title under the B&L Act Framework over Land in Ghana

5.0 Introduction

This chapter examines property rights issues concerning land as collateral in a PPSA framework that includes land. It considers how credit parties navigate these issues and the manner in which the related practices and decisions affect credit parties and access to credit generally. Using evidence from qualitative data (based on interviews),[468] this chapter explores the perceptions of the stakeholders in the Ghanaian reforms to explore how, compared to the pre-reform regime,[469] the B&L Act framework imposes (or reduces) the risk and due diligence burden on credit parties, particularly in relation to ascertaining the ownership and encumbrances on land that is used as security.

This discourse is against the backdrop of the liberty afforded by the reform framework, which makes it feasible to take security over the large swathes of unregistered land in the country (even by oral agreement only), and register the security interest at the Collateral Registry, through electronic templates, which accommodate a minimum and liberal description of the burdened land.[470] In registering a charge over land at the Collateral Registry, short particulars of the property suffice. The official description of a parcel of land given by any of the land registries is used, where this is available, but the land coordinates given by the Customary Land Secretariates (CLSs) are also acceptable. What is important is the ability to identify the parcel in question. Photographs of the land can also be uploaded to the Registry's platform. This liberal mechanism for describing a charged asset (especially for a PPSA framework that is used for 'indexing', and the 'unique identifiers' for collateral) is seen by the lender participants interviewed in this study as highly challenging and risky. This is especially true where oral security agreements over land are accommodated. This framework, through this facility, encourages lending using unregistered land as security. Despite the opportunity that this affords rural businesses—enabling them to access credit through their land, given that the

[468] Para 2.1
[469] Para 3.2.4; 5.2.1 and 5.2.2
[470] Act 1052, ss. 19 and 85; Registry Rules 2021, Paragraph 1(11)

majority of the land in Ghana lies beyond the effective reach of title registration,[471] the framework is perceived as raising certainty of title concerns.

This chapter acknowledges that the Collateral Registry is not a title registry and its operations, while not solving the pre-existing challenges caused by lack of certainty of title,[472] also pose challenges for ascertaining the ownership of unregistered land, and therefore problematic in relation to certainty of title under the B&L Act framework. It argues, however, that, overall, the reform framework interacting with, leveraging on, and in conjunction with the CLS system provides credible mechanisms for ascertaining ownership of land,[473] and offers a superior framework for discovering encumbrances over land compared with the Pre-B&L Act regime. This argument is constructed in two parts, the first of which relates to certainty of ownership while the second relates to encumbrances: First, the B&L Act framework not only integrates the land title verification mechanisms available under the Pre-B&L Act regime, but also, the facility to register security transactions over unregistered land that can be done by leveraging on, and in conjunction with the new CLSs mandate and systems,[474] indirectly (and potentially), can facilitate the creation of a meaningful database of unregistered land over time, which otherwise would not exist. Lenders will not only be able to search that platform for information on encumbrances, but also, in due course, the identification of the ownership of such land when the land records at the various CLSs are integrated to the Collateral Registry system, or when a sufficient number of security interests over unregistered land have been recorded at the Collateral Registry to make searching for the owners of unregistered land at the Collateral Registry worthwhile.[475] The invaluable role (and the mutual cooperation) of the CLSs whose land recordation functions have recently been recognized and expanded by statute, and are likely to have more traction and credibility if they are able to coordinate and cooperate with lenders and the Collateral Registry system, is crucial to this prospect of providing certainty of ownership of unregistered land. The Collateral Registry system alone is unable to provide this certainty seeing that it only records secured transactions.

Secondly, the reform framework will ensure that there is far better due diligence for encumbrances on land compared with the pre-reform regime. Lenders have an electronic and

[471] Paras 3.2.2; 5.2.2.1.1; 5.2.2.1.2
[472] Para 5.2.2.2.6
[473] Para 5.3.2.1
[474] Ibid; Para 4.3.2
[475] Para 5.3.2.1

more efficient means of searching for encumbrances on land presented as security at the Collateral Registry. Searches for encumbrances on land and companies' registries were time-consuming previously. They sometimes yielded false negatives, because it took so long to register interests at these registries, leading to hidden liens. False positives might also occur where the wrong entries had been made on incorrect certificates, or where unsuspecting persons' documents had been used fraudulently to secure credit.[476]

The chapter proceeds as follows. In Section 5.1, a general consideration of 'certainty of title' is presented. In addition to providing a context for the discussion, the section examines property rights (and associated interests) in land. It further examines how rights and interests in land are recorded for evidentiary purposes. In Section 5.2, the pre-reform legal and institutional regime for certainty of titles to land is the focus. Section 5.3 discusses the B&L Act's treatment of the subject. 5.4 reports the findings (bearing on the discourse) from the interviews conducted to study the inclusion framework in action. While Section 5.5 assesses the empirical findings, Section 5.6 concludes the chapter.

5.1 Conception of Certainty of Title to Land.

5.1.1 General Overview

The preference for employing land as collateral among financial institutions is motivated by various considerations, including the fact that land depreciates in value minimally, if at all, and its worth is rarely eroded by inflation.[477] Nevertheless, the utility of land as collateral depends on the ease of transfer (when and where necessary), as well as the property rights over it being clearly defined.[478] Thus, unless the title to the land is clear, its usefulness as collateral is not guaranteed. If the title to the land is uncertain, lenders might not accept it as security for credit. Where a lender accepts land with an uncertain title as collateral, he might be unable to enforce the security upon default. Moreover, in the event that he is able to enforce the security in such land, he might be inferior to other competing third-party claims,

[476] Para 5.4.5
[477] Hans Peter Binswanger and Mark R Rosenzweig, 'Behavioral and Material Determinants of Production Relations in Agriculture' (1986) 22 Journal of Development Studies 503.
[478] Gershon Feder, Tongroj Onchan, and Tejaswi Raparla, 'Collateral, Guarantees, and Rural Credit in Developing Countries: Evidence from Asia' (1988) 2 Agricultural Economics 231.

including purchasers and bankruptcy trustees.[479] Any doubt over the mortgaged property will adversely affect the role of the mortgage as a credit risk mitigant.[480]

The discourse about title certainty highlights the legal requirements for the attachment of land security. Attachment fastens the security interest against the asset and enables the creditor to enforce the security against the debtor, but not necessarily third parties (which is achieved by perfection, operating as a right *in rem*). Goode and Gullifer identified six ingredients for the attachment of a security interest, developed through a mixture of case law and legislation,[481] the most relevant of which here is: 'the debtor must have an interest in the asset or a power to give it in security'. The rendition of this ingredient in the majority of the PPSAs (borrowing from Article 9) is the expression: the debtor must have "rights in the collateral". This ingredient is rendered in the majority of the PPSAs (borrowing from UCC Article 9) as: the debtor must have "rights in the collateral", which notion has been criticised for being vague, obscuring the real issue of whether a particular debtor has an enforceable interest in the property,[482] and leading to conflicting judicial cases.[483]

Certainty of title in this discourse concerns both: (1) the ascertainment of whether the mortgagor has a mortgageable right or owns the bundle of characteristics that define property rights over land: exclusivity, inheritability, transferability, and enforceability, and[484] (2) what encumbrances (and associated rankings) exist on these rights, and how they can be discovered to aid business decisions.

5.1.2 Property Rights in Land

Property rights in land, in classic Honorean terms, are conceived as a 'bundle of rights',[485]which concept is nuanced in the discussion of property rights in land as estates in

[479] Adam J Levitin, 'The paper chase: securitization, foreclosure, and the uncertainty of mortgage title' (2013) 63 Duke Law Journal, 637
[480] Binswanger and Rosenzweig (n 477)
[481] See Goode and Gullifer (n 299) para 2-03.
[482] Margit Livingston, 'Certainty, Efficiency, and Realism: Rights in Collateral under Article 9 of the Uniform Commercial Code' (1994) 73 North Carolina Law Review 115
[483] Levitin (n 479).
[484] Antonio Salazar P. Brandao and Gershon Feder, 'PSD Occasional Paper No. 15 1996. Regulatory Policies and Reform: The Case of Land Markets'.<https://documents1.worldbank.org/curated/en/602141468179929468/pdf/multi-page.pdf> accessed 18 February 2022.
[485] According to Honore, property ownership property refers to the ownership of a bundle of 12 distinct elements of individual rights, including: the right to use, the right to manage, the right to income from the property, the right to security, and the right to transferability. He however acknowledges ownership in various restricted senses, which may omit any one or more of the incidents. See Anthony M. Honore, 'Ownership' in Anthony G Guest (ed), *Oxford Essays in Jurisprudence: First Series* (Oxford Clarendon Press 1961).

land.[486] This conception explains why multiple parties may claim distinct (separate) ownership interests in the same land. The duty of every property rights system, therefore, is to define the legitimate exclusive use of the land and who can exercise the right.[487]

Salaza and others,[488] expounding on this exposition by Alchian and Demsetz[489]explain that that property rights consist of four basic types: open access; communal property; private property; and state property.

In the open access category, individuals cannot be excluded from using the resource (land) as it belongs to all members of the group. Property rights under this system are not mortgageable.

Under the communal property arrangement, rights are assigned to a specific community, thus potentially excluding outsiders. Community leadership structures control access to and manage land, including its conservation or improvement. The smaller the group, the easier it is to manage and control; otherwise, the land becomes open access. Rights under this system are mortgageable only insofar as they are presented by the community itself, as represented by its legitimate leaders, with the people's consent and concurrence through their principal elders. However, in certain cases (for example, under Ghanaian customary law), a community member's right to enjoy a parcel of communal land is proprietary and alienable,[490] subject only to reversion to the community under extreme circumstances, like abandonment or a failure of succession.[491]

The authors add that, under private property rights, land is assigned to specific individuals or corporate entities, although certain formal or informal fetters may be imposed on these rights by the state or community and, the fewer the fetters, the greater the motivation to invest.

5.1.2.1 The African Context: Ghana as an example

The description of land rights by Salaza and others[492] applies to the majority of ASA countries, like Ghana. However, frequently, the definition of legitimate exclusive use (a function of the property rights system) is, at best, doubted (if not denied). It is such attitudes

[486] Armen A Alchian and Harold Demsetz 'The Property Rights Paradigm' (1973) 33 Journal of Economic History 16.
[487] Salazar and others (n 484)
[488] ibid
[489]Alchian and Demsetz (n 486), in a discussion about land markets and property rights for economic development.
[490] *Kotei v Asere Stool* [1961] GLR 492 (Privy Council)
[491] Rattray R Sutherland, *Ashanti Law and Constitution* (Clarendon Press 1929).
[492] Para 5.1.2

that characterize interests in land in sub-Saharan Africa as communal.[493] This denies the truly proprietary nature of the majority of the interests in land in Africa, especially customary interests, particularly when they are not covered by title certificates. But it is also true that, sometimes, issues arise regarding which of the existing interests is proprietary, alienable or suitable for land security, especially considering that two or more interests in a parcel of land can co-exist or be enjoyed concurrently.[494] In relation to concurrent interests in land, the question arises of what a charge over, or potential alienation of, one's interest would mean for the other's subsisting interest. These certainty considerations are important.

It is the strengths and weakness of these systems that lead scholars like De Soto[495] to prefer the use of secure individual (or corporate) property rights (founded on title registration) as the basis for any sustainable economic development effort in developing countries.

5.1.3 Proof of title to land

Evidence of ownership and security rights provided by public records ensures a high level of certainty of title. The basic systems of evidence by which a title to land is proved are: (1) by the production of the original title papers or certified copies without any requirement for registering or recording the same;[496] (2) through proof of registration or the recording of conveyances in the system dealing with the registration of instruments, otherwise known as the Deeds system; or (3) by the registration of the title itself (i.e. the ownership) rather than the registration of the evidence of the title.[497]

Under the recording system, the title is transferred at the risk of the buyer and subject to all defects throughout its recorded history. It is essential, therefore, that a prospective purchaser investigates that history carefully.

[493] Para 3.1.2
[494] Naaborko Sackeyfio, 'The politics of land and urban space in colonial Accra' (2012) 39 History of Africa 293.
[495] Hernando De Soto (n 19)
[496] This system was the *de facto* position with respect to about 90% of the land in Ghana before 2021. The deeds registry, in which instruments relating to land outside the land title registration zone were to be registered, was absent from most parts of the county. See Para 5.2.2.1.1. In these circumstances, the production of unregistered indentures to prove titles to land that was not covered by the title registration regime was the norm.
[497] See Paras 5.2.2.1.1 and 5.2.2.1.2;

5.2 Certainty of Title under the Pre-B&L Act Regime

This section briefly outlines the legal and institutional arrangements that enable lenders to ascertain the right to land (and the extent thereof) presented to secure credit under the Pre-B&L Act regime. Its purpose is to enable a comparison with the situation under the B&L Act framework, and provide the context for the comparative critique offered by the interviewees.[498]

5.2.1 Legal devices for security over land

Before proceeding to the main focus of this section, it might be useful to just remind that security interests in land under the Pre-B&L Act took the form of mortgages and customary pledges.[499]

5.2.2 Institutions and practices for taking security over land and due diligence on land

There were various institutions and techniques by which checks on landed collateral were, (and are) made under the Pre-B&L Act regime.

5.2.2.1 Institutions

The institutions that were (and remain) relevant during the due diligence to establish ownership and encumbrances over land presented as security are: the Public and Vested Lands Management Division (PVLMD),[500] the Land Registration Division (Land Registry),[501] and the Customary Land Secretariates (CLSs).[502]

There was also the common practice of searching the records of certain statutory corporations that were established to provide housing,[503] when such houses were presented as security, and the companies' registry, where encumbrances on land belonging to a company can be searched.

The PVLMD is responsible for managing state land (vested land).[504] Lenders can search their records when tracing the root of a title to land presented. In contrast, the Land Registry oversees land other than public and vested land, and operates the deed and title registration

[498] Para 5.4
[499] See Para 3.2.4 for a discussion of these devices.
[500] Lands Commission Act 2008, s. 23
[501] Lands Commission Act 2008, s. 21
[502] Land Act 2020, s. 14
[503] The State Housing Corporation and the Tema Development Corporation are examples. These corporations (now state-owned, limited liability companies) have, over time, built thousands, if not millions, of housing units, which are regularly used as collateral.
[504] See Para 3.2.1.1.1

systems that are familiar to the majority of the citizens. The recording of interests and encumbrances on public and vested land is essentially based on a system akin to the deed system.

The Deed and Title systems were (and remain) the main legal institutional arrangements through which private (non-state) title to, and encumbrances on, land were verified under the pre-reform framework. The following section will briefly discuss these.

5.2.2.1.1 The Deed System

The challenges within the deed system in Ghana and the recent changes made to the systems for the recording and registration of interests in land by the Land Act highlight the weaknesses of the Pre-B&L Act framework in terms of ensuring certainty of title to land.

Every instrument affecting land, as distinct from the title to land, is supposed be registered at the Deed Registry, which is embedded in the Land Commission. The deed system determines the order of priority between competing instruments. Under this regime, a registered deed takes precedence over an unregistered one, or a subsequently registered deed.

This form of registration was introduced in Ghana by the Land Registration Ordinance of 1883 and eventually by the Land Registry Act 1962,[505] which was enacted "to consolidate with amendments the law relating to the registration of instruments affecting land." The regime was (and remains) applicable throughout Ghana, unlike the title system, which is limited only to areas declared as 'registration districts'.[506]

The deed system faced (and continues to face) challenges related to the clarity of interests, which contributed to its limited success. The system was unable to ensure sufficient investigations prior to the 'title' registration, due to the fact that it was only the instrument or document to the land that was registered. Also, registration at the Deeds Registry did not confirm a legal interest in the land; at best, it provided evidence of equitable interests. Furthermore, the system was (and remains) literally absent or ineffective in many parts of the country, particularly in the rural areas. Again, their operation was (and remains) manual, making it difficult to conduct searches of encumbrances.

[505] This law was repealed by the Land Act 2020, but its essence is retained in the repealing enactment.
[506] Once an area is declared registration district, all interests in land are registrable at the Land Registry: nothing at the Deed Registry

Under the new Land Act 2020, however, this function of deed registration is transferred to the Land Registrar, which supervises both title and deed registration under different desks.[507] Moreover, the registrable instruments under the new deed registration system exclude mortgages,[508] but do include conveyances, vesting assents, certificates of purchase (issued under the Borrowers and Lenders Act 2020), statutory declarations, powers of attorney, caveats, and court judgements.

Indeed, the new deeds system does not record any registrable rights, which include the mortgage, easement and restrictive covenants.[509] These are all left for the land title registration system (upon the declaration of an area as a 'registration district'), and the recording of customary interests and rights by the Customary Land Secretariats.[510]

Consequently, encumbrances over unregistered land are now made more difficult to discover under the Pre- B&L Act regime (after Land Act 1036).[511]

5.2.2.1.2 Title Registration

The Land Title Registry is an invaluable source for verifying titles to land and ascertaining any encumbrances on these in Ghana. Land Title Registration[512] has the main objective of providing a machinery for registering a title to, and interests in, land, including security interests. This regime applies to land in areas that have been declared 'registration districts.'[513] One of its distinguishing features is that it makes the registration of all interests in land compulsory, unlike the deed registration regime, which excludes customary law interests in land by its writing requirement. Thus, the usufruct, the customary law tenancies and licences within a 'registration district', are all registrable,[514] but these customary interests are rarely registered in fact,[515] let alone any encumbrances over them recorded on any certificate.

[507] Land Act 2020, s. 206
[508] See Land Act 2020, ss. 206 and 207
[509] Section 82, Act 1032
[510] Section 80, Act 1032
[511] 'Pre-B&L Act' means the system that operated before Act 773 and which continues to operate in tandem with the 773 and now 1052 regime because of the lack of repeal, as discussed in Para 4.4.2
[512] The Land Title Registration Act 1986, which introduced title registration in Ghana, was repealed by the Land Act 2020, but the essence of the law has been retained in the Land Act 2020, Sections 80.81,82,83.
[513] Only two out of Ghana's 16 administrative regions have, so far, been declared 'registration district'.
[514] See Land Title Registration Act (LTRA), 1986, s19: The analogous provision in Act 1032 is Section 81 (1)
[515] Abubakari and others (n 221); para 5.1.3.

A title to land, once registered, is indefeasible.[516] This guarantee of indefeasibility (flowing from the state's acceptance of responsibility for the validity of the transactions entered on the register) clearly distinguishes this regime from the Deed system. In practice, however, a title could be challenged upon discovery of vitiating factors,[517] including fraud.

Title registration, however, faces a major challenge. It applies to land that has been declared 'registration districts' rather than to the entire country, leaving large swathes of land in the rural areas uncovered although, over time, the whole country might be covered. Even in areas that have been declared 'registration districts', the registration is sporadic, although, on paper, it is supposed to be compulsory. This and other operational inefficiencies in the system,[518] including poor record-keeping and management, make it all the more difficult for lenders to ascertain not only the ownership of land, but also any encumbrances on it.[519]

5.2.2.1.3 The Customary Land Secretariats

The Customary Land Secretariats (CLSs)[520] are also helpful in the quest to ascertain the title to land presented as collateral. Lenders taking security over unregistered land have always had recourse to these customary structures,[521] whose operations were somewhat modernised (in the form of the pre-statutory CLSs) with offices and logistics that facilitated access to them. These customary land management structures were recently statutorily acknowledged,[522] and have jurisdiction over the bulk of Ghana's land stock. Their mandate is

[516] See LTRA, 1986, s18. There is an equivalent rule in Section 111 of Land Act 2020.
[517] See *Brown v Quashigah* [2003-2004] S.C.G.L.R. 930, (SC).
[518] In addition to the fact that title registration takes a long time to complete, since, among other factors, one must visit many players in the land sector (most of whom are not automated) before the land title registration can be completed. Also, due to the bureaucracy and delays within the system, middlemen are usually recruited by the registrants to follow up registrations with the attendant costs, not to mention the corrupt tendencies of some of the officials working within the system. When these are coupled with the existing
[519] Para 5.4.3
[520] Para 3.2.2.2
[521] Para 5.2.2.2.5; Samuel B. Biitir and Nara Baslyd, 'The role of Customary Land Secretariat in Promoting Good Local Land Governance in Ghana' (2016) 50 Land Use Policy 528. The inefficiencies in the deed and title registrations system made these bodies so relevant in the land management system that, after being issued an allocation note, many land buyers in Ghana fail to complete the title or lease registration process. The Ghanaian courts (even the Court of Appeal) recognized the land allocation papers from these bodies as an effective land title instrument. See *Abdul Majeed Kareem v. Asumadu* [11/11/99] CA NO. 79/98). This situation continued until the Supreme Court, in 2008, repudiated the disregard for the existing title formalization regime (the deed and title registration system) in Boateng (No. 2) v. Manu (No. 2) [2008] SCGLR page 1119. Academics and stakeholders thereafter stepped up their demand for the legal recognition of these customary structures until their legalization in Act 2020, with the function of keeping records of all lands allocated.
[522] Land Act 20202, s.14

to record interests and rights in land and maintain accurate, up-to-date records of land transactions in their area of operation.[523]

It suffices here to recall that the traditional land-owning/management structures evolved into the CLSs, or in some cases, appointed or constituted this body.[524] The land information that the CLSs record is from these customary structures[525] who know who owns what rights over which parcel of land in their area. This access to land information is seamless, or is a matter of course, since these indigenous structures usually make up these CLSs or appoint the membership thereof, and make access to the necessary land information automatic. Having been statutorily recognised, the CLSs are now able to significantly improve their land recordation and identification functions by, for instance, easily accessing the survey and mapping competencies of the official land registry to improve the accuracy of the land coordinates they provide. This will reduce the risk to lenders who access and rely on this land information to make business decisions.[526] Additionally, the financial and logistical support that they receive, or will receive, as an agency of the state, will go a long way to help them to deliver on their mandate. The CLSs are also to be established across the country and in every traditional area. This covers every unregistered land in the country and potentially makes credit over such land possible.

Also, given that registrable instruments under the new deed system under the Land Act[527] exclude mortgages,[528] mortgages over unregistered land are now only recorded in the records of these bodies (the CLSs). The form of this record is not specified under the law, but is, in practice, akin to the land register specified in Section 110 (1) of the Land Act.[529] Lenders can, thus, visit the offices of these CLSs to obtain the relevant information over a particular parcel of unregistered land. This would help lenders in their quest for certainty of title over unregistered land.

It, however, remains to be seen how reliably the CLSs will perform this function, given that, among other factors, only a few have been established to date. Nonetheless, judging from the

[523] Land Act 2020, s. 15
[524] Para 3.2.2.2
[525] The traditional authorities, such as the chief/head of the clan, lineage, or family, who hold on trust for the people, to whom they are accountable. See Para 3.2.2.2
[526] ibid
[527] Land Act 2020, ss. 206 and 207
[528] Para 5.2.2.1.1
[529] The land register contains a description of the parcel with reference to the map and plan, the name of the proprietor, any interest held in that parcel by any other person and the name of that person.

architecture in the law, it is hard to see how, functioning alone, the CLSs can truly assist the discovery of encumbrances over land, although these may prove useful for ascertaining the ownership of unregistered land.[530] This, alone, is limited in relation to improving access credit with unregistered land, and should impel a co-ordination with the Collateral Registry to improve certainty of title to land.[531]

5.2.2.2. Practices and techniques for due diligence on land

Beyond the official institutions for ascertaining ownership and encumbrances over land, lenders have also developed (and, under the B&L Act framework, still use) certain practices and mechanisms by which they can check the status of land intended to be used as collateral, as a matter of due diligence. These techniques are neither fool-proof nor self-sufficient, but efficacy is assessed individually, on a case-by-case basis. They augment the traditional channels and are more important in the case of unregistered land.

The following section will consider a few of these.

5.2.2.2.1 Judicial Decisions

Lenders can sometimes obtain information on the title and encumbrances on land presented as collateral from judicial decisions. The Ghanaian courts give directions on which and whose title to land is supported by the law. They have, for instance, nullified land title certificates for various reasons, including fraud.[532] In repudiating a Plaintiff's land title certificate, which was procured through the dishonest disregarding of evidence of the effective possession of the land by the defendant (an earlier customary lessee), the Supreme Court held, among other things, that "the principle of caveat emptor is still a postulate of our law. A prospective vendor or purchaser of land cannot shift unto the shoulders of the existing owner the burden of informing them of encumbrances, title or interests held in him. In many cases it will not even be sufficient to conduct a search in the Deeds Registry or the Land Title Registry."[533]

Taking a cue from this, people intending to deal in land, including prospective buyers and mortgagees, conduct site visits of the neighbourhood in which the land is situated to talk to people about such issues as ownership, any disputes or litigation concerning the land, and the

[530] Para 5.5
[531] Para 5.3.2.1
[532] See *Brown v Quashigah* [2003-2004] S.C.G.L.R. 930, SC
[533] Ibid (p.954)

physical properties of the land (for example, whether the area is flood prone), among other things.

Furthermore, the registries of the courts in the area where the land is situated are usually contacted to ascertain whether there are is any litigation associated with the land being presented as collateral. These are now avenues for due diligence on the title of a prospective vendor or mortgagee.

5.2.2.2.2 The Companies Registry

The companies' registry can also be searched to ascertain, not necessarily the title, but the encumbrances on land belonging to companies, presented as security. The original, or a certified copy of an instrument, by which a charge is created on the asset (land) of a company, is to be delivered to the Registrar of the company for registration within 45 days after the date of the creation of the charge.[534] The potential for this charge to become void due to a failure to register,[535] with the consequent acceleration of the secured obligation,[536] usually incentivises registration by the company itself, or any other interested person interested in the charge.[537] Additionally, a failure to register it can attract administrative penalties against the company and its officers.[538] Searches at the Companies Registry can therefore yield results that may help a lender to make a decision regarding company land that is presented for credit.[539]

5.2.2.2.3 Surveyors

Lenders, in addition to the regular searches at the land and deed registry, also engage licensed surveyors to verify the land coordinates provided, to ensure that the site plan presented matches what actually exists on the ground.

5.2.2.2.4 Consents: Spousal and Others.

It is standard practice for lenders to require a spouse's written consent before a landed property is used as security, based on the presumption in Ghanaian law that property acquired during the subsistence of a marriage is joint[540] and, as such, any alienation, including a sale,

[534] Companies Act 2019, s. 110 (1)
[535] Companies Act 2019, s. 110 (1)
[536] Companies Act 2019, s. 110 (5)
[537] Companies Act 2019, s. 114(1)
[538] Companies Act 2019, s. 114 (3)
[539] See Para 4.3.5 for a mention of overlap between the unrepealed Company charges registration system and the B&L Act framework
[540] Land Act 2020, s. 38 (3) & (4); s.47

exchange, mortgage or lease, requires the consent of the other spouse, which should not be unreasonably withheld.[541]

Furthermore, most leases from allodial owners, such as stools, families and the government, usually contain provisions relating to the consent of these allodial owners before a dealing in the property with third parties is undertaken. Lenders, thus, seek this consent before engaging in transactions regarding such land, as its absence can pose legal risks for creditors taking such security.[542] The purpose of these consent requirements varies, depending on the allodial owner. Whereas, for the customary authorities, it is a sign of deference to their lordship, and also helps to put other interest holders (in the same parcel) on notice (especially as different interests in land might subsist concurrently), for the state (and its agencies), it is largely a means for raising revenue from every intended land transaction, and sometimes designed to monitor town and country planning.

5.2.2.2.5 The Traditional Structures

The chiefs or family heads alienate or exercise proprietary right over land with the councillors of the stool or principal family elders' consent and concurrence without which any land dealing is voidable.[543] Lender taking security over unregistered land consult these customary structures, which make up the pre-statutory CLSs,[544] for due diligence on customary land, including ownership or any encumbrances thereon. Most of the CLSs are still in their former state (as pure customary law bodies working with slightly modified customary practices), since the statutorily anticipated or refined CLSs are yet to be fully established and operational. When this anticipated full formalisation of the CLSs takes place, due diligence over unregistered land will be more effective.[545]

5.2.2.2.6 Critique

With the exception of the Companies Registry, which may help lenders to ascertain encumbrances over land, the other due diligence practices identified above only extend to establishing the ownership of only registered land. There were no credible means of establishing ownership of unregistered land in officialdom under this Pre-B&L Act regime.

[541] Land Act 2020, s.47(d)
[542] An interviewee (GB51) from a lending institution shared how their security nearly failed in court due to a lack of consent.
[543] Para 3.2.2.2
[544] Paras 5.2.2.1.3; 3.2.2.2
[545] See Paras 5.2.2.1.3; 3.2.3; 3.2.2.2

This was left for the customary structures that used indigenous land management techniques with all their limitation in a modern economy, leading to the introduction of the CLSs, which were meant to adopt and apply modern practices to traditional land management systems.[546] There, thus, exists a major gap relating to the efficient means of ascertaining encumbrances over land. The Companies' Registry is even limited in this respect, since (1) it relates only to companies, and (2) it is rarely searched for encumbrances on land before credit decisions are made by lenders.[547]

5.3 The B&L Act framework and Certainty of Title

5.3.1 Overview

Like section 5.2, this section considers the institutional environment for enquiries about a title to and encumbrances over land that is used as collateral under the reform framework. It aims to aid a comparison of the features of the B&L Act environment with the content of the prior regime, and provide a background to the interviewees' perspectives on this subject.[548] This section shows that the combination of the B&L Act and the statutory recognition of the CLSs (and therefore the expansion of their mandate) has potential for greater certainty for creditors and hence (may possibly) increased access to credit compared to the previous regime. Lenders can access avenues for enhanced due diligence, as they are able to search the other registries in addition to the Collateral Registry.

All of the rules, protocols and practices that relate to the ascertainment of ownership of, or title to, land under the pre reform regime [549] are deemed as part of the reform framework.[550] In addition to this, the CLSs' mandate for identifying and recording unregistered is able to be leveraged on by the Collateral Registry system to improve upon certainty of title to unregistered land used as collateral. Further, the practices and avenues for due diligence on encumbrances[551] (excluding resorting to the deed registry, land title registry and the

[546] ibid
[547] Interviewee YR from the Companies Registry made this point during an interview with her as part of the qualitative data collection for this thesis.
[548] Para 5.5
[549] Para 5.2
[550] Para 4.1.3.6
[551] Para 5.2

companies' registry to verify encumbrances) are also considered useful and deemed part of the due diligence regime under the reform framework.

5.3.2 Borrowers and Lenders Act 2020 (Act 1052)

The due diligence efforts of lenders under the reform framework include searches at the Collateral Registry and other registries, in addition to the rules and practices identified above.[552]

Unlike the PPSAs, whose property rights requirements (for the creation of security interests) accommodate some degree of vagueness, the inclusion framework stipulates a relative degree of certainty of title to land. Section 3 (1) of Act 1052 reads:

"A security interest is created by a transaction that in substance secures payment or performance of an obligation, without regard to the form of the transaction, where a borrower or a third party who has title to the collateral willingly creates a security interest in favour of the lender."

From this provision, a borrower or third party who presents land as collateral must have the title to the land. This contrasts with the PPSA system, where the borrower or third party must only have 'rights in the collateral',[553] a concept which faces many challenges.[554] A title under Act 1052[555] means the title to any of the various interests in the land.[556] Consequently, the means of verifying the title ('ownership') of all of the interests in land cognizable under Ghanaian law, (as noted above)[557] apply under the B&L Act framework. The Land Registry was thus to continue to remain authoritative on title ownership issues relating to registered land. Concerning unregistered land, the uncertainty as to ownership remains as before (largely dependent on the CLSs system being functional and coordinating with the Collateral Registry, in addition to what the Deeds system could offer, as well as the methods of searches set out in 5.2.2.2. Paragraph 5.3.2.1 below is however instructive on this issue.

Secondly, the reform framework also has comprehensive provisions that facilitate due diligence regarding encumbrances as a facet of certainty of title. The perfection and priority rules mainly perform this function. First, the perfection of security interests in land (whether

[552] Para 5.2.2
[553] Para 5.1.1
[554] Para 5.1.1
[555] Act 1052, s. 3
[556] Para 5.1.2
[557] Para 5.2.2

within or outside the registration district) under the B&L Act regime is carried out through registration at the Collateral Registry.[558] Registration is mandatory.[559] There is also an opportunity to amend registrations, [560]as well as a legal duty on the lender to discharge registrations whose security obligations are satisfied.[561] The court may order a lender, who wrongfully fails to discharge a security,[562]or order the Registrar, to do so.[563] In this way, the extent of the encumbrances on the land can be determined by the debtor or collateral identifiers through searching the Registry's web-based database.[564]

Contrary to the original reformers' design,[565] there is a provision in Act 1052 for lenders additionally to register land security at other registries.[566] This has become another means for enacting further due diligence, although it is a corruption of what the original reformers envisioned. The reformers conceived a scenario whereby the Collateral Registry would give the land and companies registries notice of any encumbrances registered at the Collateral Registry (for what they are worth), but no more.

5.3.2.1. B&L Act framework and certainty of ownership of unregistered land

It is the CLS system that is fundamental to the potential, in the long run, for the B&L Act framework (in conjunction with the CLS system) to innovate a solution to the challenge of certainty of ownership of unregistered land, as the subject of security interest under the B&L Act framework. The Collateral Registry system can leverage on the land identification and recordation functions of the CLS (that have been statutorily recognised and enhanced)[567] to build a database of unregistered land over time. This can be done by electronically integrating the land records at the CLSs or evolve a register of unregistered land presented as collateral that can be searched over time.

The quasi register of unregistered land that the CLS system is able to develop by virtue of its enhanced mandate[568] can help lenders to identify the ownership of unregistered land, but the CLS system alone is unable to generate the needed confidence to promote security interest

[558] Act 1052 s.22
[559] Act 1052, s 22(1).
[560] Act 1052, s.29
[561] Act 1052, s. 26
[562] Act 1052, s.30 (6)
[563] Act 1052, s. 31
[564] Act 1052, s.32
[565] Para 4.1.3.3
[566] Act 1052, s. 17
[567] Paras 5.2.2.1.3
[568] Ibid;

over such land since, without the Collateral Registry, there is no credible and efficient avenue to record such interests over unregistered land, and to bring such land into the economy. The nature of the operations of the Collateral Registry affirms and popularises the land identification mandate of the CLSs and makes them credible and meaningful. This calls for a deliberate coordination and collaboration between the two institutions, since they reinforce each other in relation to security interest over unregistered land. This coordination may involve computerising the operations of the CLSs and integrating their electronic systems with that of the Collateral Registry to aid identification and verification of any unregistered land that carries the burden of security, which is registered at the Collateral Registry.

5.3.3 Conclusion

The inclusion framework (both as conceived and enacted) contains comprehensive mechanisms of its own for searching and discovering encumbrances on land. However, it does not have sufficient mechanisms of its own to address questions of ownership of land presented as security. It essentially integrates the facilities and structures for verifying the ownership of registered land existing under the pre-reform regime. In relation to unregistered land, ascertaining certainty of title is made possible only through interaction, cooperation and coordination of the B&L Act and the CLS systems, especially with respect to certainty of ownership of land.

5.4 Empirical Findings

To study certainty of title in action, this thesis draws on the perceptions of the participants in the qualitative aspect of the research.[569] The major issues arising from this theme are reported in the following paragraphs as sub-themes.

5.4.1 Certainty of title as a regulatory prudential requirement

It was widely believed that the type of land (and the documentation covering it) that can be accepted as security under the reform is determined by what the regulator permits or allows, and that the apparent flexibility in registering security over land at the Collateral Registry is an indirect adjustment of the central bank's prudential directives to regulated entities with regard to acceptable land collateral.[570] These directives do not consider all security as

[569] Para 2.1
[570] GB21, GB31, GB161

offering sufficient protection against credit risk. Thus, some participants[571] perceived that building a regime that departed from the strict insistence on title documentation, found in the the Guide for Financial Publication for Banks & BOG Licensed Financial Institutions[572], was a purposeful relaxation of the rules to facilitate credit for small businesses. An interviewee from a bank, reflecting on the Guide's requirement for a security interest to be registered under the B&L Act regime to qualify as 'perfected collateral', and the liberal mechanism (under the reform framework) for registering land security, and its implications for the prudential directives of the central bank concerning land security, summed up the general view of the participants:[573]

> "It is about certainty, that is what security means: You are secured. I am providing security or guarantee that this money will be paid, and if it is not paid, you can fall on this. Because even the BOG will come and impair your facilities if they are not properly secured. BOG understanding that those properties (referring to unregistered land) are acceptable is a game changer. Sometimes when you take some properties, the auditors come and they want you to impair, because they will try to look at the value you have given and doubt it because of the location and title documentation".[574]

This flexibility was lauded by these participants, who viewed it as having enormous potential.[575] Nonetheless, other participants who perceived that greater clarity on the issue was needed from the Bank of Ghana. One participant stated that:

> "we may need the clarity and intervention of our regulator to see whether in instances where the customer does not have valid title document covering the property I am taking as collateral, If I take it as collateral, how would they see it? Would it come as an unregistered document? So, we would need the intervention of the regulator".[576]

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[571] GB 31, GB81, GB21, GE1.
[572] This Guide was developed to assist the financial institutions with the preparation and presentation of their financial statements. In relation to Landed Property, it states among other things: "2.2.3 For the purpose of impairment computation by banks and deposit-taking institutions, only perfected landed-property collaterals at forced-sale values will be allowed." Perfected collaterals in this regard are collaterals for which: I. title has been obtained in accordance with Land Title Registration Act, 1986 (PNDCL 152), except equitable mortgages; IV. the charge over the mortgage has been registered with the Collateral Registry in accordance with the Lenders and Borrowers Act, 2007 (Act 773), respectively.
[573] Participants GB 31, GB81, GB21, GE1.
[574] GB21. Although this a widespread opinion, Participant GB191 used similar language to make this point.
[575] All of the participants named in Footnote 558.
[576] GB171

The regulator strikes a fine balance on this issue in order to avoid creating the wrong impression, which could lead to risky lending practices by regulated institutions and jeopardize the banking sector. An interviewee from the regulator confirmed that:

> "as much as we are interested in credit to the private sector, we are also looking at the risk associated with it. And to that extent, we will pay more attention to the rate to solvency. Bank collapses and their implications are huge, and so we want to build and help the market to give more credit, but we are careful".[577]

This is reminiscent of the classic tension that exists between the regulatory standards for financial stability and economic growth (stimulated through access to credit).[578] Thus, even with the increased opportunity provided by the B&L Act (and the reformed CLS system) to establish title certainty, banks are constrained by the regulators in regard to lending to SMEs.

5.4.2 Certainty of title as a business imperative

The interviewees also perceived certainty of title to land under the reform framework as a business fundamental. The lender interviewees were clearly interested in recouping their investment in the worst-case scenario and, thus, only accepted land that ensured that that would be possible.[579] In this regard, they expressed a clear preference for registered land as security for credit, although they might, in rare cases, consider documents other than title certificates. The following exchanges with Participant GB191, for example,[580] demonstrate this:

> Interviewer: So, when you say it's only documented land you accept, what kind of documentation do you mean?
>
> Respondent: Land certificate is the ultimately preferred, but aside that if there is a registered Indenture,[581] we can look at it.

[577] Participant GE1.
[578] See Giuliano G Castellano and Marek Dubovec, 'Bridging the gap: the regulatory dimension of secured transactions law reforms' (2017) 22(4) Uniform Law Review 663. The authors discuss the tensions that can be generated by the failure to coordinate secured transactions law and capital requirements in an economy's legal framework.
[579] All of the lenders interviewed unanimously held this view. There were a few, however, (including Participants GB131, GB91, GB61, GB21) who nuanced it with such considerations as the risk appetite of the lender.
[580] GB141 shared another bad experience of accepting land documents in the hope of helping the client to register to obtain a title certificate.
[581] Para 5.2.2.1

Interviewer: Registered indenture! What if it is not registered?

Respondent: No. In the past we considered those things but we got our fingers burnt several times, where we realise that, there are many of the same document floating in the system. So, a land certificate, that is the ultimate and then followed by a registered indenture. There are a few regions who do not have trouble with land certificate like Accra does, so you if have an indenture from such places with all the stamps,[582] which a search will come out positively to confirm that it indeed belongs to the name that the document bears, we may look at it".

There is a perception that the pursuit of this level of title certainty is informed by Ghana's intractable land administration challenges, as "many of the same document floating in the system"[583] make it highly risky to consider anything less than the title certificate.[584]

5.4.3 Relative weakness of the reform framework regarding certainty ownership

The interviewees also held a widespread perception of the relative weakness of the B&L Act framework with respect to verifying land ownership. Unlike the Pre-B&L Act regime, which contained a comprehensive regime for ascertaining land ownership, there is no avenue (exclusive to the reform framework) to confirm authoritatively the ownership interests in land at the Collateral Registry:

> 'Like I said, the search serves two main things; proper ownership and encumbrance. The Collateral Registry will serve only one source: encumbrance, and that may not answer the ownership problem or question. So that is why I would choose the Lands Registry because that place has titles properly registered. When you do a search, they give you results and you'd get at least both the ownership and encumbrance".[585]

In light of the perceived weakness of the reform framework, which, on its own (apart from coordinating with or leveraging the CLS system), cannot address questions of ownership and is therefore deficient, it was suggested by the interviewees that the pre-reform regime should be 'cleaned up'[586] and digitized, and that the reform framework should be 'scrapped'.[587] This idea was however quickly dismissed (by the same participant who mooted it), with the view

[582] Official seal of authentication from the Deeds Registry.
[583] GB191
[584] All of the interview participants confirmed this reality.
[585] GB61. This view was also strongly held by GB101, GB161 and GB121.
[586] GB61
[587] GB61, GB33

that, even in the unlikely event of achieving full digitization at the Land Registry, their operations would never be as efficient as the Collateral Registry. Thus:

> "No matter how the people (Lands Registry) clean up and all that, there will be a little bureaucracy which we'd have to go through, some payments would have to be made,[588]some waiting would have to be done and so on, no matter what. The Collateral Registry will be very much relevant".[589]

The participants thus perceived the futility of hoping for the digitization of the Land Registry to replace the operations of the Collateral Registry with respect to security interests in land,[590] particularly since the Land Registry only deals with registered land.

There is, however, a progressive strand of this debate that advocates a kind of collaboration between the Collateral Registry and the Land Registry to ensure that the latter is automatically fed with notices of the encumbrances created at the Collateral Registry over land on which the Land Registry has records.[591] The envisaged collaboration is perceived as having enormous potential, and:

> "perhaps that is something we should seriously consider doing, so that there is a proper correlation between the Land Commission[592] and Collateral Registry. So that if I register my collateral at the Collateral Registry, it should also be reflected in the records at lands".[593]

Despite the acknowledged relative strength of the pre-reform regime in regard to ownership issues, the interviewees perceive inefficiencies in the land title registration process under the Pre-B&L Act regime. All persons registering a title to land must visit every agency in the land sector, most of which are not automated, for a single registration. The interviewees complained about the existence of:

> "three sectors where searches alone have to be done: we have Title, we have Commission [PVLMD] and we have Survey. Sometime you conduct a search at Survey

[588] Interviewee insinuating the payment of bribes.
[589] GB61
[590] This view was held by all of the participants, with the exception of those from the land and companies' registries.
[591] This view is akin to the original reformers' intention. See Para 4.1.1.3. Participants GB31, GB41, GB42, GB43, GB61, GB81, GB101, GB121, GB171 GB181, GB191
[592] Land Registry
[593] GB 171

> and then when you go on to do the same search with the same coordinates at the different sector, say Title, you will find that there is a bit of distortion".[594]

There was a general sense that, due to the bureaucracy and delays with the system, middlemen are usually recruited by the registrants to follow up the processes for them, with an attendant cost. Registration under this system is therefore perceived as cumbersome, expensive and unattractive:

> "Registration is our challenge. There have been so many policies or laws which have tried to solve this problem… There came this Land Administration Project in which various units were set up for clients to register their documents. The idea was to reduce corruption or extortion of money from the registrants, but that policy has been abused. Sending documents there alone for stamping can take you more than one month".[595]

Furthermore, the deed and title registration systems were perceived as useless in regard to aiding the discovery of ownership interests over the bulk of the nation's (unregistered) land). Until an area has been declared a registration district, land title registration, which leads to the acquisition of land certificate, is inaccessible:[596]

> "Let me give you an example, where I have a land: beyond Nsawam; and when we talk about title registration, it is only limited to only Accra, Kumasi township itself, and then Winneba. It is only limited to these areas: there are no land registries anywhere else. Besides. land title registrations are not making any head way".[597]

Deed registration usually applies to such an area. But the interviewees detected many weaknesses in the deeds system: "you may register a document today, tomorrow they may not find it, because somebody can just remove it so, you cannot find it".[598] The absence of the deed registry in the majority of the country, for the interviewees, meant that it was not very useful in resolving questions of ownership. Indeed, even where they exist, "the system only registers instruments, not titles".[599]

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[594] GF11.
[595] GF11, GF12, GB171, but this view was shared by all participants.
[596] Land Act 2020, s.89
[597] GA1. This was also a widely-held view among the participants, including the officials from the Land Registry.
[598] GA1
[599] GA1

5.4.4 Promising role of the Customary Land Secretariats

In the context of the concern about the limited nature of title registration nationwide, the participants[600] were optimistic about the potential for the Collateral Registry platform to build a credible database of unregistered land, particularly leveraging on the recently statutorily recognized mandate of the Customary Land Secretariats (CLSs) to record interests and rights in land and keep and maintain accurate, up-to-date records of land transactions in their area of operation.[601] This, it was perceived, could help to address the ownership challenges existing in the reform framework. The CLSs have, in the past (when they were informal), been useful to lenders, particularly in certain parts of the country, such as the Ashanti Region.

> "the Asantehene Secretariat, what they have done is that they have built it to dovetail into the Lands Commission process. And so, the Asantehene Secretariat is fully fledged in terms of consent and documentation".[602]

Nevertheless, the participants[603] also wondered whether the envisioned role for the CLSs across the country would turn out as the law anticipates. In their view,

> "the law will say one thing and the practice on the ground will be something else. And so, it is all about implementation: if it can be implemented well; and it is well structured, then I think that yes, we can rely on it.. If not, I don't think that it can hold."[604]

Generally, there was deep-seated mistrust in the customary structures with respect to their role over land:

> "Actually, the issue with the customary authorities is that, they rather have been hindering the certainty of these transactions and reliability of these transactions, because sometimes they engage in multiple grants of the same pieces of land".[605]

The interviewees were, however, willing to give the CLSs the benefit of the doubt now, given that a chapter has been opened for them through the statutory recognition of their roles.

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[600] All lender participants in the Green category shown in Table 1 (Para 2.1.3) affirmed the usefulness of the CLS to security over land, although they remain cautious for the present.
[601] Ibid s.15 (1); Para 5.2.2.1.3
[602] GB121
[603] Almost every bank participant nursed this fear.
[604] GB141. This sentiment was shared by all of the participants, but they did not wish to preempt issues; Also compare with Para 3.2.2.2
[605] GB11. This was indeed a widespread perception (and sometimes a reality) about the customary structures.

5.4.5 Superiority of the reform framework in ascertaining encumbrances

Among the interviewees, there was unanimity in regard to the superiority of the B&L Act framework over the prior regime with respect to the ascertainment of encumbrances over land. The respondents were of the view that the reform framework makes it easier to search for and discover security interests over land, compared with the Pre-B&L Act regime:

> "The Collateral Registry has availed to banks and other lenders the electronic system of registration and searches which you could sit in the comfort of your office or home and engage. But the one at Lands Commission is quite slow, very onerous and strenuous indeed".[606]

It was widespread view among interviewees[607] that poor record-keeping was a major source of inefficiency in the pre-reform framework, and the reform framework was indisputably better with regard to searching for and discovering encumbrances over land. Documents submitted for registration at the Land Registry are commonly mishandled by registry staff:

> "some of them will actually keep it on their desks, and so you don't really have a place you go; a cabinet or whatever you visit reliably to pick it up".[608]

In an attempt quickly to fix a missing file challenge, registry officers "will create another file, and so we might get two crashing at the same time".[609]

This poor manual record-keeping culture at the Land Registry was, in turn, perceived as facilitating fraudulent practices (regarding encumbrances on people's documents) among the officials there. The interviewees alleged that:

> "some of their staff actually give out the certificates they have there to prospective borrowers, so they give it to other persons, who use it to secure a loan. If you are lucky the person pays off, then they will return it".[610]

Despite the relative strengths of the B&L Act framework (compared with the weaknesses of the pre-reform regime regarding the relevant issues) articulated by the participants, there was

[606] GC1, GB201. This view was also held by all of the bank interviewees.
[607] This view was shared by all of the participants.
[608] GB133
[609] GB181
[610] GB133

a deep sense of concern among them about the liberal manner in which burdened land could be described on the registration template. The Collateral Registry template does not insist on any specific way of describing charged land in order to make it possible to take security over unregistered land and register the same. The focus:

> "is really on being able to adequately identify the land. And so, when it is a registered land, it is easier to identify, but with the customary land, it becomes a little problematic to narrow down the identifiers of that customary land. So typically, they talk about the location. And now the new law gives further requirement so you have to state geographical coordinates and all that to help narrow down the actual land that you are referring to. So, you need to put in the size, the geographical location and all of that, when you are doing the registration."[611]

This concern leads some lenders not to consider unregistered land as security. In their view:

> "once the document is not good enough, we are not going into that deal, regards of the presence of the Collateral Registry. Collateral Registry is not interested in the quality of the document you have covering the property. It is interested in the security: the charge you have brought against the land.".[612]

This cautious attitude of the lenders (towards unregistered land and the liberalism accommodated in the description of charged land) stems from a more fundamental challenge with land administration, which leads to certainty of title concerns. There was a widespread perception that:

> "we have different property addresses and then we have the land documents that do not have any relation with the property addresses, so there is no way to determine that this title document you are giving to me and the house you are pointing to me have anything in common: there is absolutely no way to check. Your ID is not on the document; your picture is not; and your signature is not on it".[613]

[611] GE2
[612] GB191. This is an important consideration in any modern secured transactions law over land, that is related to the law's effectiveness on the ground.
[613] GB191

5.5 Review of the Findings

During the interviews, the participants generally categorized certainty of title concerns into two groups: issues about ownership of the title to land and encumbrances over land. There was a sense of helplessness in regard to the mechanisms for discovering land ownership interests in Ghana. The interviewees felt stuck with the pre-reform framework, which has many endemic challenges, including fraud, bureaucracy and inefficiency. Title registration has been unsuccessful for decades. Its slow, inefficient processes have mean that it covers an insignificant percentage of the country's land stock, over which few and poor-quality records are kept. Where the inefficient manual record-keeping system reveals the proprietorship of a particular parcel, there is no guarantee that the records have not been tampered with.[614]Again, errors in the title registration processes, which are pervasive due to their manual, inefficient nature, can lead to the annulment of a title certificate. Although the victims of this incompetence of state officials and systems are guaranteed some compensation,[615] the fund supporting this guarantee is another inefficient, bureaucratic system, accessing which is burdensome.

The lenders' frustrations were exacerbated by how little (if anything) the reform framework has done to address ownership issues related to registered land. Indeed, the reform framework, more or less, relies on the systems and structures that existed under the pre-reform regime for discovering the ownership of registered land. The bank interviewees had hoped for something better from the inclusion of the secured transactions law. This 'failure' (among other things) led to a feeling (albeit not widespread) that perhaps the Land Registry system should be 'cleaned up' and digitized, and the inclusion framework 'be scrapped'.[616]

This sentiment, in the author's view, does not take account of the many benefits of the inclusion framework, including the potential, in conjunction with the CLS system, for moving towards overcoming certainty of ownership issues concerning unregistered land. The opportunity to register security interests over unregistered land, aided by the CLS system, could facilitate the building of a meaningful database of unregistered land, which would

[614] Franklin Obeng-Odoom, 'Urban land policies in Ghana: a case of the emperor's new clothes?' (2014) 41(2) The Review of Black Political Economy 119.
[615] This emanates from the Torrens System, which guarantees indefeasibility of title.
[616] Para 5.4.3

otherwise be impossible.[617] Lenders could search such a platform to ascertain encumbrances and ownership over such land in the long term.

However, without the CLSs system, certainty of ownership of unregistered land will be a real challenge under the B&L Act framework and eventually undermine the effort to make capital of the vast swathes of unregistered land in the country.

Greater accuracy is therefore required from the CLS system with respect to their land identification functions in order to avoid confusion about which parcel carries the burden of security given by whom. The Land Registry system has a rather more advanced survey and mapping system, which offers greater certainty on the parcel at issue. Although such services are usually accessed by the customary structures, the statutory recognition of the Customary Land Secretariats means that there is every opportunity formally to integrate the more efficient, reliable survey works of the Land Commission[618] into the process of recording unregistered land, which can be leveraged on by the Collateral Registry system.

In relation to searching for, and discovering, encumbrances on land, the participants deemed the reform framework matchless. The registration system under the pre-reform regime was inefficient and corrupt. The inordinate delays that are a regular feature of this system sometimes return false negatives (from hidden liens) when searches are performed. Where wrong entries were made on wrong certificates or unsuspecting persons' documents are fraudulently used to secure credit (which is very common), false positives are recorded. These significant challenges under the pre-reform framework are conveniently and effectively avoided under the reform framework.

Furthermore, there were allegations that, unbeknown to the victims, the Land Registry officials gave other people's land certificates to borrowers to secure loans.[619]

The author observes that the idea of jettisoning the reform framework for the pre-reform regime merely reflects frustration (rather than a genuine conviction). The interviewees generally acknowledged the matchless efficiency of the reform framework for searching for, and discovering, encumbrances over land.

There exists, however, a peculiar challenge related to encumbrances over customary land under the reform framework, which was not explicitly raised by the interviewees. The

[617] Para 5.3.2.1
[618] The umbrella for all land agencies in Ghana
[619] GB133; GB181

minimum description of the burdened unregistered land at the Collateral Registry tends not to account for the specific interest burdened. Considering that two or more interests in a parcel of unregistered (customary) land can co-exist or be enjoyed concurrently,[620] the question arises regarding what a charge over, or potential alienation of, one's interest would mean for the other's subsisting interest. Thus, upon default (under the reform framework, which contains extrajudicial enforcement mechanisms), the wrong person's concurrent interest could be jeopardized. This problem is partially addressed under the pre-reform regime in the sense that the title certificate (which carries the charge) is the best evidence of unrivalled ownership of land, and therefore minimizes the potential for the concurrence or coexistence of interests. Notwithstanding this, upon the expiration of the lease founding the title certificate, the title to the land reverts to the grantor. The reversionary interest, thus, subsists concurrently with the title certificate, even under the pre-reform regime. The difference, however, is that lenders are more certain of the interest serving as security. Provided that the certificate can be searched and discovered, with integrity, at the inefficient, corrupt Land Registry, the burdened interest is more visible and less problematic under the pre-reform regime than is the case with customary (unregistered) land under the reform framework.

Whether as a regulatory requirement or a business imperative, lenders are keen to ascertain the certainty of a title to land presented as collateral. They find the reform framework very useful in helping to discover encumbrances, but insufficient with respect to searching for the ownership of registered land.

Regarding unregistered land, the reform framework is deemed superior in terms of both due diligence on encumbrances and, to a limited degree, ownership or title. There was no really effective means of conducting due diligence for encumbrances over unregistered land under the pre-reform regime. There tends to be a lack of meaningful records of this category of land within officialdom, let alone any searching for any encumbrances on them. It is only under the B&L Act framework (in conjunction with the CLS system) that, in addition to the ability to conduct effective due diligence on encumbrances on unregistered land, one can, with time, anticipate a better degree of title certainty in relation to unregistered land, especially as the B&L system is able to interact, coordinate and collaborate with the CLS system that

[620] Para 10.2.5

identifies and records unregistered land[621] over which security interest is eventually registered at the Collateral Registry.

Consequently, even if lenders are currently cautious, access to credit with unregistered land is seen as having enormous potential under the reform framework, particularly with the statutory recognition and expanded mandate of the CLSs. Indeed, the constraints on banks in regard to lending to SMEs, despite the opportunities created by the B&L Act (and the reformed CLS system) to establish title certainty, are largely due to cautiousness, which is not unreasonable, and weaknesses of the B&L Act framework, which could be addressed.

It is pertinent that the World Bank has advised that the "coordination between secured transactions law reforms and prudential regulation is of paramount importance in promoting inclusive access to credit through the development of a sound financial system."[622]

On the whole, the participants perceived that the B&L Act framework is more efficient in assuring certainty of title compared with the Pre-B&L Act regime.

5.6 Conclusion

The chapter has considered certainty of title within the Ghanaian PPSA framework, that includes land. It has described the pre-reform regime and its structures for ascertaining property rights in, and encumbrances over, land, as well as the analogous provisions and institutions under the reform framework. The chapter has further reported the perspectives expressed by the stakeholders of the reform when interviewed on the issues (and more), both in ordinary and comparative terms.

The participants in the qualitative aspect of the research on the Ghanaian reform perceived certainty of title as both a regulatory requirement and a business imperative. They identified serious challenges associated with searching for encumbrances over registered land to aid credit decisions under the pre-reform regime. This problem was seen as non-existent under the reform framework, given the electronic means by which registration and searches for security interests are performed at the Collateral Registry. This was perceived as making the reform framework matchless.

[621] Para 5.3.2.1
[622] WB Collateral guide.pdf accessed 4th April 2022

With respect to discovering the ownership of registered land, the interviewees resigned themselves to fate. They perceived the reform framework as offering no immediate meaningful alternative to the expensive, slow, inefficient and corrupt structures that existed under the pre-reform regime. However, with respect to unregistered land, the impact of the reform could be hoped for, especially as there is an anticipated interaction between the Collateral Registry system and the CLS system which together, could move toward overcoming the problem of uncertainty of title to land, by among others, leveraging the land identification mandate of the CLS by the integration of systems, and making the CLSs more meaningful for lenders through the credibility their close association and interaction with the Collateral Registry provides.[623] This coordination and interaction could involve exploring avenues to computerise, digitise and CLSs and eventually integrate them to the CLS systems

Security interests over land, unlike a movable asset, require a higher degree of certainty about the property rights in the land, particularly when they involve relatively high amount as loans. Thus, propping up the taking of security over unregistered land in Ghana through the Collateral Registry's systems and processes (with all the potential risks) is a significant (and potentially ominous) call. It is also an opportunity because it covers about 95% of the land stock. Its prospects are seen, among other things, in the processes at the Collateral Registry (working in conjunction with the CLS system), which, over time, could build a potentially credible database that could help when searching for ownership and encumbrances related to unregistered land, and above all improve the legal certainty of land rights for the purpose of obtaining credit.

[623] Para 5.3.2.1

Chapter VI

Informality and Land Security under the B&L Act Framework in Ghana

6.0 Introduction

This chapter examines the phenomenon of informality and its bearing on security interests over land in Ghana. It focuses on how Ghanaian society's informal culture combines with the land administration's deficiencies, including the absence of comprehensive, effective documentation on land, to create informality with regard to security interests over land in Ghana, and how the B&L Act framework responds to this. Based on evidence drawn from the qualitative interview data,[624] the chapter explores the stakeholders' perceptions of Ghana's secured transactions law reform with regard to how, compared to the prior regime, the B&L Act framework deals with the phenomenon of informality and its effects on access to finance. In addition to offering a criterion for evaluating the B&L Act framework over land compared with the prior regime, this chapter provides an insight into what further measures might be required to deal with this informality in order to facilitate access to credit using land as security.

This chapter highlights one of the key lessons in the law and development theory, as a proxy for the modernization theory: the reality that law must always take into account the context of the society,[625] even where it seeks to change it. "Law is relative to civilization. Changing with changed conditions, it is a means to and a product of civilization, which means the social development of human powers to their highest unfolding".[626] Thus, the Ghanaian economy's largely informal nature impinges on every aspect of life, including property rights and finance. Indeed, about 80-90% of the country's land stock is unregistered, due to the failure of land title registration and the deed system.[627] The customary structures have, thus, dominated Ghana's land management—where the majority of the population is illiterate—and control the bulk of the nation's (agricultural) land stock.

[624] Para 2.1
[625] Para 1.2.1
[626] James A Gardner, 'The sociological jurisprudence of Roscoe Pound (part I)' (1962) 7 Villanova Law Review 1, 4 (author discussing Joseph Kohler).
[627] Para 3.2.1

The success or otherwise of any efforts at formalization can be explained by the extent to which this reality is embraced, and how a route for exit or formalization can be carefully charted simultaneously. Indeed, the economic impact of the efforts towards formalization can be fully felt if it is responded to by the relevant actors. A lack of the required response, however, could ossify this informality.

This chapter argues that the B&L Act framework presents a better opportunity for the formalization of interests in, and security over land, compared with the prior regime, and could (coordinating and collaborating with the CLS's land identification system) potentially increase certainty of title and access to credit. It contends that the registration process under the reform framework, which accommodates any form of adequate description of burdened land (without an insistence on official land documents, unlike under the prior regime), makes it possible to bring undocumented land (such as the customary law interests in land, and unregistered land both within and outside the registration districts)[628] into the economy, and enables it to be used as collateral for credit. Such land remains in a state of informality under the Pre-B&L Act regime, because the few attempts to formalize it in the past failed.

This chapter is divided into five sections. Section 6.1 conceptualizes informality as a phenomenon, considering several of its forms/manifestations, including orality, informal finance, and undocumented property rights as well as their impact on the economy. Section 6.2 considers how the pre-B&L Act regime for land security responds to informality. The attempts to formalize the mortgage and pledge as the main devices for security over land under that regime are discussed in order to compare the formalization efforts made under the B&L Act regime, which are briefly summarized in Section 6.3. ln Section 6.4, relevant findings from the interviews on the law in action are reported, while Section 6.5 assesses the empirical findings, Section 6.6 concludes the chapter.

6.1 Conceptualizing informality in context

This section defines the context in which informality is considered here, which is narrowed down to land administration, informal finance and land security.

[628] Para 6.1.6

6.1.1 Informality

The concept of informality in economic discourse was first used in the employment and labour issues context.[629] The terms 'the informal sector' and 'the informal economy' were coined to refer to economic activities undertaken by workers and economic units that were either not covered or only insufficiently by the formal arrangements of business operations, such as registration, regulation and taxation.[630] The International Labor Organization (ILO) uses these two terms to refer to the market economy's unregulated, non-formal portion, that produces goods and services either for sale or in return for other forms of remuneration.[631]

Underscoring their economic importance, informal firms in developing countries are said to account for about half of all economic activity.[632] The informal sector is also said to comprise about 55% of the GDP of ASA,[633] and employ about 80% of the labour force.[634] Nonetheless, countries conceptualize this phenomenon in their economies variously, which makes comparisons difficult.[635]

To humanize the phenomenon of informality within the land sector, for example, one could "picture New Orleans, where some residents reportedly refused to leave their homes after hurricane Katrina hit in the fall of 2005 because they did not have official documentation proving their ownership. Many transactions to transfer, buy or sell properties in the city were not registered but kept in personal notarized contracts, which were in danger of being lost in the floodwaters".[636]

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[629] The concept of the 'informal economy' was first used by the British anthropologist, Keith Hart, in his work on the Frafra people of Ghana, who migrated to the capital, Accra, from the northern part of the country, in search of work. He depicted the informal economy as one that is unregistered and dominated by migrants who have little education or income. Keith Hart, 'Informal income opportunities and urban employment in Ghana' (1973) 11(1) Journal of Modern African Studies 61.

[630] Deborah Potts, 'The urban informal sector in sub-Saharan Africa: from bad to good (and back again?)' (2008) 25(2) Development Southern Africa 151; Kristina Flodman Becker, 'The informal economy. Swedish International Development Cooperation Agency' (2004) <http://rru.worldbank.org/Documents/PapersLinks/Sida.pdf> accessed 13th March, 2022.

[631] Internal Labour Organization, 'Women and men in the informal economy: a statistical picture' (2018) Employment Sector Paper. Geneva, Switzerland < https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf> accessed 14th March, 2022.

[632] Rafel La Porta and Andrei Shleifer, 'Informality and Development' (2014) 28(3) Journal of Economic Perspectives 109.

[633] United Nations Economic Commission for Africa, 'Contribution to the 2015 United Nations Economic and Social Council (ECOSOC): Integration Segment. United Nations Economic Commission for Africa, Addis Ababa, Ethiopia' (2015)

[634] Nancy Benjamin and Ahmadou Aly Mbaye, *The informal sector in francophone Africa: firm size, productivity, and institutions* (World Bank, 2012).

[635] Anushree Sinha and Ravi Kanbur,. 'Introduction: Informality—Concepts, facts and models' (2012) 6(2) Margin: The Journal of Applied Economic Research 91.

[636] Elena Panaritis, *Prosperity Unbound* (Palgrave Macmillan, 2007) 1, 2.

In Ghana, the traditional authorities' alienation of land (together with its purchase and development) without planning, construction and other land use guidelines from the state agencies with the appropriate jurisdiction, as well as other unofficial access to, possession and use of public or private land (for residential or small-scale economic activities), are all manifestations of informality.[637]

For many, participation in the informal market is not a choice but unavoidable.[638] The key actors in the informal sector are said to be characterized by little or no education, although one more recent empirical study suggests that persons with academic degrees are now active in the sector.[639] It is therefore easy to see how Ghana's illiterate culture or orality, among other drivers, feeds the economy's current informality.

The majority of the transactions within the informal economy are unwritten, which partly explains the absence of documentation in many land transactions. The following section briefly considers orality in Ghana.

6.1.2 Orality

The interactions among people in (especially the rural areas of) ASA, are mainly oral in nature, leading to the label 'the oral continent'.[640] Many aspects of life in African society are conducted orally,[641] including the indigenous laws.[642] Being unwritten, the indigenous African laws take various oral forms, such as proverbs, maxims, popular fiction and traditional rituals, including ordeals oaths, and may be exemplified by cultural symbols.[643] Legal traditions are 'inscribed' in other symbolic practices, as well as the works of poets and singers,[644] who sometimes sing and dance the laws.[645] Reflecting this, Bishop explains that

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[637] Ransford A Acheampong, *Spatial Planning in Ghana: Origins, Contemporary Reforms and Practices, and New Perspectives* (Springer 2019).
[638] Panaritis (n 636).
[639] Franklin Obeng-Odoom and Stephen Ameyaw, 'A new informal economy in Africa: the case of Ghana' (2014) 6(3) African Journal of Science, Technology, Innovation and Development 223.
[640] George Lang, 'Book Reviews: "African Novels and the Question of Orality," by Eileen Julien (1995) 28(3) International Journal of African Historical Studies, 603 <https://www.jstor.org/stable/40246988?seq=1> accessed 10th March, 2022.
[641] Peter Leman, 'African Oral Law and the Critique of Colonial Modernity in the Trial of Jomo Kenyattta' (2011) 23 Law & Literature 26.
[642] Stephen L. Bishop, *Legal Oppositional Narrative: A Case Study in Cameroon* (Lexington Books, 2008) 3.
[643] Alison Dundes Renteln and Alan Dundes (eds), *Folk Law: Essays in the Theory and Practice of Lex Non Scripta* (Vol. I, Garland Publishing 1994), 395. "Folk law" is their term for what I call "traditional law" and, as they recognize, is variously identified as "customary law, unwritten law, common law, indigenous law, living law, primitive law, etc."
[644] Ibid.
[645] Okot p'Bitek, *Artist, the Ruler: Essays on Art, Culture and Values* (Heinemann, 1986) 39. For more on Okot and the relationship between law and poetry in his work, see Peter Leman, 'Singing the Law: Okot p'Bitek's Legal Imagination and the Poetics of Traditional Justice' (2009) 40(3) Research in African Literatures 109.

the picture "means that what in Western legal traditions exists as the recorded decision, case, or opinion, exists most often in African legal traditions as the story, or narrative".[646]

Contracts within African customary law are also oral, but the words must be concretised by certain rituals or behaviour, as determined by the culture of the society in question, to create contractual liability.[647] Among the Akans of Ghana, for example, oral transactions over land under customary law obtain legal force upon the payment of the tramma or guaha.[648] This is usually in addition to the indication of land boundaries in the presence of witnesses, and the giving of possession to the grantee in the case of a conveyance.[649]

Although, nowadays, it is common for a valid oral transaction over land under customary law to be followed by the execution of a written document,[650] the document only serves as evidence of what has already happened, and nothing more.[651]

6.1.3 Perspectives on Informality

Informality has been explained from different perspectives, which tend to indicate whether the phenomenon is seen as permanent or temporary. Thus, whereas some hold that the informal economy will disappear with 'development',[652] others see it as something to be embraced, especially as it is unlikely to disappear, being a core feature of capitalism.[653] A couple of these explanations are considered below.

Chen[654] argues that informality is a response to the complex, unfriendly legal systems that lead people to adopt informal and extra-legal norms. For those operating outside the formal rules and regulations, informality becomes necessary to avoid the costs of formal business registration. De Soto[655] thus concludes that conducting business cheaply will encourage

[646] Bishop (n 642).
[647] Gardiol J an Niekerk, 'Orality in African Customary - and Roman Law of Contract: A Comparative Perspective' (2011) 44 De Jure 364.
[648] The Trama allows either party to enforce a specific performance or rescind the contract but, by the "Guaha" (putting the purchaser in possession), it leaves the vendor the sole remedy of suing for the purchase price. See Jospeh William Swain deGraft Johnson, 'Akan Land Tenure' (1955) 1(4) Transactions of the Gold Coast & Togoland Historical Society 99 <https://www.jstor.org/stable/41406637> accessed 10 April 2022.
[649] Gordon R. Woodman, 'The Formalities and Incidents of Conveyances in Ghana' (1967) 4(1) University of Ghana Law Journal 1.
[650] Ibid.
[651] *Wuta-Ofei v. Danquah* [1962] J. A. L. 35 (P.C.); *Brown v Quashigah*, SC (n 517)
[652] W Arthur Lewis, 'The dual economy revisited' (1979) 47(3) The Manchester School 211.
[653] Mike Davis, *Planet of slums* (Verso 2006).
[654] Martha Alter Chen, 'The informal economy: definitions, theories and policies' (2012) 1(26), WIEGO working paper 90141.
[655] De Soto (n 19)

formalization, especially for those who possess assets such as land, who seek the legal recognition of the property right in their assets.

Apart from informality's legal explanation, a voluntarist view of the phenomenon is also proffered: namely, that after assessing informality's costs and benefits (compared to formality), some businesses choose to operate informally to avoid regulations and taxation. Clearly, therefore, the existing business registration procedures *per se* do not account for the phenomenon but, rather, the profits that are sought through avoiding formality.[656]

6.1.4 Informality in modern secured transactions

Security agreements in modern secured transactions are commonly in written form. Indeed, the UNCITRAL Model Law on Secured Transactions sets out security agreements' minimal requirements, including writing, and the credit parties' execution/signature.[657] UCC Article 9 echoes this requirement.[658]

Notwithstanding, several secured transactions laws acknowledge unwritten or informal security interests. For example, in English law, a legal mortgage of goods can be created orally[659] although, in most instances, the security instrument will take the form of a written contract between the parties. Indeed, all four forms of consensual security known under English law (the mortgage, pledge, charge and contractual lien)[660] appear to admit informal means of creation—by oral means or through the conduct of the parties involved. The rules of equity and principles of oral contracts appear to be used to resolve any conceptual difficulties, but a security interest over land in English law must be in writing, and executed by the parties.[661]

6.1.5 Informal finance in Ghana

The informality in Africa also manifests itself in the field of finance, in both the rural and urban settings.[662] Informal finance in ASA refers to credit transactions that occur outside the banking and other financial sector regulations. It falls into two broad categories: (1) non-

[656] Chen (n 654).
[657] UNCITRAL Model Law, Article 6(3).
[658] See UCC § 9-203 (b)(3)(A)
[659] *Newlove v Shrewsbury* (1888) 21 Q.B.D. 41 cited in Goode and Gullifer (n 299) para 1-13.
[660] Ibid) para 1-55.
[661] *Kuwait plc v Sahib* [1997] Ch. 107; Law of Property Act (Miscellaneous Provisions Act 1989), s. 2; Law of Property Act 1925, s. 53 (1) (c)
[662] Machiko Nissanke and Ernest Aryeetey, 'Institutional analysis of financial market fragmentation in sub-Saharan Africa. A risk-cost configuration approach' (2006) Research Paper No. 2006/87. United Nations

commercial transactions, such as those between relatives and friends or small-scale group arrangements (among estate owners, traders, grain millers, and smallholder farmers); and (2) commercial transactions, including the operations of savings collectors (mobile bankers, known as susu or esusu collectors in West Africa), moneylenders (professional or part-time), credit unions and cooperative societies.[663] Despite the term "non-commercial", depending on the source of the funds, credit from relatives, friends and small group arrangements can attract interest and collateral.

Informal finance forms exist to meet the credit needs of diverse customer base,[664] which may be production or consumption, including paying hospital and funeral costs.[665] Informal finance's popularity in Ghana arises from the unsatisfied demand for formal sector credit, particularly in the rural areas, where it is well developed.[666] Lenders' screening activities in the informal sector rely heavily on their personal knowledge of the borrowers. The development of personal ties and proximity to borrowers are practical means that allow lenders to address the effects of adverse selection and moral hazard.[667]

Of the many providers of informal finance, moneylenders are the only type of informal lenders who do not lend to distinct clientele, but are accessible to the public, who find them reliable in meeting their credit needs. They do not necessarily require a business relationship with the applicants in order to lend them money. This assumption of risk causes them to charge higher interest rates.[668] The information about borrowers and lenders that circulates freely in the moneylenders' area of operation makes it unnecessary to monitor the borrowers' loans and activities.[669]

In the informal setting, although the enforcement of land collateral tends to be difficult in the absence of proper ownership documentation, and challenges in the legal systems,[670] the knowledge that the moneylender can always find a relation to till the burdened land until a

[663] George Owusu-Antwi and James Antwi, 'The analysis of the rural credit market in Ghana' (2010) 9(8) International Business & Economics Research Journal.
[664] Nissanke and Aryeetey (n 662).
[665] Emmanuel Ekumah and Thomas T Essel, 'Gender access to credit under Ghana's financial sector reform: A case study of two rural banks in the central region of Ghana' (2001) IFLIP Research Paper 01.
[666] Owusu-Antwi and Antwi (n 663).
[667] Christopher Urdry, 'Credit markets in Northern Nigeria: Credit as insurance in a rural economy (1990) 4(3) The World Bank Economic Review 251.
[668] Nissanke and Aryeetey (n 662).
[669] Ibid.
[670] Timothy Besley, 'How do market failures justify intervention in rural credit markets?' (1994) 9(1) The World Bank Research Observer 27.

loan has been repaid in full incentivises loan repayment.[671] This is rarely the case for the formal banks, which might incur additional costs when enforcing land security in rural areas. Other means of ensuring loan repayment are usually explored, including verbal threats, sanctions, or community authority intervention.[672]

6.1.6 The nature of informality over interests in land in Ghana

The failure of Ghana's land administration to provide effective, efficient documentation regarding land interests to enable the leveraging of the resource to bring optimal economic benefits, including access to credit, impoverishes many, for whom land is effectively dead capital. These challenges to the documentation over land nationwide fuel the economy's informality. In the past, security interests over such land were rarely created and, even the few that were, remained informal and obscure prior to the B&L Act.

There exist three main forms of informality in the land sector, underpinned by the type of the interests in land concerned; namely: (1) customary law interests, such as usufruct and customary law tenancies;[673] (2) undocumented property or buildings in the cities and urban centres, some of which are located in 'registration districts'; and (3) large land swathes in the rural areas, which the state's land documentation regimes do not cover, or only ineffectively.[674]

6.1.6.1 Informality of customary law land interests

For many years, there was no opportunity formally to document security interests over customary law land interests in Ghana. These always existed informally because the customary law interests, such as usufruct and customary law tenancies, which are legislated as registrable land interests,[675] were never registered at the land registry since their inception.[676] It remains unclear why these interests remained unregistered despite their statutory recognition,[677] although the relevant law's narrow interpretation, and absence of procedures for such registrations, may play a part.[678] This means that these land interests

[671] Ernest Aryeetey, 'Informal finance for private sector development in Sub-Saharan Africa' (2005) 7(1) Journal of Microfinance/ESR Review, 3.
[672] Urdry (n 667).
[673] Para 3.2.1
[674] Paras 3.2.2.1; 5.2.2.1.2
[675] Para 3.1.2.3; Land Act 2020, s.1 (f)
[676] See Abubakari and others (n 221); see also Anthony Arko-Adjei, 'Adapting Land Administration to the Institutional Framework of Customary Tenure: The case of Peri Urban Ghana' (2011) TUDelft Sustainable Urban Areas 39
[677] Para 6.1.6.1
[678] Abubakari and others (n 221).

remain informal. Dealings in them, including security transactions, are discouraged or remain off the record. These interests' proprietors cannot be found on record and so fail to exploit their property to the full, especially through formal finance. This is ample evidence of the absence of an efficient land registration regime in Ghana. Even where the law requires the recording of land interests, the official outfit with that responsibility has failed/neglected to make that possible.

6.1.6.1.1 Usufruct

Usufruct[679] is alienable and can be used as security for credit. Where an area is declared a 'registration district', usufruct is one of the interests in respect of which a title certificate may be issued, but the evidence suggests that, although these interests exist within the 'registration districts', they have never been registered.[680]

6.1.6.1.2 Customary Tenancy

The customary tenancy[681] is often used as security for credit, especially in rural Ghana, by tenant farmers and sometimes their grantors. In the event of a default, it is the farm proceeds or the interest granted (and used as security) that is attachable in the enforcement of the security. Like usufruct, there is no avenue for registering this interest under the Pre-B&L Act regime.

6.1.6.1.3 Unregistered land within the registration district and informality

The title registration process in Ghana is unable to record all of the proprietors of land in areas declared 'registration districts', including the capital cities and peri-urban areas. Many land parcels in these areas thus remain undocumented because they have not been served by the bureaucracy in charge.[682]

These parcels' values, especially the investments made in them by their proprietors, are significant. Indeed, De Soto estimates the worldwide cost of construction materials that are locked in buildings that are considered informal and hence illiquid to be around 9.3 trillion,

[679] Para 3.1.2.2
[680] Abubakari and others (n 221).
[681] See Para 3.1.2.3
[682] Kasim Kasanga and Nii Ashie Kotey, 'Land management in Ghana: Building on tradition and modernity' (2001) IIED report. The reasons for this failure are said to be diverse, including the sporadic, unsystematic manner of the registration programme and implementation.

which is "nearly as much as the total value of all the companies listed on the main stock exchanges of the worlds twenty most developed counties".[683]

Nonetheless, accessing credit in the formal sector using such property is virtually impossible. The few borrowers who manage to do so in the informal economy receive insufficient financing, and also incur extra costs for the risks in such circumstances. The utility of any land titling programme for access to credit depends on third parties, such as the lenders' ability easily to access registries to obtain reliable land ownership information. Where such records are lacking, land titling's credit effects may be limited to a few.[684]

6.1.6.1.4 Unregistered Land (located outside the 'registration districts')

The third form of informality in the land sector bearing on security interest over land relates to: (1) the vast land swathes in the rural areas that have not been declared 'registration districts' (and therefore are not covered by titling); and (2) areas where the deed system is absent or ineffective.[685] Indeed, the deed system, which has operated since colonial times, excludes oral transactions over, or titles to, land. Moreover, since orality is the dominant culture in these areas,[686] which constitute about 80% of Ghana's land stock, no record of this land, or the transactions over it, can be accessed in officialdom. They are extremely informal and completely under the control of the customary or traditional structures. Even the few hectares that are covered by the deed system are difficult to search. This is regrettable because documented land rights, which are discoverable by searching the public registries (at low cost), facilitate the land markets and promote access to credit.[687]

6.2 Informality under the Pre-B&L Act regime

This section considers the legal regime for land security under the Pre-B&L Act and its effect on the informality in regard to land security in Ghana. It examines the legal devices for security over land and the relevant administrative bodies' role in approaching the informality. This section provides a context for comparison with how the B&L Act framework treats

[683] De Soto (n 19), p.35
[684] Michael R Carter and Pedro Olinto, 'Getting institutions "Right" for whom? Credit constraints and the impact of property rights on the quantity and composition of investment' (2003) 85(1) American Journal of Agricultural Economics 173.
[685] Para 5.2.2.1.1; 3.2.2.1
[686] Para 6.1.2
[687] Benito Arrunada, *Building Market Institutions: Property Rights, Business Formalization, and Economic Development* (University of Chicago Press, 2009; Daniel Ayalew Ali and others, 'Sustaining land registration benefits by addressing the challenges of reversion to informality in Rwanda' (2021) 110 Land Use Policy 104317.

informality and shows that, although efforts were made to address the informality in security over land under the Pre-B&L Act regime, little was achieved.[688]

6.2.1 The Pledge

The pledge is a legal device under customary law[689] which illustrates this informality.

6.2.1.1 The pledge and informality

There is a relationship between the pledge and informality in security interest over land in Ghana.

First, the nature of the security device itself is informal. The pledge's creation, attachment, publication, priority and enforcement as security over land are all essentially oral in nature, although, nowadays, there is a tendency to formalize some of these aspects of the security interest by, for instance, reducing it to writing and suing in the formal courts to enforce the security. This, however, does not affect its character as a customary security transaction.

Secondly, the type of land to which the pledge applies tends to be unregistered land in rural areas, and the customary law interests: the customary tenancies and usufruct in the rural areas, although other unregistered land in the 'registration districts' is also used.[690] Indeed, the device thrives within informality and affords the undocumented proprietors of land an opportunity to access credit using their land (farms) as collateral, usually at a high interest rate.[691]

Although the pledging of farmland has long been legislatively abolished,[692] that legislation has been ignored in practice due to the device's utility for rural dwellers, and its informal nature. The moneylenders continue to advance credit under informal arrangements, which essentially involve this device. For example, instead of being in possession in line with the pristine

[688] Para 6.3- 6.5
[689] Para 3.2.4.2; 3.1.4.2
[690] Para 6.1.6.1.3
[691] Para 6.1.5
[692] Mortgages (Amendment) Decree 1979, ss 1 and 2. These provisions stated as follows: "1. Every customary loan transaction in respect of which any farmland is given as security for a loan shall be made in accordance with the Mortgages Decree, 1972 (NRCD 96); and 2. Where at the commencement of this Decree any agricultural farmland stands as security for a loan under any customary loan whether or not recorded in writing, such transaction shall forthwith be and is hereby converted into mortgage under the Mortgages Decree, 1972 (NRCD 96) and accordingly all the provisions of that Decree shall apply to such transaction as far as may be necessary." This thesis takes the view that this statutory intervention failed to abolish the customary law pledge of all land, and that the security device continued (even with regard to farmland) after the Decree.

incidents of the device, the moneylender may yield possession of the land to the farmer by agreement.[693]

6.2.1.2 Formalization of the pledge

The main effort to formalize the customary law pledge under the Pre-B&L Act framework relates to the statutory interventions in its essential features. The Loans Recovery Ordinance[694] and Moneylenders Ordinance[695] were two statutes that significantly modified the customary law pledge. Whereas the former enabled the courts to reopen pledges whose terms were deemed "harsh and unconscionable" in order to impose fairer terms, the latter created a presumption that a pledge was "harsh and unconscionable" if the interest exigible exceeded the rate stated in the statute.

To protect borrowers, the statute imposed additional formalities on the customary pledge,[696] including the requirement of writing and the parties' signatures.[697] This being the law in the books, several of the customary pledge's essential features were thus changed. An appreciable degree of formalization was therefore achieved as a result.[698] However, since the law operated in a highly illiterate culture, such drastic measures achieved little, and, rather, deepened the informality. Very few contracts complied with the legislation's requirements, since the moneylenders went underground, but their services were fully patronised by the many who had no realistic financing alternatives.[699]

6.2.2 The Mortgage.

The Pre-B&L Act regime also confronted the phenomenon of informality in the taking of security over land using the mortgage as a legal device.[700]

6.2.2.1 Informality and the mortgage

Informality in mortgages as a legal device is seen in equitable mortgages.[701]

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[693] Dankwa (n 320) citing Pugucki, Gold Coast Land Tenure, Vol. 2. ₽ 90, citing the case of *Amonoo v Abbakuma* (1871) Sar. F.C.L.
[694] The Loans Recovery Ordinance Cap 175, s 3(1).
[695] The Moneylenders Ordinance Cap 176, s 13(1).
[696] The Moneylenders Ordinance (Cap 176), Sections 12, 19, 20, 22, 24 and 26. Gordon R Woodman, 'Developments in Pledges of Land in Ghanaian Customary Law' (1967) 11 Journal of African Law 8.
[697] s. Cap 176, s.12
[698] This includes unwittingly inculcating in the public, the tendency to use for the pledge the enforcement procedure meant for the mortgage. See Paras 8.3.1 and 3.2.4.2.4
[699] Samuel Date Baah, Legislative Control of Freedom of Contract in Essays in Ghanaian Law p120.
[700] For a discussion of the mortgage, see Paras 3.2.4.1.2; 3.1.4.1.
[701] Para 3.1.4.2. For further discussion of equitable mortgages in Ghana, see *Omar Baksmaty v Security Discount Co. Ltd*., the unreported judgement of the High Court Commercial Division, Accra dated 26th January 2009, Suit NO. OOC/09/05.

Two examples from the Pre- B&L Act law illustrate the informality of mortgages. First, the Mortgages Act 1972, acknowledging Ghanian society's illiterate/informal culture, excuses the requirement of writing (in the case of customary law transactions) for a valid mortgage.[702] This oral or equitable mortgage is distinguishable from the customary pledge, although they share much in common in terms of their informality. It does not include possession by the mortgagee as a key ingredient of the device, as does the pledge (where the mortgagee's right to possession can be negotiated off). The parties may orally choose (or by their objective informal conduct imply) this statutory mortgage, especially in a traditional, informal setting. When this happens, the security agreement becomes an equitable mortgage, governed by the Mortgages Act and the recording regime under Section 37 of the Land Act 2020.[703] This transaction can happen over the customary law interests: the usufruct and customary law tenancies, as well as over unregistered land both within and outside the registration district.

Second, the informal act of depositing a title deed for credit is another circumstance where an equitable mortgage is created or inferred under Ghanaian law. In order to deposit title documents to create a security interest, it must be shown that the documents were delivered for the purpose of security and nothing else.[704] This technique is almost always used in relation to registered land except that, in practice, any form of documented land, including land covered by the deed system, may be used as security.

6.2.2.2 Formalizing the equitable mortgage

Given the challenges that the informality within Ghanaian equitable mortgages can cause, the Pre-B&L Act regime for land security attempted to formalize this security device. The following examines these attempts.

6.2.2.2.1 Formalizing oral/equitable mortgages

Sections 4-11 of the Conveyancing Decree I973 laid down several mechanisms for recording oral land transactions. They required the essentials of an oral land transaction to be put in writing in a prescribed form with an agent's assistance, then certified by the land registrar in that area.

[702] See Mortgages Act 1972, s. 3(1) (b) and (c)
[703] This section deals with the recording of customary law grants that are unwritten. It replaces a similar provision repealed by Conveyances Decree 1973.
[704] *Norris v Wilkingson* (1860) 33 ER 73.

This effort to formalize customary transactions over land was described by the Memorandum to the then Conveyances Decree 1973 as "a significant step in developing permanent records of transfers of interests in land while preserving the customary mode of transfer…In response to the national need for methods of transfer that are reliable, simple, cheap, speedy and suited to the circumstances of our country, provision is made for an imaginative development of the registries of our court system to handle the recording of customary transfers of interests in land. The intention is to require a recording in the Register of a District Court of transfers of interests in land, and to make such a recording a condition for validity in the same way as the traditional 'guaha' was essential".[705]

This formalization effort was strongly criticized from its inception for being out of touch, burdensome and unsuitable for the illiterate/semi-literate majority of the population. Indeed, the administrative machinery needed for this formalization effort was never established.[706] Section 138 of the Land Title Registration law 1986[707] eventually repealed these sections (Sections 4-11 of Conveyancing Decree 1972) due to this criticism, but failed to provide any meaningful way to register such transactions. A similar regime for recording oral transactions over land found its way back into the recent Land Act 2020.[708] Although it remains to be seen how this regime will play out, little can be hoped from it, because the new regime is very similar to the previous one,[709] and society remains largely illiterate.

6.2.2.2.2 Formalizing equitable mortgages through the deposit of title documents

Regarding mortgages created through the depositing of documents of title over registered land, as already noted, the Land Title Registration Law 1986 has been repealed, but the Land Title Registration Regulation, 1986 (L. I. 1341), passed pursuant to the repealed law, which provided for the recording of the deposited documents, remains in force.[710]

[705] See Memorandum to the Conveyancing Decree 1973, cited in LK Agbosu, 'Registrable Transactions: Boateng v. Dwinfuor' (1980) 12 Review of Ghana Law, 166.
[706] Agbosu (n 705) 172.
[707] This law was repealed by the Land Act 2020. The recording of oral interests in land under customary law is reenacted by Section 37 of the Land Act 2020.
[708] See Land Act 2020, s. 37. This Act also repealed the Conveyancing Decree, but reenacted the whole of its substance, including these provisions.
[709] The only difference is that, whereas the current one is to be manned by the Customary Law Secretariats, the previous one was supposed to be operated by the judiciary, but it was never rolled out.
[710] Land Act 2020, s.282 (2)

Under this regime, notice of this unwritten transaction must be given to the Land Registrar in accordance with paragraph 81 (1) of the Land Title Registration Regulation 1986 (L. I. 1341), Y, which reads:

> *"81(1) A person with whom a land certificate or provisional certificate is deposited as security for money shall give notice in Form 50 of the First Schedule to the Land Registrar.*
>
> *(2) On receipt of such notice the Land Registrar shall enter a note of the deposit in the register and shall give a written acknowledgement of its receipt".*

It, however, remains unclear whether such a notice amounts to registration and matters with regard to priority determination.

The practice of mortgaging through the depositing of title documents is still common under the pre-B&L Act regime, particularly among banks with excellent (and almost personal) relationships with such mortgagors. The inherent informality within these transactions persists, as there is no real evidence that the formalization regime introduced in the law had any meaningful impact. Banks prefer formally to register such mortgages with the land registry as legal mortgages than spend resources and time recording them with the land Registrar, particularly in light of the confusion regarding their legal effect *vis-a-vis* registered mortgages.

While land documents related to unregistered land may be deposited for credit, this is rarely accepted by banks. Such documents are only used in informal finance in the rural areas.

6.3 B&L Act and Informality

6.3.1 Overview

This section briefly summarises the relevant aspects of land security under the B&L Act framework related to informality. It focuses on how the framework formalizes or otherwise deals with informality.

6.3.2 The Registry Templates and formalization

The Collateral Registry's electronic template, by which security interests over land are registered or perfected, is the main device by which some interests in land and security

interests therein are formalized. Through the template, unregistered land (both in the rural areas and otherwise) becomes eligible for use as security. Also, informal security transactions over land can easily be formalized.

The creation and attachment[711] of a security interest over land under Act 1052 is achieved through a simple agreement between the credit parties, which must be in writing,[712] indicating the use of the Collateral Registry's templates.[713] A photograph of the charged land may be uploaded as an attachment without the need to provide any technical descriptions or details.[714]

Through these processes of the Registry, the informality over: (1) the customary law interests, such as the usufruct and customary law tenancies;[715] (2) undocumented property or buildings in the cities/urban centres, some of which are located in the registration districts;[716] and (3) the large land swathes in the rural areas that the state's land documentation regimes do not cover or only ineffectively, can all be brought into the formal economy.[717]

6.3.3 Challenges associated with B&L formalization

First, the framework is not overt regarding its treatment of oral agreements. The conclusion that it deals with oral agreements through the electronic template is reached by interpreting the relevant sections and the Registry's actual operations. This leaves room for doubt regarding a matter of great importance, i.e. the formalization of land security.

Secondly, the template fails fully to address issues regarding the ownership of land, which are of paramount importance to lenders. This criticism is however partially addressed by the fact that the Registry's system, leveraging on (and working in conjunction with) the CLS system, with time, could indirectly build a credible register of the owners of unregistered land's interests.[718]

[711] In the case of oral transactions (usually over unregistered land), the security interest in land attaches at approximately the same time it is created and perfected, using the Registry's template. This makes the registration of the oral agreement over land a constitutive act.
[712] Act 1052, s. 5
[713] Para 4.3.1
[714] This feature of the Registry's system went live in September 2019. Any document which could help identify the land can be scanned and attached. Act 773
[715] Paras 6.1.6.1.1; 6.1.6.1.2
[716] Para 6.1.6.1.3
[717] Para 6.1.6.1.4
[718] Para 5.5

Thirdly, the liberality in the description of burdened land, which is accommodated on the Registry's platform, could lead to confusion about which parcel bears the burden of the security. Land coordinates on the site plans could be used during the registration of security interests over such land at the Collateral Registry, and there is an opportunity to upload these documents (together with others) onto the platform. Poor survey work, therefore, can prove catastrophic. The customary structures navigate this by employing trained surveyors, independently to prepare site plans to accompany indentures or allocation papers evidencing land alienation.

6.4 Empirical Findings

To examine informality in action in regard to security interests over land in Ghana, this thesis draws on the research participants' perceptions.[719] The major issues arising in relation to this theme are reported in the following as sub-themes.

6.4.1 Differing attitudes towards informality

The interviewees displayed mixed attitudes towards informality. Whereas some of them rejected all forms of manifestation of the phenomenon in property rights over land, including land security in Ghana, others embraced it as reflective of society's nature and stated that it should be harnessed. The participants who objected to this informality tended to come from the banks, whose operations are located largely in the cities/urban areas. Their concerns about informality were focused on certainty of title and anxiety regarding whether, in the event of default, they might be unable to dispose of security covering land that was taken in informal circumstances or without any formal documentation. One interviewee stated:

> "usually we need to see certificates and documentations on the land before we go ahead and do the lending".[720]

Dealings over land that could not be searched in the deed or land registry were perceived as risky, and simply avoided. The unregistered indenture was unacceptable to them, not to mention an unwritten or oral interest in land:

[719] Para 2.1
[720] GB52, GB11, GB171, GB81

> "You cannot have the deal go bad and then the collateral also go bad, because the collateral is a fallback. That is the reason why we do some of these things, like asking for official documents. Yes, we can work with some minimum information, but at what risk?... Some banks, like I told you, have stricter policies than us: they don't take anything less than title certificate".[721]

Also, the concern that, in the event of a borrower defaulting, the bank may be unable to sell unregistered land that was used as security due to the absence of market demand for rural or undocumented land increased their intolerance of informality. One interviewee from a bank reasoned that:

> "the collateral is the second way out and your second way out usually should be enough to pay for both the principal and the interest. Now if you are taking a land in the rural area as he said, how quick can you dispose of that land, or how much can you sell that land in order to pay off a person's indebtedness? I think that is usually key in deciding whether to take a property or not".[722]

Among the sceptics regarding informality, however, some made an exception for informal documents over land that came from a few, well-established, functioning customary land secretariates:

> "The Ashanti region is one of the most efficient and effectively run tenure usage management areas in the country. You don't find any disputes or anything at that place, because the Asantehene has been able to put in place various mechanisms of ensuring that all the things done there are recorded. And, so the Asantehene Secretariat, what they have done is that they have built it to dovetail into the Lands Commission process".[723]

Several interviewees expressed sympathy for informality, on the other hand, perceiving it as integral to society and thus neither denied nor despised it. They pointed to the illiterate culture in society, and the absence of, or ineffectiveness of, any role by the state in the majority of the rural areas and various facets of life in the polity, including land administration. To them, in such circumstances, this informality is not a matter of choice, but unavoidable. One interviewee stated:

[721] GB181, GB51
[722] GB53, GB121, GB81
[723] GB121, GB61, GB201

> "basically, a lot of the transactions there[724] are not in writing. But these days there is even some improvement: some typist may put something down once the essence is captured. But there are situations, or several transactions where there are no writings. These are mostly in reference to farmlands, which are used as customary mortgages and those things. In most cases, you don't have writings, but the courts recognize them and enforce them".[725]

6.4.2 Better efforts at formalization through the B&L Act framework

All of the interviewees were unanimous that a greater attempt at formalization had been made by the B&L Act framework through the Collateral Registry's electronic template. This effort to address informality in relation to land and security interests over land was observed trough how:

> "the Borrowers and Lenders Act does not attempt to create a distinction between customary land or registered lands. I think the focus is really on being adequately able to identify the land for the purposes of registration of the security at the Collateral Registry ".[726]

This, in the interviewees' view, differed from the prior regime, where it was essential to have the deed or certificate[727] "before we register our mortgages".[728]

The interviewees described the efficiency of the mechanisms under the Collateral Registry framework, which makes the recording or formalization of security interests over unregistered land, and informal security over land, feasible. One interviewee explained:

> "when you are doing the registration, you are required to enter or key into the template[729] the location of the customer's property, and all the details you have about the land can also be added. Now, most of the customers do not have landmark for registrations. So, we just get the GPS registration numbers".[730]

[724] Referring to rural areas and customary societies in Ghana.
[725] GA4, GA2, GC1, GD2, CF3
[726] GE2. All of the interviewees share this view.
[727] Land Title Certificate
[728] GB41; GBB141
[729] The electronic template is designed for uploading data on security interests to the Collateral Registry platform.
[730] GB12. The Global Positioning System (GPS) is a map, navigation and direction system that has been accepted by the Collateral Registry as a way to help to identify or locate burdened land. It is intended to supplement the other identification aids, such as the indenture, site plan, geographical coordinates and photographs of the burdened land. Although not 'very official', it is currently used by certain lenders to identify

The interviewees contrasted the B&L Act framework's effort at formalization through the Collateral Registry processes with registration and searches at the registries under the pre-B&L Act regime. In the lenders' view, the latter encouraged or thrived on informality, as:

> "we even end up using external registration officers. We get some of their staff to assist us on that. We have been doing that for which they expect an extra payment".[731]

6.4.3 Lenders' Inadequate Response to B&L Act formalization

The interviewees shared a widespread perception that, despite the opportunity provided by the B&L Act framework related to the taking of security over unregistered land, the lenders' response, particularly the banks, had been insufficient. They were perceived as having been overcautious, and to have failed optimally to effect access to credit using unregistered land. The general sentiment among the non-bank interviewees was that:

> "lenders must begin to move beyond the pigeon hole attitude or mentality they have used in letting people have access to credit. I understand their fears that they want to play it safe and be sure that the people whom they give credit to, the security they produce over which they take the charge, actually belong to them, and in the event of default these properties are capable of paying back the money".[732]

This seemingly nonchalant attitude towards the formalization effort under the B&L Act framework was confirmed by several bank interviewees, who stated:

> "no matter how cleaned up the system may be, on the first day we will insist on the title".[733]

The bank interviewees argued that it is only "microfinance businesses who will quickly take these lands. They do very few due diligence and then they lend to you at 6%, 7% per month but as a bank, you have to go through all these trouble because we do not want to lend to the customer at such an exorbitant interest".[734]

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their land collateral, because the Collateral Registry's system admits any means of identifying burdened land. The Bank of Ghana, through the Collateral Registry, plans to collaborate with the Ghana Post, who owns the software, and possibly the Land Commission, to make it widely available to facilitate land security, especially with regard to unregistered land.

[731] GB133

[732] GA2. All of the other interviewees held this view.

[733] GB61. Some banks are however willing to consider other documents that are considered reliable even if they do not come from the Land Commission. See Para 5.4.4

[734] GB162

6.5 Assessment of the findings

The interviews generally revealed the perception that the structural roots of the informality in Ghana's economy (with manifestations in land administration and finance for both businesses and individuals) make the denial of the phenomenon counterproductive. Through the Collateral Registry's electronic templates,[735] the B&L Act framework is seen as enabling informal security agreement registration, as well as registration of security interests over unregistered land.

The following considers this general view among the participants under distinct headings corresponding to the different forms of informality relating to land, and security interests over land identified.[736]

6.5.1 Registration of parole transactions over land

The interviewees were unanimous that the B&L Act does not statutorily mention oral transactions, but makes it possible to register them by reducing the essential details of any unwritten security agreements into the registry's templates, for which the law provides.[737] This mechanism for recording unwritten or informal customary transactions is a major step towards land security formalization within the society's informal culture. Illiterate/semi-literate borrowers can take advantage of this in respect of security interests over land nationwide.

The Pre-B&L Act framework recognizes oral transactions but has no mechanism in place for recording them.

6.5.2 Undocumented rural land

It also emerged from the interviews that the Collateral Registry's registration template accommodates security interests over the vast swathes of undocumented rural land, where the deed and title registration systems are absent and ineffective, respectively. Nevertheless, this system alone is insufficient to address the problem associated with the proof of title to land, which it can only contribute significantly toward addressing if it coordinates, cooperates and integrates the CLS's land identification systems. Thus, in conjunction with the CLS system,

[735] See Para 6.3.2
[736] Para 6.1.6
[737] Act 1052, ss 23, 28

the B&L Act framework marks a step forward towards overcoming the challenges related to certainty of title to land.[738]

The customary pledge is the common legal device for taking land security over such rural land, but the statutory mortgage can also be adopted and adapted for the customary context. Recall that the Mortgages Act 1973, on paper, abolished pledges over farmland,[739] but the device has persisted and remains popular among rural dwellers, due to its informal nature. Moneylenders using the pledge can now reduce it to writing without losing any of the essential ingredients that were present under customary law. Such a public record of the transaction puts the public on notice. This improves the prior mechanisms for recording oral transactions attempted under the Pre-B&L Act regime, which failed and was repealed.[740] This is because, first, it is electronic; second, it does not require the pledgor to travel to a city to thumbprint any document; and, third, it saves costs. The professional moneylender, who is always better organized, can use the registration platform to complete all of these tasks. The challenge with the moneylenders' control over the registration process is that any false or erroneous input into the Registry's data cannot be detected by an illiterate farmer in a rural area, who lacks even internet access. Such a rural farmer can defend himself using the traditional evidence for the transaction, which may be kept customarily anyway, despite registration at the Collateral Registry. This might forestall wrongdoing during the registration of the customary pledge at the Collateral Registry.

6.5.3 Unregistered land within the registration districts

The interviewees also revealed that the Collateral Registry's electronic templates, by which security transactions over unregistered land can be recorded (using the minimum description of the land), make security over unregistered land within the registration districts not only feasible, but also capable of being formalized. Equitable mortgages through the depositing of title documents,[741] for instance, can be formalized easily under the framework, by registration using the templates. However, this formalization's efficiency is questionable. The depositing of title deeds, particularly over unregistered land, can provide a quick, convenient way for small businesses to access credit, since this does not require any registration anywhere, thus

[738] Paras 5.3; 5.5; 5.6
[739] Para 6.2.1.2
[740] Para 6.2.2.2.1
[741] Para 6.2.2.2.2

saving costs and time. Notwithstanding, the transparency, certainty, and stability that registration offers trump any shallow benefits arising from title deeds deposition.

Also, where an area is declared a registration district, all of the land within it becomes subject to the land title registration regime.[742] Pending title registration in that area, only existing deeds remain valid, although land is rarely registered under the deed system before an area is declared a registration district. In any case, generally, the inefficiencies within the deed system discourage security transactions over land that are covered by the deed system.[743] This land tends to be located in the urban and peri-urban areas, and becomes dead capital, although parts of it hold significant investment.[744]

Lenders still have no reliable means of taking security over such land under the Pre-B&L Act regime. Under the B&L Act, however, the absence of the kind of documentation over such land required by banks as security for credit, i.e., title certificates (since the land lies within the registration districts) has been mitigated by the Registry's processes. Under the Pre-B&L Act regime, an encumbrance over registered land would be noted in the title certificate. Therefore, the absence of a land certificate meant that, even where the lender was certain that landed property belonged to the borrower, there was no encouragement to take it as security for credit, because the transaction could not be recorded at the land registry as a mortgage (since the land was not covered by a land certificate), even though it lay within a registration district. This applied unless the lender, by way of an informal transaction (i.e., an equitable mortgage through the depositing of 'unofficial title documents',[745] or the deed) was willing to take a risk by taking possession of whatever basic documents over the land existed.

However, through the Collateral Registry's registration processes, which use a basic description of the burdened land—such as details that can be found on the indenture and site plan—security interests over unregistered land within the registration districts can be formally taken.

6.5.4 Customary law interests in land

Furthermore, the interviewees' views, perceptions and descriptions show clearly that security transactions over the customary law interests in land have also become feasible and capable

[742] Land Act 2020, s. 89 (2)
[743] Para 5.2.2.1.1
[744] 6.1.6.1.3
[745] A title document that is not registered anywhere in officialdom, and as such cannot be searched for or discovered anywhere.

of formalization under the B&L Act framework. As already noted, these interests are registrable under the law, but have never been registered.[746] Lenders taking security over (1) the crops of farmers who have property rights under such customary tenancies,[747] and (2) the customary usufruct, especially in the peri-urban areas, are able to formalize their security through registration at the Collateral Registry, and thereby bring the interests into the formal economy.

It is noteworthy that the liberal mechanism for describing a charged asset (especially for a PPSA framework that is used for 'indexing' and 'unique identifiers' for collateral) is highly challenging and prone to fraud. It might be challenging to realize a poorly identified tract of land whose description is debatable. However, given the opportunity it affords rural businesses (enabling them to access credit using their land) and the fact that the majority of the land in Ghana lies beyond the effective reach of title registration, the problems with this registration regime must be accommodated.[748] It is, therefore, gratifying that stakeholders are now exploring more accurate means of identifying burdened land, such as using GPS systems, but it is essential that this liberalism's negative effects are reduced.

6.6 Conclusion

This chapter considered the phenomenon of informality, its manifestations in regard to security interests over land in Ghana, and how it largely flows from two main sources, namely: (1) the challenges associated with land administration, which have left vast swathes of land undocumented, thereby making it difficult to take security over them; and (2) the illiterate culture, which has kept security transactions over land undocumented and beyond officialdom.

The combination of these factors has deepened the informality within finance in Ghana, and negatively affected access to credit. The financing of businesses in this environment is mainly undertaken by informal moneylenders, who lend to borrowers under onerous terms, if borrowers are fortunate enough to access their services, which are in high demand in the rural areas.

[746] Para 6.1.6.1
[747] Paras 3.1.2.3; 3.2.1
[748] Participants GB31, GB52, and GB21 held a very similar view on this, but raised certain regulatory questions, which are discussed in Para 5.6.

This chapter also shed light on how the Pre-B&L Act framework on land security treats the phenomenon of informality, emphasizing that the mortgage and pledge, as the main legal devices for taking security over land, could not ameliorate the impact of the state institutions responsible for land management's failure to document the landholdings nationwide. It has been shown that the formalization efforts made under the Pre-B&L Act regime (although honest) were largely ineffective, to the extent that some were even abandoned,[749] thereby deepening the phenomenon of informality.

It has been explained, however, that the B&L Act processes are able to bring into the economy undocumented land nationwide, by making credit over it feasible. The mechanism for recording oral or informal customary transactions over land, coupled with the possibility of registering land by providing only basic details about it, including the coordinates given by the Customary Land Secretariats and photographs of it, are superior formalization efforts compared to the situation under the Pre-B&L Act regime. This means that farmers, who own the majority of the rural land but were hampered from creating security interests over it to access credit for their agricultural businesses, can now leverage their land for finance. Furthermore, customary interests in land, such as customary tenancies, which are acknowledged by statute[750] but were never registered at the land registry, can now be formally transacted over through the Collateral Registry's templates.

All of this demonstrates the B&L Act framework's superiority over the prior regime in terms of overcoming the informality within land security in Ghana. The discussion confirms the findings in chapter 5 that lenders (at least bank lenders) want proof of title, which the B&L Act framework alone (apart from the CLS system) cannot secure. A move towards solving this problem using proof of title to unregistered land under the reform framework can be achieved if the Collateral Registry system leverages on, and works in conjunction with, the CLS system. Continuous efforts at formalization to benefit the economy are, nonetheless, required to achieve an optimal solution. This might include changing the illiterate culture through providing universal education, and recalibrating the land documentation programme, in order to achieve access to credit for all.

[749] Para 6.2.2.2.1
[750] Land Act 2020, ss.3, 5, 7

Chapter VII

Land Security Centralization under the B&L Act Framework in Ghana

7.0 Introduction

This chapter considers centralization as an efficiency benchmark in Ghana's legal regime for security interests over land. It offers a criterion for evaluating security interests over land within a PPSA framework, compared with the traditional common/statutory law mortgage under the Pre-B&L Act regime, examining its inherent fragmentation and duplication, and how the B&L Act framework addresses this. Based on evidence drawn from qualitative data (interviews),[751] the chapter explores participants' perceptions regarding how, compared to the prior regime, the B&L Act framework centralizes the legal and institutional framework for security interests over land in Ghana.[752]

The opportunity to take security over land under a comprehensive, unified legal and institutional framework, rather than a disjointed, uncoordinated regime with multiple state agencies and legal instruments mediating it, is not only convenient, but also essential for an economy, including access to finance.[753]

This chapter argues that the B&L framework centralizes land security more efficiently (with the concomitant efficiency gains) compared to the Pre-B&L Act regime, despite the fact that this centralization effort is somewhat undermined by the prior regime's co-existence.[754]

The framework has created a unified regime for security interests over land.[755] All encumbrances created over land are publicized at the Collateral Registry, whose system is electronic and accessible to the public. This centralization enables searchers and lenders to obtain information about the parties' credit transactions over land in real-time without having to visit three other registries (the land, deeds and companies' registries) to obtain the same information. Also, the distinct legal devices of the mortgage and customary law pledge are unified under the functional conception of security interests in this framework. When one adds security interests over movable assets to this centralization equation, the scale becomes

[751] Para 7.4
[752] Paras 2.1; 7.5
[753] Para 7.1.2
[754] Para 4.3.5
[755] Para 7.3.1, 7.3.2, 7.3.4

enormous. Moreover, in order to distinguish this approach to security interests from the regular conception of the unitary approach, which excludes land, it is appropriate to refer to it as the Super-Unitary Model: a secured transactions regime that includes land within a typical PPSA framework.

Notwithstanding, the efforts made towards centralization under the B&L Act are being undermined by the Pre-B&L Act regime's co-existence, which was not repealed, but allowed to run concurrently with the B&L Act framework, with the resultant costs and inefficiency.[756] The negative impact of this failure is somewhat minimized by the 'conflict of laws' provisions, which give the B&L Act precedence over any other law.

This chapter is organized as follows. Section 7.1 conceptualizes centralization of land security and briefly considers the functionalist and formalist conception of security interests to determine their centralizing tendencies or otherwise. Section 7.2 examines how the Pre-B&L Act framework treated or organized land security. Section 7.3 focuses on the substance and aims of the previous section, but in respect of the B&L Act framework. Section 7.4. reports the interviewees' perspectives on the centralization of land security under the B&L Act framework compared with their experiences under the Pre-B&L Act regime. Section 7.5 assesses these empirical findings, while Section 7.6 concludes the chapter.

7.1 Understanding the centralization of security interests over land

This sections briefly conceptualizes centralization as defined in this thesis.

7.1.2 Centralization in land sector management

In the land sector, a legal and institutional framework that, *inter alia*, clarifies in a non-overlapping manner the authorities dealing with land administration and their responsibilities is considered key to good land governance.[757] In other words, mandates concerning land sector regulation and management require a clear definition in order to avoid the duplication of responsibilities.

[756] Para 7.3.3
[757] Klaus Deininger, Harris Selod and Anthony Burns, *Land Governance Assessment Framework* (World Bank Publications 2011) 14.

It is in this context that centralization, in the sense of steering away from institutional fragmentation in the land sector—which often leads to poor coordination, duplication and high transaction costs—is seen as a matter of good land governance.[758]

It is noteworthy that good land sector governance practices are justified on many grounds, including their potential to "reduce the cost of accessing credit for entrepreneurs, thus increasing opportunities for gainful employment and contributing to innovation and the development of financial systems".[759]

7.1.3 Land security centralization

The centralization of security interests over land in the context of this thesis (and indeed more broadly) is conceived as the existence of a single legal and administrative framework for the taking of security over land. Under such a framework, the creation, perfection, priority, and enforcement of security interest over land are all governed by a single law, which is administered by a central authority operating one central secured transactions registry, where all of the credit parties (individuals, companies or other business forms) can register and also search for encumbrances over any land nationwide.

The philosophical roots of this conception lie in the unitary approach to security interests,[760] and also in legal centrism, where 'the law, "as a 'whole, unified, integrated thing' with the courts at the top, who are 'fully competent to administer the whole law'", pulls "towards coherence across the whole legal landscape".[761] Legal centrism, thus, requires the law to be the law of the state, which is uniform for all, exclusive of all other laws and administered by a single set of state institutions.[762]

This promotes certainty and clarity in the law, saving costs through standardization (the absence of inconsistencies), the avoidance of the duplication of functions as well as the deployment of resources to branches. Thus, despite the criticism that centralization promotes bureaucracy and autocracy, which, in the long term, leads to inefficiency, centralization generally improves efficiency.

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[758] Ibid.
[759] Ibid.
[760] Para 7.1.4.1
[761] Michael Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law' (2005) 43 Osgoode Hall Law Journal 223, 261.
[762] John Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism 1. Although this article was published in 1986, an earlier unpublished draft had been circulating (and had been cited) since 1979.

7.1.4 Modern approaches to security interest

The following considers the two main approaches to the conception of security interests in modern secured transactions law: the unitary and formal approaches. It will become clear that, whereas the former centralizes security interests, the latter disperses them. The UNCITRAL Model Law's centralizing features, which uses the former approach, are also briefly touched upon as the benchmark instrument for the analysis in this chapter.

7.1.4.1 The Unitary Approach

This section draws a parallel through which centralisation of land security may be conceived. The unitary approach to security interests brings all secured transactions over personal property and fixtures under the same umbrella if the transactions in substance secure the payment and performance of obligations, regardless of their form. This approach is, thus, functionalist in nature when seen from the perspective of the economic function of the financing device.[763] This approach has a harmonisation objective in the law and makes the existence of a single registry, where the registration of security interests can be performed and searches conducted to ascertain encumbrances on assets, essential. This reduces the transaction costs associated with registering and searching at distinct registries.[764]

Nowadays, computerization and improvements in the field of electronic communications have reduced the cost of centralization. The centralization of a registry's services is strengthened, rather than undermined, when other operation centres of the registry are established as part of business continuity plans to enable the registry to recover from any form of disruption or interruption to services.[765]

It is worth clarifying that the 'unitary approach' considered in this chapter is related to the fact that all mortgages and pledges over land must be perfected by registration, rather than having different perfection mechanisms, as under the previous law, which observed their distinct nature. Naturally, however, given that the priority rules are based on registration, the same priority rules will apply, despite the fact that this similar treatment of mortgages and pledges is also related to other aspects of secured transactions law, e.g., creation and

[763] Tibor Tajti, 'Could Continental Europe Adopt a Uniform Commercial Code Article 9-Type Secured Transactions System: The Effects of the Different Legal Platforms' (2014) 35 Adel Law Rev 149.
[764] Roderick J Wood, 'The Evolution of the Personal Property Registry: Centralization, Computerization, Privatization and Beyond' (1996) 35 Alberta Law Rev 45.
[765] The International Institute for the Unification of Private Law (UNIDROIT), Best Practice Registry Document: Guide on Best Practices for Electronic Collateral Registries, 26-29. A functional critical performance factor framework (ctcap.org)) pp 26-28. Accessed 7 May 2022

enforcement. This is somewhat distinguishable from 'functionalism' in UCC Article 9, the Model Law and the PPSAs, which relate not only to 'true security interests' but also to the retention of title devices or (certain) outright transfer devices. Let it suffice here to state that a 'true' security device (under the common law) is created by a grant, with a right to redeem and obligation to account for a surplus.[766]

There are two possible ways of conceptualising a modern secured transactions law. One is that it recharacterizes all of the transactions it covers so that they all involve the creation (granting) of a 'security interest', which is a *sui generis* type of proprietary interest. The different devices, therefore, no longer exist. This appears to be the rationalisation in the US. The second is that the different devices exist but, for the purposes of the relevant legislation, are all treated identically (this appears to be the rationalisation in Australia). The B&L Act's effect in Ghana could be rationalised along the lines of the latter.

7.1.4.2 The Formalist Approach

The Formalist Approach to security interests, on the other hand, does not view the law as operating on a functional basis. The effect given to the form of a transaction chosen by the transacting parties is determined by the law, rather than what the transaction aims.[767] Great reliance is placed on the various legal devices or forms and their respective legal incidents. The formal approach sharply distinguishes the granting of security from the retention of the title.[768] This approach is particularly concerned with not only the form of the device, but also where the title to the property resides in determining whether a transaction is a security interest or not.[769]

Generally, in formalist states, non-possessory security rights are available only through distinct legislation dealing with specific types of assets or grantors. They also operate separate registries (where registration is required) for different categories of assets and grantors. The majority of quasi-security devices, such as hire-purchase or sale and lease-back, and also receivables, are not registrable in the company registries of formalist states, thus creating hidden liens in the process.

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[766] *Re George Inglefield Ltd* [1933] Ch. 1, the Court of Appeal identified the essential differences between a sale and a secured loan.
[767] Geoffrey Crowther and others, Consumer Credit: Report of the Committee (1971) Vol. 1. HM Stationery Office.
[768] Goode and Gullifer (n 299); Michael G. Bridge and others, 'Functionalism, Formalism and Understanding the Law of Secured Transactions', (1998-1999) 44 McGill Law Journal 568, 573.
[769] ibid

The formalist approach has been criticised for being "incoherent and inefficient, as well as regulating transactions according to their form and not their substance"[770] but, in English law, the home of formalism, this 'inefficiency' tag may not be entirely applicable, since the formalist approach appears to suit the context, especially as the general efficiencies in the system facilitate its success. Consequently, in England, proposals for reforms along functionalist lines[771] have led to a significant debate over their utility.[772]

7.1.5 The UNCITRAL Model Law

The UNCITRAL Model Law on Secured Transactions (UNCITRAL Model Law) was chosen as the benchmark secured transaction instrument for discussion in this chapter in this thesis as a whole. This choice was informed by the instrument's versatility: it is user-friendly towards almost every jurisdiction, as it has contributors from all over the world. This contrasts with UCC Article 9, which is purely a US legislation, and its transplantation has long been viewed as equating to advancing US hegemony[773] and business interests.[774]

The UNCITRAL Model Law centralises security interests. It uses a unitary approach by adopting one concept for all types of security interests in movable property. The Model Law applies to all types of transactions that fulfil security purposes, such as secured loans, retention-of-title sales and financial leases. It thus covers all types of assets, secured obligations, and parties.[775] This is the core of the instrument's functionalist approach.

The Model Law's preference for a single public registry for the publication of security interests is confirmed by the use of the direct article 'the' throughout to describe the secured

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[770] The Secured Transactions Law Reform Project: History of Reform. Accessed 16 May 2022.History of reform – Secured Transactions Law Reform Project

[771] The Law Commission, 'Company Security Interests, 2005 (Law Com No. 296); The Law Commission, 'Company Security Interests: Company Charges and Property other than Land (Consultation Paper No 164. H:\WORD\Company Charges\Cp164\cover.pdf.prn.pdf (lawcom.gov.uk)

[772] On the Law Commission's proposal, see the following sources, most of whom agree with the recommended adoption of functionalism in English personal property security interest law: Louise Gullifer, 'The Law Commission's Proposals: A Critique' (2004) 15 European Business Law Review, 81; Gerard McCormack, 'The Law Commission Consultative Report on Company Security Interests: An Irrelevant Riposte?' (2005) 68 Modern Law Review 286; Richard Calnan, 'What is Wrong with the Law of Security?' in John de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge 2009) 162. The City of London Law Society Financial Law Committee appears to be the strongest opponent of the Law Commission's reform proposal. It has put forward a secured transactions code that expressly opposes the unitary approach

[773] Tibor Tajti, (n 763), 152. The author considers this view unfortunate and recommends the Unitary Approach for European countries.

[774] See Diego P Fernandez Arroyo and Jan Kleinheisterkamp, 'Inter-American Model Law on Secured Transactions' (2002) 4 Yearbook of Private International Law 251

[775] See UNCITRAL Model Law, Art. 1 (1) and Art. 2 (kk)

transactions registry as conceived under the framework.[776] This is in line with the UNCITRAL Legislative Guide on Secured Transactions and the Model Registry Provisions, which recommend a single electronic registry, in which registration is simple, quick and inexpensive.[777] The Guide also recognizes specialized registries, such as for ships, aircraft and intellectual property rights,[778] but treats document registries in which registration has constitutive effects and registries with high registration fees as detrimental to secured financing.[779]

7.2 Pre-B&L Act Centralization of Security over Land

This section considers the centralization experiment in security interests over land under the Pre-B&L Act regime. It examines the unitization endeavours in the Pre-B&L Act on security over land and reviews the existing administration to determine the extent to which centralization occurred/is occurring. This is then compared to the UNCITRAL Model Law and B&L Act framework. This section concludes that, notwithstanding the bold attempts, the Pre-B&L Act regime failed to centralise security over land in Ghana.

7.2.1 Pre-B&L Act Devices for Security over Land

The common/statutory law mortgage and customary law pledge remain the main legal devices for land security under the Pre-B&L Act regime over land in Ghana.[780] These devices possess distinct legal ingredients and features, and exist separately in the formalist understanding of the law, although they are both related to the use of land as security for credit.

7.2.1.1 The customary pledge and centralization

The customary law pledge,[781] being unwritten, had no centralised registry for its recording and efforts, in the past, at removing it from deep informality failed.[782] The possession of the pledged asset (land) is a key ingredient, although the credit parties, especially nowadays, can by agreement compromise on this and yield possession back to the grantor of the security.

[776] See UNCITRAL Model Law, Art. 28; Model Registry Provisions
[777] See the Guide, Chapter IV, paras. 7-46; Spiros V. Bazinas, 'Acquisition Financing under the UNCITRAL Legislative Guide on Secured Transactions' (2011) 16 Uniform Law Rev 483.
[778] See the Guide, Chapter III, paras. 67-86 (see recommendations 38 and 77).
[779] Ibid., Chapter IV, paras. 10-14.
[780] For a discussion of the mortgage and the pledge see Paras 3.2.4.1; 3.2.4.2
[781] Para 3.2.4.2
[782] Para 6.2.1.2

Generally, in modern secured transactions, the creditor's possession of the security, which is one of the means of perfecting security interests, is viewed unfavourably, since grantors normally wish to retain possession of the collateral and work with it in order to repay the loan. If, however, the grantor obtains possession, the security interest would need to be registered otherwise there would not be continuous perfection.[783]

The absence of writing, which is typical of the customary pledge, naturally makes the existence of a registry for such security interests challenging, although not impossible, as the B&L Act framework shows.

7.2.1.2 The mortgage and centralization

Mortgages over registered land were registrable at the Land Registry,[784] while those over unregistered land, could only be recorded at the Deed registry, which is absent from most parts of the country.[785] Thus, many mortgages over large swathes of rural land were not registered anywhere under the Pre-B&L Act regime.

The centralization deficiency in the Pre-B&L Act mortgage can be seen in both the substantive law itself and the administration (registration) of mortgages.

7.2.1.2.1 Administration and centralisation

The perfection of the mortgage under the Pre-B&L Act regime demonstrates the fragmentation within the framework. The deed registry, which, *inter alia*, can record security interests over unregistered land, is absent from most parts of the country. Even where present, it uses manual processes that are inefficient. This means that lenders operating in different parts of the country had to travel to where the parcels of land presented as collateral were situated in order to search the relevant deed registries manually and so make business decisions. This may have made it too expensive, inconvenient and detrimental to access finance.[786] The UNCITRAL instruments, the Model Law and Legislative Guide, prescribe a centralized, electronic registry where searches can be performed anywhere nationwide.[787]

The Land Registry, which is responsible for registering encumbrances over registered land, to some extent, suffers from the same problem. The land registries, which exist in the very few registration districts nationwide, are geographical and restricted to those areas. While the

[783] See UNCITRAL Model Law, Articles 21 and 22
[784] Paras 3.2.4.1; 3.2.4.1.1.2.1
[785] Para 6.1.6.1.4
[786] Para 7.4.1
[787] Para 7.1.5

local registries may not be electronic, a central land registry must be; otherwise, it becomes difficult to deliver efficient services. Unfortunately, this is the state of affairs regarding the land registry in Ghana. This contrasts with what the UNCITRAL instrument provides, which is a single, electronic registry under a comprehensive framework of secured transactions.[788]

7.2.1.2.2 Substantive law and centralization

The greatest effort towards the centralisation of land security under the Pre-B&L Act regime was seen in the advances effected by the Mortgages Act, 1972, but this was unfortunately deficient. Section 2 of the Mortgages Act attempted to bring all non-possessory security transactions, involving immovable property, into the ambit of the Act, which would apply regardless of the form chosen to express the mortgage. It states:

"A mortgage of immovable property shall only be capable of being effected in accordance with the provisions of this Decree, and every transaction which is in substance a mortgage of an immovable property, whether expressed as a mortgage, charge, pledge of title documents, outright conveyance, trust for sale on condition, lease, hire-purchase, conditional sale, sale with right of purchase or in any manner, shall be deemed to be a mortgage of immovable property and shall be governed by this Decree".

According to the Memorandum, it is for the court to determine, in each case, whether a transaction is, in substance, a mortgage. It continues: "The essence of the mortgage is that specific property is identified as security for the promised performance, the mortgagor retaining the right of ownership subject to the security interest". Section 2 was thus designed to prevent attempts to make what was in substance a mortgage outside the bounds of the Act. There appeared therefore to be a preference for "substance over form".

The nature of this provision sparked an academic debate about whether or not the law's broad sweep converted a customary pledge into a mortgage.[789] The Mortgages Amendment Decree 1979 (MAD) settled this debate to some extent,[790] but introduced a related controversy; namely, whereas MAD's attempt to abolish what was claimed to be subsumed under the mortgage clarified that the customary pledge over land was not captured under the Mortgage Act, it also sparked debate about whether the customary law pledge over all land (or only

[788] Ibid.
[789] On the debate on this subject, see: Dankwa (n 320); Anselmus KP Kludze, 'Modern Ghanaian Law of Mortgages' (1974) 11 University of Ghana Law Journal 1; Gordon R Woodman, *Customary land law in the Ghanaian courts* (Ghana Universities Press 1996).
[790] Para 3.2.4.2.5

farmland) had been abolished. The reference to a "pledge" in section 2 of the Mortgages Act does not refer to the customary law pledge, but rather to a "pledge of title documents", which is definitely not the customary pledge, since the latter is notoriously unwritten.

Kludze[791] argues that such an important substantive law device as the customary pledge could not have been abolished so cavalierly. Although Woodman appears ambivalent on this issue,[792] this thesis takes the view that this statutory intervention failed to abolish the customary law pledge, and that the security device continues after the Decree. Pledges of land other than farmland are still cognizable in law in Ghana. Even pledges of farmland that were affected by the MAD, in practice, still exist, albeit these are 'dead' on the books.[793] Statutory mortgages appear more popular than pledges in the urban areas, but not in the hinterlands.

Consequently, what appears to have been a unitizing initiative by the Mortgages Act ultimately failed to achieve the desired results. At the minimum, there is controversy over its efforts while, in practice, the pledge remains operational, especially being employed by farmers in the rural areas, using their farm produce as security for credit. In such places, as in many other places nationwide, the device co-exists with the mortgage. This is a deviation from the UNCITRAL Model Law,[794] which adopts the unitary approach, under which one legal regime applies to all security interests.[795]

7.3 B&L Act Framework Centralization

This section examines the harmonization efforts inherent in the B&L Act treatment of land security through the available legal and administrative devices, and provides a basis for a comparison with the Pre-B&L Act regime for land security in Ghana, as well as the best practice approach to security interests in modern secured transactions. It argues that the B&L Act framework adopts a functional approach to security over land, which avoids fragmentation. This is largely in line with the UNCITRAL Model Law, which nonetheless, permits possession as a means of perfection of security, a rule which is excluded by the B&L Act framework. It is explained, however, that the B&L Act framework incompetently retains the prior regime for security over land, causing unnecessary duplication and overlaps.

[791] Kludze (n 789).
[792] Woodman (n 789).
[793] Para 6.2.1.
[794] Para 7.1.5
[795] Para 7.1.4.1

7.3.1 Substantive law and centralization

The conception of a 'security interest' under the B&L Act is a major means by which its centralizing or unitising quality is achieved. The B&L Act framework conceives security interests in land (and generally) in a functional manner. Act 1052 defines security interests as "a proprietary right in a movable or immovable asset that is created by an agreement to secure payment or the performance of an obligation, regardless of whether the parties have denominated it as a security interest and regardless of the types of asset".[796]

This definition concerns the substance, rather than the form, of security interests, and so any legal device is accommodated provided that the statutory requirements, or the essentials of a security interest, are satisfied. This appears to be the epitome of the unitary conception of security interests.[797] The customary law pledge and mortgage are effectively brought under one treatment of land security interests, with common requirements for the creation perfection, priority and enforcement of both, as security devices. This is in line with the UNCITRAL Model Law,[798] but in contrast to the Pre-B&L Act regime, where security over land continues to be conceived in the distinct forms of the mortgage and the customary law pledge. [799]Under the B&L Act, a security interest must be made effective against third parties by registration, and possession is not a means of perfection.[800]

7.3.2 Administration and centralization

The B&L Act framework establishes the Collateral Registry as the single registry for the registration of all security interests in land (and indeed other assets).[801] This framework dispenses with the additional means of perfection under the Pre-B&L Act regime; namely, perfection through the possession of burdened land (in the case of the customary pledge) and title document deposition.[802]

These centralizing features of the administration of land security under the B&L Act framework are characteristic of the unitary approach of the UNCITRAL Model Law and the

[796] Act 1052, s. 85
[797] Para 7.1.4.1
[798] Paras 7.1.5, 7.1.4.1
[799] Para 7.2.1
[800] Paras 4.3.2; 4.2.4; 4.1.3.3
[801] Act 1052, ss. 14, 18, 19 and 22
[802]See Paragraph 81(1) of Land Title Registration Regulations. The Land Registrar must be notified if a document relates to registered land. Act 1052, s. 14 establishes registration as the only means of perfection.

related Model Registry Guide,[803] although the B&L Act framework disallows possession as a means of perfection which the latter regime permits.

7.3.3 Decentralization of security over land under the B&L Act framework

Despite the adoption of the unitary approach to security interest by the B&L Act framework, the Pre-B&L Act regime on land security coexists with it,[804] which undermines any claims concerning the latter's centralizing qualities. Although this was unplanned, and is due to the challenges that arose during the reform's enactment,[805] it introduces unnecessary duplication into the framework and undermines access to credit.[806]

7.3.4 Summary

To summarize, the B&L Act framework for security interests in land operates concurrently with the Pre-B&L Act regime for land security. The reformers' intention was for the B&L Act framework to be the only framework applicable to security in land, but this was never enacted, which marked a significant setback to the efforts to harmonise land security under the B&L Act framework.

The B&L Act framework, however, despite any inherent challenges, centralises land security in Ghana,[807] but would be far more effective in this regard with legislative amendment. The attempt to resolve potential conflicts between the regimes by providing for the preeminence of the reform framework[808] is helpful but unnecessary, given that it could have been avoided in the first place.

7.4 Empirical findings

To investigate land security centralization under the B&L Act framework, this thesis draws on the perceptions of the key stakeholders in the Ghanaian reform, gathered from interviews.[809] The salient views on land security centralization are reported in the following as sub-themes.

[803] Para 7.1.5
[804] Para 7.4.2
[805] Para 4.1.3
[806] Para 4.3.5
[807] This is better realised where the B&L Act framework is coordinating with, and leveraging on, the CLS system.
[808] Act 1052. See Paras 4.3
[809] Para 2.1

7.4.1 The B&L Act Framework's Superior Unitization Objectives

There was unanimous acknowledgement of the harmonization attempt of the B&L Act framework, which was seen as superior to similar efforts made under the Pre-B&L Act regime. All of the interviewees perceived that the framework aims to achieve a "one-stop-shop"[810] for security interests over land (and indeed other assets). This, in the view of the interviewees, aims to address the Pre-B&L Act regime's disparate nature:

> "what I get is that the Borrowers and Lenders Act is trying to make it easier to take landed property as security. I know back in the days under the Mortgages Decree (even before the Mortgages Decree), some people would, sort of, do an assignment of the land when they were taking a facility. Later under the Mortgages Decree you registered your interest as a mortgagee at the Lands Commission, or maybe the company registry. The Borrowers and Lenders Act is supposed to make it easier: you don't have to go through all these documentations and all these processes or places".[811]

Accordingly, the interviewees constantly cited computerization and advanced IT as the hub around which the centralization capabilities of the Collateral Registry (and the B&L Act framework for that matter) revolve. One interviewee described being:

> "impressed about the fact that it is one online registry and so one does not need to walk to a particular office for information; it is online. Whatever information you want, you go online and you get the information from a single source. Same with registrations. I think it is a very good and brilliant idea, and so for that reason, it is a bit more easy and flexible: one could access information even from his office, or wherever".[812]

All of the interviewees shared this view.

7.4.2 Parallelism's Besetting Reality

Notwithstanding the acknowledgement of the B&L Act framework's centralizing objective, the interviewees regretted the persistence of the Pre-B&L framework for land security alongside the former, which is comprehensive and sufficient on its own. In this respect, one interviewee reported that the reform's stakeholders:

[810] GD2, GC1 and GE2 used this expression, but this view was held by all of the participants.
[811] GB41.
[812] GA3.

> "have a problem with that because, lately, I have seen some companies scrambling in my court to seek leave to register charges with the Company Registry although they have already registered them with the Bank of Ghana's Collateral Registry. So, they are registering the charges at both ends, and as you said, when it relates to land, also at the Lands Title Registry. So, I think this is duplication which brings unnecessary cost and expense, and maybe we need to streamline that".[813]

Similar sentiments were expressed by all of the interviewees, especially the judges, lawyers and banks.

The participants attributed the two regimes' concurrence to a failure to enact a desirable relationship between the two frameworks, contrary to the reformers' vision.[814] They alleged that:

> "at the time of drafting, there were reservations in terms of usurping the roles of the other registries. And so there could be problems in that regard, and I think as we go along, the courts would make clear decisions that would make it clear as to how priority and enforcement will be done under this regime".[815]

In addition, the parliamentary process was also perceived to have caused some of the many changes to the original draft. A substantive deviation from the essential principles "...was purely put there by the MPs".[816]

This state of affairs was widely perceived as detrimental to accessing credit, particularly for:

> "small businesses, going to register mortgage at the Collateral Registry and then also being saddled with another requirement to cause it to be registered at the Lands Commission with all the complexities that it may involve. It is really quite deterring to them".[817]

7.4.3 Divergence of views on the needed response to duplication

The interviewees held different opinions regarding how best to deal with the concurrence of the two regimes, which undermines the B&L Act framework's otherwise centralized nature.

[813] GA4.
[814] Para 4.1.3
[815] GE2, GD2. This perception was also insinuated by other interviewees from the banks.
[816] GD2.
[817] GC1

One school of thought held the view that one of the regimes should be scrapped,[818] while another maintained that they should continue to co-exist, "at least for some time".[819]

In the former's view, there was yet a further division in regard to which of the regimes should be scrapped and which maintained. An overwhelming number of the interviewees expressed a preference for the maintenance of the B&L Act framework with the Collateral Registry. One interviewee opined that he would:

> "advocate for a situation where once the registration is done at the Collateral Registry, a company or a person must not be compelled to go and do a second registration whether at the Land Title Registry or even at the Companies Registry so that, that confusion will be avoided…"[820]

The interviewees were almost unanimous on this point, but a few thought that the B&L Act framework should be "scrapped", possibly due to frustration at the ease with which the extrajudicial enforcement (its major achievement) is overreached:[821]

> "From where I sit, I would have wished the Borrowers and Lenders Act would rather be eliminated, because when you register under the Borrowers and Lenders Act, even the Police and the court, most at times, don't corporate.
>
> Yes, the Lands Commission one is costly; it's cumbersome, delays time, but in the end, it is readily and better accepted without questions than this one that is less costly, less time consuming".[822]

This view was unique but, as a protest vote against the overreach of the extra judicial enforcement mechanisms under the B&L Act framework, it had widespread support, although not to the extent that it should be abolished.[823]

As noted earlier, one participant stated that the regimes' co-existence must be maintained, at least for a time:

[818] GB61
[819] GA1
[820] GA3.
[821] Para 8.4.3
[822] GG21.
[823] Para 8.4

> "So, to me, I am of the opinion that we should let the two regimes operate for some time. If a time comes and the Borrowers and Lenders Act is capable of absorbing all these registrations, then they may go ahead to repeal the Mortgages Act". [824]

There was yet another view on how to deal with the two regimes' concurrence, which appeared to be a nuanced version of the argument that they should exist side by side. This view advocated the regimes' integration, because:

> "you cannot prioritize one over the other. On the one hand you are talking about security in respect of lending or borrowing. On the other hand, you are talking about the general aspects of land management".[825]

The interviewees added;

> "in as much as the Collateral Registry is comparatively superb, we are still dealing with an issue of the legally recognized entity in dealing with land. We might have had a peaceful registration on the system,[826] but the recognized agency dealing with land transactions have no knowledge at all; no knowledge of transactions affecting the land. So, if there was a more integrated system, it would have helped".[827]

This view appeared to be a compromise for advocates of the Pre-B&L Act regime's abolition. They were willing to allow it to remain but only provided that it did not matter in the reckoning of security interests over land. In their view, the prior regime should only exist to be given copies of the registration that happens at the Collateral Registry, so that a searcher (who intends to buy a parcel of land) can gain, as far as possible, a full picture of it, even without conducting a search at the Collateral Registry.[828] There surely is something to be said for sharing information between electronic registries.

[824] GA1. This view was supported by YR and YL, although their support was motivated by a desire to protect their turf. The clamor for a repeal of the duplicating provisions in the Pre-B&L Act regime would affect their schedule; thus, their insistence that they operate side by side, regardless of the cost.
[825] GB53
[826] Referring to the Collateral Registry platform.
[827] GB52.
[828] Para 4.1.3.3 (VII)

7.5 Assessment of the findings

The interviewees confirmed that a self-sufficient, unified framework for security interests over land existed under the B&L Act framework.[829] This was perceived as superior to what prevails under the Pre-B&L Act framework. The framework was also viewed as offering the inherent efficiency benefit of enabling secured transactions over land to be performed in one place, without the use of different legal regimes, or visiting three other distinct registries (the land, deeds and companies' registries).[830] This was seen as cost efficient, clear and a way to avoid duplication. Under this framework, security interests over both registered and unregistered land are governed by a single legal framework and perfected solely at the Collateral Registry. This reflects institutional non-fragmentation as a good governance benchmark in the land sector.[831]

This centralization of security interests over land under the B&L Act regime is a corollary of the functionalist and unitarist philosophy[832] on which the framework is based, in accordance with the UNCITRAL Model Law.[833] All land transactions that perform the function of security are brought under a single legal regime, with registrations and searches of encumbrances on all land being performed at a single or centralized secured transactions registry.[834]

The B&L Act framework's functionalism can be contrasted with the prior law's formalist[835] regime, which had both the customary law pledge over land and the real property mortgage law, which were treated differently. These devices have distinguishable formal and essential validities or requirements. In other words, the pledge and mortgage under the Pre-B&L Act regime were differently understood and, in legal terms, dealt with differently.

The interviews also show that land security centralization under the B&L Act framework, which has partly been achieved through the Collateral Registry's computerized system, has introduced real efficiency gains compared with the Pre-B&L Act's operations,[836] which were largely manual in nature, so it could take weeks, if not months, to search for and retrieve a file, if this was possible at all. The interviewees confirmed that, at a click of a button, searches are

[829] Para 7.4.1
[830] Ibid
[831] Para 7.1.2
[832] Para 7.1.4.1
[833] Para 7.1.5
[834] Even if it has been implemented inefficiently. Registrations and searches continue at other registries but all security interests in land must be registered at the Collateral registry for third party effectiveness.
[835] Para 7.1.4.2
[836] Para 7.4.1

conducted at the Collateral Registry, yielding more accurate results in real time. This assists with data analysis and decision-making.[837]

To assess this efficiency gain more fully, we should consider whether the digitization efforts at the Land Registry, if or when fully implemented, will achieve similar results. It appears likely that, even if the Land Registry achieves full digitization, their operations will never, for instance, be able to: (1) capture every security interest over any land parcel nationwide; or (2) support activities like amendments in real time, which are done at the Collateral Registry.

This demonstrates the futility of hoping that the Land Registry's digitization process will replace the Collateral Registry's operations with respect to security interests in land.

Furthermore, although it could be argued that keeping all land transactions, including ownership and encumbrances, at the Land Registry (and therefore under the Pre-B&L Act regime) would enable the various interests (if any) affecting a particular land parcel of land to be viewed in one place (thereby promoting greater centralization), the nature of the applicable law under the land registries' regime and the related inefficiency argue against this. The law is formalist in nature and rolls out a disparate regime and structures for land security interests.[838]

The centralization effort under the B&L Act framework, and associated efficiency gains, are significantly undermined by the framework's co-existence with the Pre-B&L Act regime. The resultant duplication and overlap are seen as confusing, expensive and time consuming, which justify the call for the Pre-B&L Act regime over land security's abolition, which would ensure that the B&L Act framework is the sole land security regime, without the need to establish such status through the interpretation of the statutes.[839] This change in the law, according to the interviewees, must recognize the need for the Collateral Registry to furnish the Land and Company registries with electronic copies of registrations at the Collateral Registry,[840] apart from anything connected with land security, in line with the reformers' original intention.[841]

[837] Ibid
[838] Para 7.2
[839] Through interpreting Act 1052 as a whole, one may conclude that the B&L Act framework is, in practice, the authoritative law on land security in Ghana. This is after one considers the legal provisions for its preeminence over any other law in the event of conflict. However, it is preferable for the legal regime to be clear *ab initio*, without any ambiguities that call for statutory interpretation.
[840] Para 4.1.3.6 (II); 4.1.3.3 (VII)
[841] Para 4.1.3

Despite this besetting coexistence of the Pre-B&L Act regime with the B&L Act framework,[842] the latter's superiority with regard to centralizing security over land is clear,[843] as it is, by its nature, unitary. The concurrence, although concerning, only extends to duplication, and does not deny the latter's nature, while the former is intrinsically decentralized in nature.[844]

7.6 Conclusion

This chapter explored the land security centralization in Ghana. It underscored the benefits of a comprehensive, unified legal and institutional framework for land security, rather than a disparate, overlapping regime. Two main philosophical approaches to security interests over movable property, that tend to undergird security interests' centralization and decentralization, were briefly considered.[845] Whereas the unitary approach has centralizing tendencies towards security interests, the formal approach is decentralizing in nature. Using these approaches to analyze security interests over land in Ghana, the chapter has shown that the B&L Act framework over land, which adopts a unitary approach to security interests, centralizes security over land (and, indeed, all assets) more efficiently than the formalist Pre-B&L Act regime. This is despite the fact that, as the chapter demonstrates,[846] the Mortgages Act 1972 made a decent attempt to centralize security over land by characterizing as a mortgage every proprietary right in immovable assets that was created through an agreement to secure the payment or performance of an obligation, regardless of how the parties described it. However, the failure to cover the customary pledge adequately, coupled with the existence of different registries dealing with security interests over land, led to this centralization effort's failure.[847]

The B&L Act, as explained, effectively unites security over land through the law and relevant administrative devices: a single, centralized, web-based collateral Registry, receiving registrations of security interests over any land tract located anywhere nationwide, whether registered or unregistered, customary or state.[848]

[842] Para 7.4.2
[843] Para 7.4.1
[844] Paras. 7.2; 7.4.1
[845] Para 7.1.4
[846] Para 7.2.1.2.2
[847] Ibid.
[848] Paras 7.3.1, 7.3.2 ,7.3.4

The chapter also explained that the centralization claim of the B&L Act framework is nonetheless undermined by the coexistence of the Pre-B&L Act regime, although this only arises from the failure to enact the original reformers' intention.[849]

[849] Para 7.3.3

Chapter VIII

Enforcement of Security over Land under the B&L Act Framework in Ghana

8.0 Introduction

This chapter considers the legal and institutional structures and procedures that, upon the default of a secured credit obligation, enable a secured creditor to recover the real value from land collateral in a PPSA framework that includes land in Ghana. It examines the enforcement mechanisms and processes available in the B&L Act framework and assesses their efficacy in aiding secured creditors to recoup their investments or mitigate their risks or losses. Using evidence drawn from qualitative data (interviews), the chapter explores the stakeholders' perceptions of the Ghanaian reforms with regard to how well, compared to the pre-B&L Act regime, the inclusion framework facilitates the enforcement of security interests over land.

The reform to include land in a PPSA framework in Ghana intervened in a system in which debt enforcement involving land was slow, lengthy, ineffective and expensive.[850] The B&L Act enacted judicial and extrajudicial enforcement mechanisms (found in the PPSAs),[851] which promise efficiency, time and cost savings, by helping lenders to protect their investments. Lenders, for example, no longer need to go to court to realize a burdened land in the event of borrower default.[852] They can, *inter alia*, use the appropriate processes to sell the collateral on their own, or make proposals about retaining the burdened land in partial or full satisfaction of the secured debt. How these enacted enforcement mechanisms are experienced in practice, however, can only be ascertained from the relevant stakeholders, who work with the law in practice. This chapter, thus, critically evaluates land security enforcement under the B&L Act framework compared with the Pre-B&L Act prescriptions, from the perspective of the stakeholders and best practice. Its conclusions can also inform the decisions on further reforms or amendments.

This chapter constructs two arguments. First, it maintains that, unlike under the Pre-B&L Act regime, the raft of judicial and extrajudicial enforcement mechanisms available through the

[850] Para 3.3
[851] Para 4.1.2.1
[852] Ibid.

inclusion framework promotes efficiency and time/cost savings by helping lenders to enforce land security, despite the challenges that exist, which are particularly acknowledged in the specific context of their failure to achieve the optimum benefits.

Secondly, this chapter argues that the adoption of legal rules, which ensure the efficient, transparent, reliable and cost-effective enforcement of security in the PPSAs, is insufficient *per se* to realize the optimum enforcement of security over land. The pearl of the reform, extrajudicial enforcement, is susceptible to overreaching in the absence of comprehensive changes to civil procedure, judicial attitudes, and stakeholder behaviour, which are necessary to secure the reform. The court's jurisdiction is frequently frivolously seized, transforming extrajudicial enforcements into full-blown, lengthy litigations.[853] In effect, legal reform introducing best practice for the enforcement of movable assets (including the judicial and extra mechanisms) to land *per se* is not optimal (nor is the superiority of the reform framework over the pre-B&L Act regime clarified), unless these best practices are, for instance, accompanied by a more robust civil procedure.

This chapter is organized as follows. Section 8.1 reflects on the economic and philosophical justifications for the enforcement of a security agreement. Section 8.2 explores the standard enforcement mechanisms available in modern secured transactions. Section 8.3 briefly considers the Pre-B&L Act regime and B&L Act framework for the enforcement of security interest in land. Section 8.4, the empirical section, reports the interviewees' perspectives on the enforcement of land security under the B&L Act framework compared with their experiences under the Pre-B&L Act regime. Section 8.5 assesses the empirical findings, while Section 8.6 concludes the chapter.

8.1 Economic and Philosophical justifications for Credit Agreement Enforcement

This section explores the economic and philosophical bases for the enforcement of security interests over land. It maintains that, for philosophical and economic reasons, it is essential that credit and security agreements are enforced efficiently.

[853] Paras 8.4.2, 8.4.3

8.1.1 Economic bases for enforcement

There exists empirical evidence that the better protection of creditor rights, including enforcement, has a positive bearing on the credit market.[854] Bianco and others,[855] for example, found that the Italian courts' inefficiency affects the access to, volume, and cost of credit.[856] Similarly, Levine,[857] and Beck and others,[858] establish that countries with well-developed banking systems and high economic growth rates tend to have strict contract enforcement and well-protected creditors, *inter alia*.

Scholars have stressed the availability of extrajudicial enforcement remedies in secured transactions laws as important for economic growth.[859] This reality has informed the national and international efforts to improve the credit enforcement frameworks in recent years.[860] In this regard, legal systems are encouraged to provide prompt, predictable and affordable enforcement procedures and remedies for the realisation of security interests, in order to maximize the collateral's recovery value and also encourage the provision of cheap credit.

8.1.2 Philosophical bases for enforcement

The enforcement of a security interest in land (and, indeed, over any asset) in the event of default is an imperative of property law, not just contract law. Secured transactions create property rights, which are effective against third parties, including other secured creditors (according to the priority rules) and unsecured creditors on insolvency. A security interest's enforcement, therefore, is not simply a matter of enforcing a contract, although a contract is needed to create the security right. This is clearer where the enforcement is against an insolvency debtor, with competing claims, in which case it is clearly considered the

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[854] Rafael La Porta and others, 'Legal Determinants of External Finance' (1997) 52 Journal of Finance 1131; John Armour and others (n 22).
[855] Magda Bianco, Tullio Jappelli and Marco Pagano, 'Courts and banks: effects of judicial enforcement on credit markets' (2002) CEPR Discussion Paper, no 3347.
[856] The authors measured the efficiency of the court system by the number of pending cases per thousand people and the average length of trials. This was found to be positively correlated with credit distribution, and negatively correlated with lending volume. They additionally found that the bank interest rates are high in provinces where cases take longer to settle.
[857] Ross Levine, 'The legal environment, banks, and long-run economic growth' (1998) 30(2) Journal of Money, Credit, and Banking 596; Ross Levine, 'Law, finance, and economic growth' (1999) 8 Journal of Financial Intermediation 8.
[858] Thorsten Beck, Ross Levine and Norman Loayza, (2000). 'Finance and the sources of growth' (2000) 58 Journal of Financial Economics 195.
[859] Calomiris and others (n 20)
[860] Nadège Jassaud and Kenneth H Kang, 'A Strategy for Developing a Market for Nonperforming Loans in Italy' (IMF Working Paper No. 2015/024, 2015) <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/A-Strategy-for-Developing-a-Market-for-Nonperforming-Loans-in-Italy-42689> accessed 17 March 2022.

enforcement of property rights effective against third parties. The tendency to see the enforcement of security interest as the enforcement of a contract usually occurs where the enforcement is against a solvent debtor, without any competing claims.

Further relevance for contract law in security interest enforcement could be seen where the parties agree on a particular approach. Whereas this may be permitted in certain jurisdictions (albeit with limitations), other countries will only allow an agreed mode of enforcement provided that it is consistent with those set out in the secured transactions law or general law, which may be limited to judicial modes of enforcement.

Closely related to the above is the fact that there exist various theories and philosophical explanations regarding why contracts are enforced.[861] These different views on the theoretical underpinnings of contract law (and why contracts are enforced) affirm rather than dispute that contracts such as security agreements should continue to be enforced.[862]

The Autonomy or Will theory maintains that contracts are enforceable because the parties have 'willed' or chosen to be bound by their agreements. "According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect."[863] Thus, enforcing a credit agreement against a defaulting borrower or obligor would be morally justified, because the obligor himself has permitted it by his wilful assent to the agreement.

The Sanctity of Promise theory also holds that, by intuition, promises are sacred *per se*, that there is something inherently wrong about breaking a promise, and that society must ensure the enforcement of a contract.[864]

8.2 Enforcement Mechanisms

8.2.1 General overview

This section reviews the various effective and efficient mechanisms for enforcing security interests that are available under best practice secured transactions frameworks worldwide.

[861] Bargain Theory, Fair Contract Theory and Reliance Theory are examples of such theories that are not considered in this thesis due to space limitations.
[862] Steven L. Harris and Charles W. Mooney Jr., 'A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously' (1994) 80 Va L Rev 2021 .
[863] Morris R. Cohen, 'The Basis of Contract' (1933) 46 Harvard Law Review 553.
[864] Ibid 571.

Although examples from movable property contexts are used here, the mechanisms identified can be applied to land, which is a major argument of this thesis.

Countries choose from an array of mechanisms for enforcing security interests, taking into account transparency, speed and effectiveness,[865] as well as their legal, economic and political philosophy. The value maximization of collateral to the advantage of both debtors and creditors also underpins or informs the enforcement mechanisms' choice and design,[866] in addition to focusing on and generally protecting both debtors and creditors' rights fairly and efficiently.[867] There are indeed no blueprints for nations to adopt.[868] The conventions, model laws, principles, benchmarks, legislative guides and other instruments developed by the supranational organizations, however, provide valuable insights and might serve as a guide. Nations' regimes are assessed based on their enforcement framework's quality,[869] and their choices clearly affect access to credit and investment.

The UNCITRAL Model Law of Secured Transactions is employed as the benchmark for assessing the Ghanaian framework for the enforcement of security interests over land.[870]

The credit parties' agreement plays a key role in their credit relationship. It defines, *inter alia* default and identifies the agreed enforcement method, which is consistent with the Model Law provisions.[871] The following judicial and extrajudicial enforcement mechanisms are discernible in the UNCITRAL Model Law.

8.2.2 Collection

Under this mechanism, the secured creditor receives directly from an obligor what is ordinarily payable to the debtor, but accounts to the debtor for any surplus. The security agreement normally provides this relief, although it may also be available under the general secured transactions law. Under the Model Law, where the parties' agreement fails to address this right, the secured creditor could continue to exercise it,[872] provided that the secured party acts in a commercially reasonable manner, including giving the underlying obligors adequate

[865] UNCITRAL Legislative Guide on Secured Transactions, 2009
[866] Recommendations 131(ff), Chapter VIII, Legislative Guide.
[867] Ibid.
[868] Gullifer and Akseli (eds), (n 20); Frederique Dahan, 'The EBRD's Experience in Secured Transactions Reform: How Can Outsiders Help?' in Gullifer and Akseli (n 20)
[869] Philip R. Wood, *Comparative Law of Security Interests and Title Finance* (3rd edn, Sweet & Maxwell 2019).
[870] Para 2.1.5.3
[871] See UNCITRAL Model Law, Art 72(1)(b)
[872] See UNCITRAL Model Law, Art 82 (1).

notice.[873] Under this regime, the underlying obligor may object to the payment to the secured party on the grounds of prior exercise by the debtor of setoff rights against such an underlying obligor.[874] Due to its relative speed, it tends to be preferred by the majority of lenders.[875]

8.2.3 Possession

The secured creditor's right to obtain possession of an encumbered asset is an important mechanism for enforcing a security interest. As a preliminary step in the enforcement process, the burdened asset's actual or threatened possession can motivate the secured obligation's performance. This right is exercisable either with or without the court's assistance. The UNCITRAL Model Law provides the conditions under which it is available, including: (a) that the grantor of the security must consent to it with the parties' agreement (as exercisable with or without a court order); (b) that the grantor and persons in possession are given notice of the intention to possess; and (c) that the attempt to possess is not objected to (or resisted, leading to a breach of the peace) by the person in actual possession at the time of the repossession.[876]

It should not be unreasonable to expect the debtor's creditor, after possession, to take reasonable care of the collateral, and the debtor should always have the right to redeem it upon the secured obligation's performance or renegotiation.

8.2.4 Sale

The sale of the collateral is also one of the enforcement mechanisms available to a secured creditor. A sale (as an enforcement mechanism) can be made by private arrangement or through a public auction and may be performed with or without the court's supervision. Typically, in unreformed systems, court administered sales can be complex, lengthy and slow, and other laws and regulations may impose other requirements (or impediments). In this type of system, (as exemplified by Indonesia), the court, attorneys, and auctioneers' fees could absorb most of the collateral's value, leaving the lender not fully paid, and nothing left

[873] See UNCITRAL Model Law, Art 62
[874] See UNCITRAL Model Law, Art 64.
[875] Kathy Cabral and Teresa Wilton Harmon, 'Remedies outside the Box: Enforcing Security Interests under Article 9 of the Uniform Commercial Code' (2012) Business Law Today 1. This author was commenting on an analogous regime under UCC Article 9.
[876] UNCITRAL Model Law, s. 77 (2)

over for the debtor.[877] In reformed systems, collateral is sold in a commercially reasonable manner, with an obligation on the selling creditors to maximise the collateral's value. How deficiencies may be recovered or surpluses returned to the debtor are also provided for.[878]

In most countries that have reformed their secured transactions regimes, the law also protects small debtors and other vulnerable groups, by restricting or prohibiting certain collateral's seizure, in certain circumstances, on social protection grounds, but "with very rare exceptions, there is no *ab initio* exempt property. This is because assets are not, *per se*, exempt, but only when a certain context of the owner's personal poverty exists; and it is at the enforcement stage when the existence of the social context is to be ascertained".[879]

8.2.5 Collateral Retention

The secured party's right to keep the burdened asset upon debtor default (in the secured debt's partial or full satisfaction) is cognizable under most secured transactions frameworks, including the UNCITRAL Model Law on Secured Transactions (UNCITRAL Model Law)[880] and UCC Article 9.[881] This remedy is the right to retain rather than sell the burdened asset once the secured creditor has obtained possession (or the equivalent). Normally, a sale is required to liquidate the asset's value so that any surplus can be returned to the debtor. However, if the debtor (and other interested parties) agree (or, in some circumstances, do not object), the secured creditor can, instead of liquidating the value, keep the object and expropriate any surplus. Normally, if there is any surplus value, the debtor or another interested party will object.

In most frameworks, there are conditions for the application of this remedy. Under the UNCITRAL Model Law, the secured creditor may propose, in writing, to acquire the encumbered assets by sending a proposal to that effect to: (a) the grantor and debtor; (b) any person with a right in the burdened asset that informs the secured creditor of that right in

[877] Ibrahim Assegaf and Aria Suyudi, 'Secured Transactions Law Reform in Indonesia: Fiducia, at a Crossroads' in Louise Gullifer and Dora Neo (eds), *Secured Transactions Law in Asia: Principles, Perspectives and Reform* (Hart Publishing 2021)
[878] Heywood Fleisig and others, *Reforming Collateral Laws to Expand Access to Finance* (World Bank Publications 2006).
[879] Louise Gullifer and Ignacio Tirado, 'Financing micro-businesses and the UNCITRAL Model Law on Secured Transactions' (2017) 22(4) Uniform Law Review 642, 658, who cite as an example Germany's s 850 Zivilprozessordnung or arts 605 *et seq* of Spain´s *Ley de Enjuiciamiento Civil*.
[880] See UNCITRAL Model Law, Art. 8
[881] UCC § 9-620

writing, within a specified period before the proposal is sent to the grantor; and (c) any other secured creditor that registers a notice over that security.[882]

This proposal for collateral retention must include the secured amount, the intention to retain the asset and the interested parties' right to redeem and terminate the enforcement.[883] This must not be objected to by any of the persons entitled to the notice of the collateral within a specified period of the notices (if such proposals are served on them). A timely objection to the secured party's proposal prevents the retention of the collateral from taking effect.[884]

8.2.6 Enforcement and insolvency

Modern regimes aim to design an enforcement system that works well both in and outside insolvency proceedings. Delays occasioned by insolvency proceedings, whatever the arguments for them, can undermine secured lending. A reformed system, therefore, limits or eliminates this potential for delay. This is usually in addition to preserving secured creditors' pre-eminence over unsecured creditors in insolvency proceedings. A moratorium on all enforcement actions against a company's assets for a limited period is usually employed by modern insolvency laws to help to restructure the insolvent company.[885] This is typically consistent with secured creditor enforcement, as the secured creditor's rights outlive the period of the moratorium or stay. It is indeed recognised by the UNCITRAL Model Law.[886]

8.3 The Pre-B&L Act and B&L Act Regimes for Land Security Enforcement

This section examines the mechanisms for the enforcement of security interests over land under both the Pre-B&L Act regime and the B&L Act framework. Its objective is to identify the basis for the interviewees' assessments outlined in the qualitative part of the study.[887]

8.3.1 Pre-B&L Act enforcement

As already noted, the pledge and mortgage remain the two main legal devices for security interests in land under the Pre-B&L Act regime.[888] The remarkable distinction between them,

[882] UNCITRAL Model Law, Art. 80 (2)
[883] UNCITRAL Model Law, Art. 80 (3)
[884] UNCITRAL Model Law, Art. 80 (4)
[885] Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91(5) The Yale Law Journal Company, 857; Sarah Paterson, 'Rethinking corporate bankruptcy theory in the twenty-first century' (2016) 36(4) Oxford Journal of Legal Studies 697.
[886] UNCITRAL Model Law, Art. 35
[887] See Para 8.4
[888] Paras 3.2.4.2; 6.2.1

including the pledgee's right to retain the collateral, is thought to have been abolished. This belief (albeit erroneous) flows from the Mortgages Decree 1972's promulgation, which was to have made the mortgage the only applicable legal device for land security.[889] Consequently, in the past, pledgees could spend years in court (as mortgagees did), trying to enforce what was, in essence, a customary pledge, when they could simply have realized the security in line with customary law.

8.3.1.1 Enforcing the Pledge

There exist customary law rules for enforcing a pledge,[890] including the pledgee's use of the land, which self-liquidates the debt (i.e., it constitutes the repayment of the principal plus interest),[891] since the pledge is a possessory security device and thus could deny the borrower an opportunity to work on the land in order to repay the loan. This enforcement method deviates from the mechanisms available under the Model Law.[892] It can, however, be justified on the ground that the borrower would otherwise have received funds which he could use for other business options, apart from tilling the burdened land. In modern times, the pledge agreement is more likely to give the pledgor possession of the land.

8.3.1.2 Enforcing the Mortgage

The Mortgages Decree provided for the enforcement rights and obligations of the parties to a mortgage upon the default of the mortgagee.[893]

8.3.1.2.1 Possession

The possession of the mortgagor was to be exercised peaceably through an action for possession. Where the mortgagee was allowed by the court to take possession, he was liable to account for his stewardship, including maintaining the property and paying occupation rent.[894] Although this relief is, in principle, similar to possession under the Model Law,[895] it is unavailable as an extrajudicial remedy, unlike under the model law.

[889] Dankwa, (n 320)
[890] Para 3.2.4.2.4
[891] ibid
[892] Para 8.2
[893] Para 3.2.4.1.1.4
[894] The Mortgages Decree, s. 17
[895] Para 8.2.3

8.3.1.2.2 Judicial sale

The sale of mortgaged property was not simply another but the ultimate mechanism for realizing a mortgage. It was however available only pursuant to a court order.[896] Indeed, sale without reference to the court was abolished.[897] It is worth noting that sale, as a mechanism for enforcing security under the B&L Act regime, was deficient in comparison with sale under the Model Law, since it was supervised by the court, and by public auction only. This is unlike the Model Law, where sale can be extrajudicial, and can also take place by private treaty.[898] Also, other forms of disposition of the collateral, such as a lease or licence, are available under the Model Law, but not under the Pre-B&L Act regime.

8.3.1.2.3 Appointment of a Receiver/Manager

The appointment of a Receiver is yet another enforcement mechanism that was available under the Decree. The mortgagee could apply to the court for this appointment upon mortgagor default. Under Section 16 of the Decree, a receiver so appointed was invested with the court's power to take possession of and manage the property, including collecting the income and paying the expenses. Whatever its advantages over sale under the B&L Act regime, it remains unavailable to the creditor extrajudicially.

8.3.2 Enforcement under the B&L Act Framework

8.3.2.1 Overview

The enforcement mechanisms available under the B&L Act framework are grouped into judicial and extrajudicial methods, as well as the appointment of a receiver/manager, which can be done by the lender, with or without the courts.[899] This categorization may, however, be deceptive. The courts' intervention may be sought even in an extrajudicial enforcement, and *vice versa*. Either of these methods (judicial or extrajudicial enforcement) is exercisable after 30 days of notice of default to the debtor,[900] within which period the debtor can cure the default. The B&L Acts framework's enforcement mechanisms, which introduce speed and efficiency, are crucial for its success.

[896] See the Mortgages Decree, s 18.
[897] Para 3.2.4.1.1.4
[898] UNCITRAL Model Law, Art. 78 (3)
[899] Act 1052 ss. 61 (1), 74
[900] Act 1052, s 60.

8.3.2.2 Extrajudicial Enforcement

Extrajudicial enforcement begins with the Registrar's issuance of a Memorandum of No Objection (CR7)[901] where she/ he is satisfied that not only has the lender filed certain documents with the registry, but also that the borrower has received certain other papers from the lender.[902]

This CR7 and the breadth of the circumstances under which it is issued potentially bring the Collateral Registry to the very centre of disputes arising from realizations.[903] Employees in a typical web-based secured transactions registry neither interfere nor intervene in registrations, nor in the subsequent processes.[904] The UNCITRAL Model Registry Provisions, for instance, only allow a registry to reject a registration form in which no information is entered for a mandatory designated field but prohibit the further scrutiny of its content.[905] This, in other instruments, is designed to restrict the registry's liability to purely: (a) errors or omissions by Registry officers/employees and contracted third parties (operation only); (b) hardware failures; and (c) software failures. Human error arising from an officer manually entering registration or discharging data is avoidable. The requirement of a CR7 is, therefore, undesirable.

The following considers the extrajudicial mechanisms for enforcing credit agreements under the B&L Act framework.

8.3.2.2.1 Possession of Security

Possession is usually a first step towards the realization of the collateral by any of the following means: (1) the collateral's retention to satisfy the secured obligation; (2) the appointment of a receiver or manager to manage the burdened property and make some recoveries; or (3) sale by the lender himself or a receiver manager.

The right of a lender right to possession as an extrajudicial mechanism for enforcing security is provided for under the law[906] and, in the process, the lender may render the collateral

[901] The Memorandum of No Objection is an administrative mechanism designed to maintain order in the process of realization outside the court. Paragraph 20 of the Registry Rules 2012 provided for it. Under Registry Rules 2021 (under Act 1052), it can be found under paragraph 15 (2).
[902] Act 1052 s. Section 60(4)
[903] The Registry, for instance, issues the CR7 essentially on the creditor's claim, for example, that the borrower has been served with all of the relevant notices. The Registry does not (and cannot) verify this claim. Aggrieved borrowers often join them to enforce suits against creditors.
[904] See IFC Toolkit on Secured Transactions and Collateral Registries System, 2010 p.69.para 2.4
[905] See UNCITRAL Model Law, Model Registry Provisions, articles 6 (1)(a), 7(3)
[906] Act 1052 s. 63 (1)

unusable by the borrower,[907] but may not breach the peace. Notice to the borrower must always precede possession.[908] Under the regime, where a lender is potentially or actually unable to enforce a right of possession in a peaceable manner, the lender may seek police assistance with a court warrant,[909] which is issued upon an application of notice to the borrower, who can dispute the lender's claim at this stage.[910] Obstructing a lender who is taking possession with police assistance through a court warrant is an offence, punishable by a fine, or imprisonment where the obstruction is ongoing.[911] Police assistance in extrajudicial enforcement is contrary to international best practice, such as the UNCITRAL Model Law,[912] but might incentivize the registration of security interest and introduce orderliness into extrajudicial enforcement.[913]

8.3.2.2.2 Collateral Retention

Under this, the lender applies the collateral to satisfy the debt.[914] Under Act 1052, collateral may be retained by a lender who has priority in the burdened land.[915] Notices of this intention are served on all subordinate priority holders (of the burdened land) with a proposal to retire every secured amount in their security agreements.[916] Any secured party on whom such a notice is served has ten days in which to object, failing which their consent will be assumed, entitling the prior secured creditor to retain the property as proposed,[917] and thereby extinguishing any of their rights in the collateral.[918] Any objection by any secured party will lead to the sale of the collateral by the prior lender.[919] This remedy is largely in line with what the Model law provides.[920]

8.3.2.2.3 Appointment of a Receiver/Manager

The appointment of a receiver/manager to realize burdened land is provided for by Act 1052.[921] This appointment can either be by the creditor pursuant to the parties' agreement,[922] or the

[907] Ibid
[908] Ibid. s.63 (3)
[909] Ibid s.64 (1)
[910] Ibid s 64(2) and (3)
[911] Ibid s. 64(4)
[912] Article 77 of the Model Law only requires the secured creditor to send a notice of default and an intention to possess the collateral to the debtor and grantor, who should consent to, or not resist, the intended possession.
[913] Dubovec and Gullifer (n 106) 161.
[914] Act 1052 s.73
[915] Ibid s. 71
[916] Ibid s. 71 (2)
[917] Ibid s. 72 (1)
[918] Ibid s. 72 (2)
[919] Ibid s. 73 (3)
[920] UNCITRAL Model Law, Art 80
[921] Act 1054, s. 74
[922] ibid s. 74 (a)

court.[923] The essential aim is to take possession of and protect the property or sometimes to collect/manage the rent and profits derived from it. This is usually the case where it is imprudent to sell the burdened land immediately, if at all. However, this process can eventually lead to the property's sale.[924]

There is no provision for this remedy in the Model Law or Legislative Guide and, as such, its role in a reformed framework is curious. This remedy is, however, akin to the "non-administrative" receivers under English law, who are usually appointed to collect rent, and manage and dispose of property using the statutory power in the Law or Property Act 1925, under a fixed charge or mortgage (rather than a floating charge). It is, therefore, unclear whether the applicable law on this remedy should be the company law of Ghana, in which the concept is well developed. This remedy could however represent an equally effective, but less controversial, alternative to the other extrajudicial remedies in the B&L Act framework. Moreover, it is available where the enforcement is against any person or business form or entity as the grantors, unlike under company law, where only companies can access this remedy.

8.3.2.2.4 Sale of Security

Some of the following discussions also apply to sale under the courts' auspices.

The (at least attempted) sale of the security is the most common means of realizing security extrajudicially under the B&L Act framework. An extrajudicial sale can be by private contract or public auction, under the parties' agreement.[925] Sale by public auction can increase the cost of realization, making a private treaty preferable, although it is often viewed with mistrust by debtor protection advocates. Where a sale is intended, the lender must give at least seven days' notice to any interested person in the collateral, including other secured creditors.[926] Before the sale, the burdened land must be valued by an independent valuer, appointed by the lender, and his assessment will determine the minimum price for which the property will be sold.[927]

8.3.2.3 Judicial enforcement

Act 1052 provides that recourse to the court for any remedy shall be "in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I.47) or the District Court Rules (C.I. 59)."[928]

[923] Ibid s.74 (b)
[924] Ibids.74 (b) (iii)
[925] Ibid s.66(1)
[926] ibid s 67
[927] Ibid s. 66 (2)
[928] Act 1052 s.84

However, it does not clearly isolate any summary procedure for court case resolution under the framework. This is reminiscent of the failure of Act 773 to enact the reformers' original principles regarding enforcement.[929] Act 773 lacked comprehensive provisions on enforcement also. It was the Registry Rules issued under that Act that, in a legally doubtful manner, prescribed a summary procedure for the adjudication of cases under the Act.[930] It was therefore anticipated that Act 1052 would adopt a summary adjudication process, but it failed to do so.

8.3.2.4 Enforcement and Insolvency

The Ghanaian regime for the enforcement of security during the insolvency of a company that is a grantor of security is provided by the Corporate Insolvency and Restructuring Act 2020 (Act 1015), which provides for insolvent companies and other corporate bodies' administration and official winding-up, together with related matters.[931] Specifically, the law, *inter alia*, provides a legal regime for: (a) the administration of a distressed company's business, property and affairs in a manner that provides an opportunity for it to, as far as possible, continue to exist as a going concern; (b) the temporary management of the affairs, business and property of a distressed company; and (c) the temporary freezing of creditors and other claimants' rights against a distressed company.

To help to achieve these goals, the Act prohibits the enforcement of security during a company's administration, except with the court's permission.[932] However, an enforcement action begun before the administration may be concluded.[933] Although various attempts at creditor protection have been made in the law, the law's very essence, which prevents the enforcement of security at the secured creditor's preferred time (at the administration of the obligor), raises the tension between secured transactions and insolvency in relation to the protection offered to secured creditors.

It is striking that the Borrowers and Lender Act, 2020 (Act 1052) is categorical about the protection provided to a secured creditor against third parties, including administrators.[934] Act 1052 is also given precedence in the event of a conflict with any other law.[935] Indeed, it is more recent than the Insolvency legislation,[936] but fails to accommodate it, unlike the Model Law

[929] Para 4.2.1
[930] See Para 20 of Registry Rules 2012
[931] See the Long Title of Act 1015. It came into force on 30th April 2020.
[932] Act 1015, s. 30
[933] Act 1015, s. 38
[934] Act 1052, s. 14
[935] Act 1052, s. 86
[936] Act 1052 came into force on 29/12/2020, eight months after the Insolvency legislation.

which spells out (in the secured transactions law itself) the preferred relationship between these oft-conflicting goals.[937] The chance that enforcement during administration will be permitted in accordance with the B&L Act is very real. Nonetheless, it remains to be seen how the courts will resolve this conflict.

8.4 Empirical Findings

To investigate the enforcement of land security under the B&L Act framework, this thesis draws on the perceptions of key stakeholders in the Ghanaian reform, expressed during interviews.[938] The salient views on enforcement, as a major theme of this study, are reported in the following as sub-themes. They relate specifically to land (the focus of the empirical work), but could also apply to other assets.

8.4.1 Relative speed, simplicity and efficiency in enforcement through extrajudicial methods under the B&L Act framework

All of the interviewees agreed on the available mechanisms' progressive nature for enforcing land security under the B&L Act framework. They commended the extrajudicial methods designed for the enforcement of land security for being simple and speedy, stating that, where a default occurs, they simply need to "trigger the CR7 and then follow the process; and if the customer does not come with any resistance, you can easily repossess the property and then there you go".[939]

The interviewees, including the judges, generally[940] perceived and praised the extrajudicial mechanisms of enforcement available as simply, speedy and efficient:

> "the enforcement regime under the Borrowers and Lenders Act is very efficient. I think it is the best we can have. And we Judges in particular, are happy with it, because the courts are over-crowded. So, the time has come where Ghana must rely on administrative enforcement… So now you can realize the security, you can even possess, take it in lieu of the balance left on the loan and all that without necessarily

[937] UNCITRAL Model Law, Article 35.
[938] Para 2.1
[939] GB131
[940] The only interviewee who was indifferent about this was the participant from the Land Registry.

going to the court and I think this is a very efficient way of going about it, taking into account how borrowers are in Ghana".[941]

The interviewees contrasted this efficiency with the enforcement of land security under the pre-B&L Act regime, which they unanimously perceived to be weak, slow and inefficient:

> "banks actually were exposed to several problems in terms of realisation of their security or collateral when default occur. Challenges in how they could realise this collateral made lending riskier because it comes to the point whereby the collateral which is securing a facility cannot be easily realised, and has to pass through a lot of litigation, ending up sometimes making the bank lose the quality of the credit".[942]

Extrajudicial enforcement was however criticized due to the potential for abuse:

> "it is not a better position in my view because of the kind of system that we live in; and there have been instances where some banks have come to court to state that the mortgagor owes the bank 10million and it has turned out that it was only, let's say, 5million or so. So, if they don't have to come to court to prove anything, then you can imagine: it's really dangerous".[943]

However, this view was not widespread.

8.4.2 Inefficiency of enforcements through the courts

The interviewees felt frustrated by the court system's crippling inefficienty, which bedevils the enforcement of collateral under both the Pre-B&L Act regime and the B&L Act framework. Although judicial enforcement under the B&L Act framework was seen as slightly better compared with under the Pre-B&L Act regime (theoretically), in practice, the challenges are the same for both frameworks.

With respect to their experiences prior to the B&L Act framework, the interviewees felt disillusioned by the slow pace at which court cases were adjudicated. Court holidays and adjournments due to non-attendance by witnesses and lawyers always cause delays:[944] "when

[941] GA4, GB162, GB191, GB201
[942] GB201
[943] GC1. This participant was a lawyer. Few others held this view.
[944] GB91

you go through the normal court system it can take you about 5-6 years for just one case of enforcement".[945]

For the interviewees, the most frustrating aspect related to the courts was the judges' indifference or insensitivity towards the commercial realities that lenders face as the custodians of the depositors' funds. The judges were perceived as tending to deny lenders the fruit of their labour, as judgments were obtained only after an arduous journey through the courts:

> "I always say that it's easier to obtain judgment in the court than to enforce it. Where you have courts always granting Stay of Execution to pay by instalment, selling the mortgage property is impossible…".[946]

The experience of judicial enforcement under the B&L Act framework was somewhat similar to that under the Pre-B&L Act regime. The interviewees related numerous occasions where simple processes had been delayed, such as obtaining a court warrant to enable the police to assist with the possession of burdened land. The lender participants explained:

> "without the court order, the police are not going to go in there. So that is where another problem comes in because you will need to go to court to start the process. Now you serve the customer who will bring all sorts of false allegations to frustrate you. And the matter gets stuck in the court".[947]

The participants expressed their disappointment with Act 1052 due to its failure to provide effective guidance on how to access the courts to achieve expedition. No specific summary procedure is identified. The participants generally agreed that this undermines expedition, which lies at the heart of the B&L Act framework:

> "Under the old Borrowers and Lenders Act, there was this problem as to how a person should access the courts. You know under the rules of court, the primary mode of accessing court is by the issuance of writ of summons. Now there was the thought that it hindered the quick disposal of cases and so one may come by an application, particularly under the Borrowers and Lenders Act (where a borrower has failed to

[945] GB132
[946] GB71
[947] GB53

honor his obligations under an agreement and there is the need to realize the security), but somehow it is not very clear now in the new law".[948]

The general scepticism regarding the courts' efficiency was seen to find expression in the borrowers' attitudes towards debts and lenders in general. It was reported that defaulting borrowers often taunt creditors who attempt to enforce security: "Some will tell you 'Take me to court.' They know that when you take them to court, you spend years to get judgement. You start execution, that is when they will come to you for settlement".[949]

8.4.3 Susceptibility of extrajudicial enforcement to overreaching

All of the interviewees expressed grave concerns about the dwindling efficacy of the available extrajudicial enforcement mechanisms, regretting that "despite the beautiful sections and provisions of the Act",[950] creditors are hardly able to complete an extrajudicial enforcement process without judicial interference:

> "What happens is that the borrower will raise all sorts of issues and you find yourself back to the situation as if you were enforcing under the Mortgages Act where you would have had a court order necessary for realization".[951]

> "Borrowers always run to the court and then drag the lenders back to court when they (lenders) are trying to avoid the court process".[952]

Most of the interviewees confirmed that the threatened loss of borrowers' homes/property motivates this desperation and that, at this stage "sometimes, it becomes emotional and rough".[953]

It was also perceived that borrowers use these overreaching tactics to force a renegotiation of the debt, and also to buy time to settle their indebtedness. This is:

> "because, if they let the process of the CR7 go ahead, it is faster. But sometimes the person just wants to buy time and they know our court system takes a long time."[954]

[948] GA3
[949] GB101
[950] GB101
[951] GB11
[952] GE2
[953] GB114
[954] GB132

The interviewees perceived the lawyers and judges' attitudes as facilitating this phenomenon. The judges were perceived as willing and indulgent regarding these efforts to frustrate extrajudicial enforcement under the reform framework, due to a limited appreciation of the reform, or the fact that they are too steeped in the pre-B&L Act legal culture, that they struggle to relinquish:

> "I was dealing with a case; where a judge asked me: 'where is the evidence'? He gave me the law; I would quote back and forth; about six adjournments; I did everything. At the end of it, he said it seems that I have the right, but he as a judge, is not comfortable with the law. A creditor cannot just sit in his or her office, acquire rights and then take over the property of a debtor without a judicial pronouncement".[955]

Lawyers were also perceived as inciting this overreaching phenomenon. Some of the lenders[956] alleged that the lawyers sometimes take this frustrating recourse to the court without instructions from their clients, sometimes even in bizarre circumstances, to earn legal fees:

> "Now in my 11 years of Bar experience; what I noticed is that Lawyers who charge per appearance in court, drag issues. So, if you are unfortunate to meet a lawyer like that, know that you are in court forever. In fact, I had one lawyer like that in one of the cases. Because every day he comes to court he charges, he came up with all kinds of excuses and applications, and the client did not know anything".[957]

Concerns about these debtors and grantors' overreaching practices were seen as instigating the increasing creditor recourse to the inefficient courts, in the first instance.[958] The view that borrowers would drag enforcing creditors back to the courts even after the latter had made some progress with extrajudicial enforcement, was thought to be making secured creditors, themselves, enforce security through the courts, instead of through their preferred extrajudicial rout. The participants, thus, perceived a steady slide back into the pre-B&L Act regime with its inefficiencies, which offers no land security enforcement outside the courts:

[955] GB101
[956] The majority of the lender interviewees insinuated this in diverse ways during interviews.
[957] GG21
[958] This view was shared by all of the interviewees, even with those (with regret) who were judges.

> "So, we wanted to realize, we got the No Objection and then the customer started putting impediments in our way; today it is this story, tomorrow it is that story. So, we realized that if we had gone to court, it would have been better for us. So now the lawyers we use, even if it is the Collateral Registry, they will just start it from court and then say that we are realizing under the Collateral Registry, and we have the No Objection. I just signed a couple of affidavits yesterday for them to file using the No Objection and all that and the parties are aware. Although we have had the Borrowers and Lenders Act since 2007 or so, change is difficult. Debtors also know they can also find refuge in the courts. How? They know one, they can dispute the quantum of the debt just to buy time".[959]

8.5 Assessment of the findings

Of the many aspects of the Ghanaian reform to include land in a PPSA framework of modern secured transactions, enforcement received the most views, reviews, and commentary from the participants in the broader study, because the reform promised a speedy, simple security interest enforcement process.[960] Having experienced the Pre-B&L Act framework for the enforcement of security interests over land for so many years, with all of its associated frustrations and challenges, the participants were eager to share their experiences.

The interviewees stated that they had faced enormous challenges in enforcing security over land under the Pre-B&L Act regime, due to the absence of extrajudicial means of enforcing security, and the courts' inefficiency. The delays in enforcement were mainly caused by the huge volumes of cases brought before the courts and poor case management. Also, the lack of specialized courts meant that nearly all cases were brought before the same judges, who were likewise insufficiently specialized.[961] Debtors and lawyers' penchant for filing frivolous applications in order to delay cases was a further problem, so a simple application for the possession of burdened land could take years to pass through the courts.

The B&L Act framework introduced significant changes to Ghana's general credit environment, applying to the enforcement of security over land a range of extrajudicial

[959] GB71
[960] This was one of the cardinal objectives for including land in the Ghanaian reform as envisioned by the original reformers.
[961] The Commercial Court, a division of the High Court, was established in 2005. The scope of its jurisdiction is so wide that it includes any claim arising from trade and commerce.

mechanisms usually associated with security interests in movable assets. To the interviewees, the B&L Act architecture, at least from the reformers' perspective, aims to make recourse to the courts for any relief, including the enforcement of security over land, the exception rather than the norm.[962]

There is evidence, however, that these mechanisms' efficacy is being increasingly undermined. They are regularly overreached by defaulting debtors, who find every means possible to apply to the court in almost every enforcement case.[963] Moreover, the secured creditors themselves, knowing that defaulting debtors will, at some point, thwart their extrajudicial enforcement efforts, now start enforcement actions in the courts themselves, instead of using the available extrajudicial mechanisms.[964] This virtual overreaching of extrajudicial enforcement was generally understood to emanate largely from the failure to enact the reformers' ideals fully,[965] and the legal fraternity's addiction to the prior legal culture.

It is noteworthy that the various enforcement challenges identified under the B&L Act framework are dissimilar to those under the Pre-B&L Act regime. The stakeholders' disappointment and frustration with enforcement under the B&L Act framework related to that framework's promise and potential,[966] compared with their actual experiences thereunder. They doubtlessly emphasized the superiority of the enforcement of the B&L Act framework over the Pre-B&L Act regime, as the findings of this current study confirm.

8.6 Conclusion

This chapter reported the stakeholders' experiences and attitudes regarding the enforcement of land security under the B&L Act framework based on both a qualitative study and a doctrinal consideration. It emphasized the importance of the secured creditor's ability effectively and swiftly to resort to the enforcement of security interest over land in Ghana, establishing that the need for this is not simply a corollary of property or contract law and jurisprudence, but has

[962] Para 4.1.3.5. The reform introduced effective extrajudicial enforcement mechanisms, including: (1) the possession of burdened land; (2) the retention of collateral; (3) the sale of burdened; and (4) the appointment of a receiver/manager for burdened land, all without the need for a court order.
[963] Para 8.4.3
[964] Ibid.
[965] Para 4.1.3.5
[966] Para 4.1.3.5

real ramifications (supported by empirical evidence) for access to credit by businesses and the overall economy.

The framework for enforcement under some of the best practices in modern secured transactions has been examined, highlighting both the judicial and extrajudicial methods available. This chapter demonstrated that the B&L Act framework's efficiency, compared to that of its counterpart, emerges mainly in its provision for lenders' self-help rights, which makes enforcement speedy and effective, thus enhancing access to credit. These rights were unavailable under the Pre-B&L Act framework.[967] Clearly, generally, costs and time are saved when realizations do not have to go to court.

Extrajudicial enforcement is however increasingly overreached by the frequent, frivolous seizure of the courts' jurisdiction during extrajudicial enforcement cases. The courts' tendency to assume jurisdiction in many inappropriate cases has emboldened defaulting debtors and their lawyers, thus making extrajudicial enforcement rarely possible. Secured creditors are sadly joining the fray, perceiving that, as they will end up in court anyway, they might as well begin enforcement in the courts themselves. This is leading to a rapid slide back into the Pre-B&L Act regime, from which comprehensive extrajudicial enforcement methods were absent, with negative consequences for access to and the cost of credit.

It is evident therefore that, the reform, which, in terms of legal rules, applied efficient methods of enforcement under the PPSAs to land security in Ghana, requires modification in order to work optimally. To stem this overreaching trend, this thesis makes some suggestions.[968]

[967] See the Mortgages Act 1972, s 18. The enforcement of a mortgage could only be achieved through the courts before 2008.
[968] See Chapter 10

Chapter IX

Public Participation and the Reform to include Land in a PPSA framework in Ghana

9.0 Introduction

This chapter considers citizen participation in the reform to include land in Ghana's PPSA framework of secured transactions law. It examines stakeholders' involvement in the various stages of the reform process, including its implementation. The chapter provides insights into how far the reform's successes and challenges are attributable to the public's participation in and awareness of the reform. These considerations, while not entirely peculiar to the reform to include land in a PPSA secured transactions framework, assume special significance given the complexity of the conceptual and practicable issues that the inclusion of land within a PPSA framework (which is an adaptation of a legal transplant) engenders, and the need not only to explain such a reform but also to engage the public and obtain their support, using appropriate awareness-raising mechanisms. This chapter therefore positions its discussions within the wider literature on public participation (with emphasis for legal transplantation), demonstrating the challenges associated with embarking on a reform of this nature, given that public involvement and sensitization, as well as stakeholder education and buy-in, can in themselves, potentially disrupt the reform agenda, if they are in any way deficient. Public engagement is thus essential when undertaking legal transplantation to ensure the best outcome,[969] particularly where the reform is substantial, requiring, *inter alia*, the dislodgement of an entrenched legal culture.

Using the interviewee data and documentary evidence obtained from the stakeholders of the reform and other sources, the chapter analyses public participation in the reform and how their participation influences the stakeholders' understanding and experiences of it. This chapter, firstly, contends that the reform at issue was primarily enacted through a bureaucratic approach to policy-making,[970] which was responsible for the many of the implementation-related challenges that arose.[971] Public participation in the reform at the

[969] Para 1.2.2.1
[970] Para 9.1.1.2
[971] Para 9.4

emergence stage of the law[972] was weak, if not non-existent, but the resulting deficiencies in certain aspects of the policy concept were neutralized by technical support from development partners.

Recall that the two phases of the reform are identifiable by Act 773 and Act 1052.[973] The reform was conceived by the Bank of Ghana in collaboration with the Ministry of Finance. Although the reform was mainly driven by economic factors, there were limited consultations (on Act 773 in particular) with the stakeholders. This absence of effective public participation during the early stage of the reform impinged upon its successful formulation, including the omission from the law of many of the standard secured transactions legislation's features.[974] Nevertheless, the negative effects of this limited public participation were attenuated by the IFC's Access to Finance and Investment Climate Advisory team's strong support,[975] leading to the passage of a new, improved law (Act 1052).[976] However, the challenges arising from the inclusion of land in a PPSA framework meant that these interventions proved insufficient.

This chapter, secondly, argues that the formulation and implementation stages of the two statutes that enacted the reform under consideration, Act 773 and Act 1056, were fraught with public participation challenges, which were partly responsible for the existing law's deficiencies and the challenges associated with the reform's implementation.[977] The history of the reform and the amount of public engagement with it more generally offer an insight into the causes of these challenges. Public participation was completely absent from Act 773, which the bureaucrats and experts dominated during the formulation stage,[978] with a few, inadequate efforts at awareness-raising during its implementation phase.[979]

With respect to Act 1052, while public participation during the 'outside-parliament' formulation[980] and implementation phases were substantially better in comparison, that

[972] By 'law' or the B&L Act framework (unless the context requires otherwise) the author intends the combined substance of both Act 773 and Act 1052. See Para 4.1.1
[973] Paras 4.2, 4.3
[974] Dubovec and Gullifer (n 106); Marek Dubovec and Benjamin Osei-Tutu, 'Reforming Secured Transactions Law in Africa: The First African Collateral Registry in Ghana' (2013) 45 Uniform Commercial Code Law Journal 77.
[975] The technical assistance from the WBG to the Ghanaian secured transactions reform occurred later, when Act 773 had already been passed with many deficiencies in the law. It was during the implementation stage that the IFC's assistance, whose advice influenced the Registry Rules as far as possible, was sought.
[976] Para 4.3
[977] Para 4.4.1
[978] Para 9.3.1.2
[979] Para 9.3.1.3
[980] Para 9.3.1.2.1

during the 'inside-parliament' formulation[981] was, however, deficient and detrimental, which impeded parliament from identifying and rectifying the policy tensions in the final bill (as sent by the professional drafters without some of the essential ingredients intended by the original reformers).

Despite the efforts made at awareness-raising, stakeholder education and training under Act 773 were unsatisfactory, and remain a formidable challenge to the future successful implementation of Act 1052 and the reform.

This chapter is organized as follows. Section 9.1 provides a contextual explanation of public participation in policy-making, and law reform in particular. Section 9.2 discusses the purposes, methods of fostering and tools for increasing public participation. Special actors in the policy-making space, such as civil society and the law reform agencies, are also discussed. In Section 9.3, the focus is on the law reform process, highlighting the role of public participation in the various stages. It clarifies the concepts and standards related to the statutes enacting the reform to include land in a PPSA framework in Ghana. Section 9.4 reports the empirical findings, comprising the stakeholders' perspectives on public participation in the reform. Section 9.5 assesses these empirical findings, and Section 9.6 concludes the chapter.

9.1 Understanding Public Participation

This section considers public participation in the general area of public policy, and the specific discipline of law reform. It considers the nature of the concept together with its justifications and importance for public policy-making, including the reform of the law. It argues that the amount of public engagement in Ghana's secured transactions law reform was inadequate.

9.1.1 Public policy and public participation

9.1.1.1 Understanding

Fundamentally, there exists a strong relationship between perceptions of a reform idea and the participation of the group for whom the reform is designed. The success of a reform relies substantially on the extent to which the stakeholders understand and accept the change.[982] Understanding individuals' perceptions of a reform is therefore critical to its successful

[981] Para 9.3.1.2.2
[982] Xiaowan Zhang, 'Stakeholders' test perceptions on test reform' (2021) 70 Studies in Educational Evaluation.

implementation.[983] This helps to identify potential obstacles to change,[984] and assists the change agents (principally those responsible for implementing change initiatives, such as regulators) to devise strategies for fostering acceptance of a change initiative, and so ultimately determine its success or failure.[985]

Gordon defined perception as an active process "by which each person senses reality and comes to a particular understanding," as "different people have different, even contradictory, views and understandings of the same event or person".[986] Thus, it is vital to recognize and manage people's perceptions about phenomena, including reforms.

9.1.1.2 Citizen participation versus bureaucratic policy-making

Citizens' participation in policy-making is the foundation of good governance.[987] Public support determines policies' success, which largely depend on not only the depth and breadth of public consultation, but also the perceptions of those engaged.[988] This approach opposes the sole reliance on bureaucrats and elected officials for public policy formulation and implementation.

Bureaucratic or official policy-making has, at times, been preferred (especially in the past) because officials and experts often view problems as too complex for the public to understand, and that they require the expertise and rationalism of bureaucrats.[989] It is also argued that citizen participation is time-consuming, expensive, complicated, and emotionally draining,[990] especially as experts and bureaucrats perceive the citizens as uninterested,[991] and as pursuing self-interest rather than the public interest in any policy discourse.[992]

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[983] Anthony J Dibella, 'Critical perceptions of organisational change' (2007) 7(3-4) Journal of Change Management 231.
[984] Johnny Jermias, 'Cognitive dissonance and resistance to change: The influence of commitment confirmation and feedback on judgment usefulness of accounting systems' (2001) 26 Accounting Organizations and Society 141.
[985] Nerina Jimmieson, Katherine M White and Leah Zajdlewicz, 'Psychosocial predictors of intentions to engage in change supportive behaviors in an organizational context' (2009) 9(3) Journal of Change Management 233.
[986] Judith R Gordon, *A diagnostic approach to organizational behavior* (Allyn and Bacon 1993).
[987] Hazel M McFerson (2009) 'Measuring African governance: by attributes or by results?' (2009) 25(2) Journal of Developing Societies 253.
[988] David Vogel, *National styles of regulation: Environmental policy in Great Britain and the United States* (Cornell University Press 1986).
[989] Daniel Bell, 1971. Technocracy and Politics. Survey 16; Frank Fischer, *Evaluating Public Policy*. Nelson-Hall Publishers 1995) 12, 190; David Mathews, *Politics for People: Finding a Responsible Public Voice* (University of Illinois Press 1994) 72.
[990] James L Creighton, *The Public Involvement Manual* (Abt Books 1981) 13.
[991] Mathews n (989).
[992] Fischer (n 989) 98.

Citizen participation in policy-making, which prioritizes the citizens' active consultation and direct involvement in the policy process,[993] is advocated based on the principal argument that a reliance on experts and bureaucrats in policy decision-making conflicts with democratic principles.[994] It is contended that experts' dominant role in policy-making leads to the citizens' apathy regarding public affairs and democracy.[995]

Despite the above benefits of public participation in the policy process, in Ghana and indeed much of Africa, especially in the past, instead of viewing the public as a potential source of policy ideas, the bureaucrats and politicians saw them as a source of problems, to which the bureaucracy exists to provide solutions.[996] There has, however, been a gradual shift away from the elite and bureaucratic approaches that dominated prior to the 1990s to a more participatory approach in the public policy-making process in Ghana[997] and elsewhere in Africa.[998]

New public management theories that "roll back the state",[999] together with thoughts from social movement theories advocating civic engagement at the expense of elitist policy-making,[1000] and influences from the liberal democratic institutions,[1001] have drawn attention to public participation in the policy process worldwide. Modernization and socioeconomic progress have also caused a "decline in popular deference to elites".[1002] Regarding legal transplantation as well, the need to engage the public in order to achieve the desired objectives is emphasized in the literature.[1003]

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[993] Jon Pierre and B Guy Peters, *Governance, Politics and the state* (Macmillan 2000).
[994] Robert B Reich (ed), *The Power of Public Ideas* (Ballinger Publishing Company 1988).
[995] Anne Larason Schneider and Helen Ingram, *Policy Design for Democracy* (University Press of Kansas 1997).
[996] Calestous Juma and Norman Clark, 'Policy research in sub-Saharan Africa: An Exploration' (1995 15(2) Public Administration and Development 121.
[997] Micheal W Kpessa, 'The politics of public policy in Ghana: From closed circuit bureaucrats to citizenry engagement' (2011) 27(1) Journal of developing societies 29.
[998] EE Osaghae, 'The role of civil society in consolidating democracy: An African comparative perspective' (1997) 27(1) African Insight 15.
[999] Jon Pierre, 'Public consultation and citizen participation: Dilemmas of policy advice' in B Guy Peters and Donald J Savoie (eds), *Taking Stock: Assessing Public Sector Reforms* (McGill-Queen's University Press 1998) 137;
[1000] SD Phillips, 'Social movements in Canadian politics: Past their apex?' in James Bickerton and Alain-G Gagnon (eds), *Canadian politics* (Broadview Press 1999) 371.
[1001] Terrance Carroll and Barbara Wake Carroll, 'The rapid emergence of civil society in Botswana' (2004) 42(3) Commonwealth and Comparative Politics 333.
[1002] Barbara Wake Carroll and Terrance Carroll, 'Civic networks, legitimacy and the policy process. Governance' (1999) 12(1) International Journal of Policy and Administration 18.
[1003] Para 1.2.2.2; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The transplant effect' (2003) 51 American Journal of Comparative Law 163.

9.1.2 Law reform and public participation

Although the term 'participation' lacks an agreed definition in the law reform literature, it is seen as any communication between the citizenry and law-making bodies that aims to present information, views or concerns about law reform issues or policy. It is both a means to an end and an end in itself.[1004] Public participation in law reform can affect the law's quality, improve the support for it and increase the likelihood that the reform will work well in practice.[1005]

It is additionally maintained that, even in the absence of any established evidence that public participation results in better or more just laws, the strongest argument for public participation in law-making should be made on democratic grounds: i.e., in view of the benefits or virtue associated with enabling the citizens to participate robustly in issues and outcomes that affect them.[1006]

In the secured transactions law reform literature, the terms "sensitization" and "awareness-raising" are used in association with "citizen participation".[1007] Clearly, however, whereas the former emphasizes the citizens' engagement with a policy or reform prior to its implementation, the latter appears to focus more on information-provision or educational activities during the policy or reform's implementation. This does not mean, however, that attention is not paid to pre- and post-policy implementation activities in citizen engagement under both concepts. Indeed, the academic literature focuses more on stakeholder involvement from the outset, rather than ex-post education.[1008]

9.2 Engaging in Public Participation

This following two sections provide a benchmark against which the efforts at public engagement in the Ghanaian reform may be assessed.

[1004] Natalina Nheu, *By the people, for the people? Community participation in law reform*. Law and Justice Foundation (Vol 6), 4.
[1005] Brian Opeskin, Engaging the public - community participation in the genetic information inquiry (2002) 80 Reform; Patrick Bishop and Glyn Davis, 'Mapping public participation in policy choices' (2002) 61(1) Australian journal of public administration 14.
[1006] Nheu (n 1004) 14.
[1007] World Bank (n 4)
[1008] A Abad, D Rosario III and G Santos, 'Banking the Unbanked: An Examination of the Personal Property Security Act of the Philippines' in Louise Gullifer and Dora Neo (eds), *Secured Transactions Law in Asia: Principles, Perspectives and Reform* (Hart Publishing 2021) <http://dx.doi.org/10.5040/9781509926527.ch-010> 31 August 2022.

9.2.1 Participation Strategies

Various consultative instruments, including "advisory committees," "focus groups," "sequential consultations" and "consensus conferences", have been devised to complement the more popular, traditional mechanisms for promoting citizen involvement in policy-making,[1009] including group forums, task force commissions, neighbourhood meetings, internet chats, submissions and workshops, public engagement tours, public forums, town hall meetings, radio and television discussions, structured education and training programmes in schools, etc.

Other public participation formats and tools include both static and travelling exhibitions and displays, and printed materials, such as brochures, billboards, cartoons, comics, pamphlets, posters, and resource books, as well as audiovisual resources, for example, pre-recorded cassettes, videos, websites, email discussion lists and blogs.

9.2.2 Civil Society and Public Participation

The instruments for public consultation and the participatory processes identified above bring civil society's role to the fore. Policy-makers, indeed, often go beyond normal stakeholders, and invite the general public to express their views on various policy issues.[1010]

9.2.3 Law Reform Agency

A Law Reform Agency (LRA), Law Reform Commission, Law Reform Committee, Law Commission, or Law Review Committee, is widely used for law reform in the majority of countries.[1011]

[1009] Éric Montpetit, Public consultations in policy network environments: The case of assisted reproductive technology policy in Canada (2003) 29(1) Canadian Public Policy/Analyse de Politiques 96; Thomas C Beierle, 'Using Social Goals to Evaluate Public Participation in Environmental Decisions' (1999) 16(3/4) Policy Studies Review Policy Studies Review 75; Therese Leroux, Marie Hirle and Louis-Nicolas Fortin, 'An Overview of Public Consultation Mechanisms Developed to Address the Ethical and Social Issues Raised by Biotechnology' (1998) 21 Journal of Consumer Policy 445; Lawrence C Walters, James Aydelotte and Jessica Miller, 'Putting More Public in Policy Analysis' (2000) 60(4) Public Administration Review 349.

[1010] Michelle V Esau, 'Contextualizing social capital, citizen participation and poverty through an examination of the ward committee system in Bonteheuwel in the Western Cape, South Africa' (2008) 24(3) Journal of Developing Societies 355. The World Bank, for example, insists on the citizens' involvement in the policy-making process when funding projects in developing countries, and uses civil society organizations to generate feedback, as well as measure efficiency, transparency and accountability.

[1011] Especially Commonwealth countries. Michael Sayers, 'Small States and Law Reform' (2008) 34(1) Commonwealth Law Bulletin 129.

9.2.3.1 Usefulness

The use of this reform mechanism affords the law-making process expertise, independence, continuity, focus and public participation. The LRAs' independence stems from the fact that they usually comprise persons with experience and expertise in different areas of the law, who are normally abreast of legal developments, and can easily identify areas that are in need of reform, in order to address society's needs.

Lord Gardiner, the Lord Chancellor, during the Second Reading in Parliament of the statute that would establish the two LRAs for England/Wales and Scotland in 1965, summarized the benefit of having commissioners and staff focused on improving the law as follows:

'It may be your Lordships' experience that things in life do not get done unless it is somebody's job to do them. It has never been anybody's job in England, who could do it, to see that our law is in good working order and kept up-to-date'.[1012]

9.2.3.2 Challenges

Although LRAs are an effective law-making tool, developing countries, in particular, face challenges with their mandate, which undermine their effectiveness, including with respect to proposing legislation and how public participation is included in law reform. A key challenge here is the resource constraints and funding limitations, which means that, particularly in small states, LRAs have had to rely on irregular donor funding.[1013] Even where funds are available, moreover, suspicions about the LRAs' independence have been aroused linked to possible undue influence being exerted on them to prosecute a certain kind of, or donor-dictated, law reform agenda. The Law Reform Commission in Ghana could not have ensured a better quality of the reform at issue (if it were in charge), because it is largely inactive in the law-making sphere, owing to underfunding.

9.3 Public Participation in Law Reform

This section explains Ghana's law-making process, illustrating when, how and where public participation in the process that led to the enactment of the law reform in issue was, or ought to have been, undertaken.

[1012] Ibid 129.
[1013] Ibid 132.

9.3.1 Stages of the law-making process

Just as public policy-making involves different stages, which are iterative[1014] and enable policy ideas to be tested, rethought and readjusted,[1015] the law reform process also consists of four main stages in which public participation is crucial: namely, emergence, formulation, implementation and review.[1016] The processes of these stages are fluid and sometimes chaotic, with different institutions involved.[1017]

9.3.1.1 Emergence stage

The emergence stage depicts the period and processes leading to an idea's successful emergence onto the legislative agenda, before it becomes a legislative proposal. The idea could be drawn from a political party manifesto or an election promise. Ministers working with the bureaucracy could also propose a reform for consideration through the reform process. This was how the reform to include land in Ghana's PPSA secured transactions framework was originally conceived.[1018]

Secured transactions law reform emerged onto many countries' legislative agendas recently for economic reasons, including the recognition of the correlation between such reforms and increased access to credit. Also, countries that have reformed their secured transactions law tend to rank highly in the World Bank's Doing Business rankings.[1019] The World Bank Group (WBG) sometimes also make such reforms a condition for issuing loans to developing countries.[1020]

Overall, the successful emergence of issues onto the legislative agenda is determined by a combination of the 'right issues', 'right time' and 'right source'.[1021] Usually, a set of influences or drivers of a reform, such as economic forces, media attention, opinion polls, and international pressure, *inter alia*, act together to nudge the government towards a particular reform path.

[1014] Nheu (n 1004) 21.
[1015] Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian policy handbook: A practical guide to the policy-making process* (3rd edn, Allen & Unwin 2004) 131.
[1016] Ross Cranston, *Law, Government and Public Policy* (OUP 1987).
[1017] Althaus and others (1015).
[1018] Paras 4.4.3.1; 9.5
[1019] Gullifer and Akseli (n 20)513, The World Bank Group has now discontinued business rankings.
[1020] Gullifer and Akseli (n 20)
[1021] Nheu (n 1004).

9.3.1.2 Formulation

Formulation, as a stage in the law reform process, is where and when an issue becomes a legislative proposal, leading to its enactment by parliament. It spans the emergence of the issue onto the legislative agenda to its enactment/failure in cabinet.

In the case of secured transactions reforms, the formulation stage typically begins after the reforming country, either alone or with the help of an international expert such as the WBG, performs a diagnostic assessment of its legal, economic, social and institutional environment to determine the reform's extent and nature. It then designs and implements a secured transactions reform project. The UNCTRAL Legislative Guide on Secured Transactions cautions that states should carefully consider the legal environment before rolling out a reform.[1022]

Workshops for stakeholders are held during this stage, for various purposes.[1023] The preparation of a draft secured transactions law is a technical assignment that is usually undertaken by experts working with local counterparts.[1024] All forms of public participation are encouraged to ensure, *inter alia*, that the law reflects the local conditions.[1025] In the Ghanaian law making-process, for instance, the formulation process consists of two main stages: (1) the outside-parliamentary, and (2) inside-parliament formulations.

9.3.1.2.1 Outside-parliament

The outside-parliament formulation entails the processes and activities after the legislative idea emerges until the legislative proposal's submission to parliament. It involves the government departments and agencies framing the legislative proposal for the cabinet's consideration. In Ghana, the proposal is submitted in the form of a Cabinet Memorandum, which includes background information, the necessity of addressing the issue, and the financial and policy implications. Extensive stakeholder or public consultation may be required before the memorandum is submitted to the cabinet. Due to time considerations, the policy ideas may also be transformed into a draft bill (by an in-house counsel, or the Attorney General's Department's drafting division) by the government's sponsoring agency. Further

[1022] See Paragraph E (1) under 'Introduction' of the Guide.
[1023] The purposes of these workshops include to equip the stakeholders with a better understanding of the reform and its benefits in the financial sector, and share the experiences of other countries that have undertaken a reform in this area in order to generate support for it.
[1024] For this exercise, the use of models and Model Law, such as the UNCITRAL Model Law on Secured Transactions, the Canadian or New Zealand PPSAs, are often helpful.
[1025] This is a crucial for effect legal transplantation. See Para 1.2.2

public consultation about the reform may be made with regard to this draft bill, which may also be submitted to the cabinet for consideration.

The Cabinet Memorandum (which may attach any draft bills) goes before the cabinet for a decision and policy approval. The cabinet may, however, recommend further consultations on the proposal prior to its final consideration and approval. After approval, the relevant Ministry, liaising with the sponsoring agency, prepares a set of drafting instructions for the Attorney General's Department for a draft Bill to be prepared.

The final Bill, prepared by the Legislative Drafters in the Attorney General's Department, is then sent back to the cabinet for final approval and submission to parliament by the appropriate Minister. (Extensive) public participation should occur during this stage.

9.3.1.2.2 Inside-parliament

The parliamentary law-making process is governed by rules (parliamentary standing orders). Bills pass through four main stages in Ghana's parliament, namely: First Reading, Second Reading, Consideration Stage, and Third Reading. Acts 773 and 1053 followed this procedure.[1026]

The various reading stages in parliament are followed in Ghana, as in the UK Parliament and other parliaments in most common law jurisdictions. The public may be invited to offer input to the Bill by the relevant parliamentary committee, after it has been referred during the First Reading stage. Apart from through their MPs, the public has limited participation in the other stages of the process.

9.3.1.3 Implementation

The implementation stage begins after the reform proposal becomes law or official policy. Of the many actions that may be required during this stage, resources and information communication or education are crucial, and their absence may undermine the reform itself. The implementation is usually the executive's responsibility through the bureaucracy and government agencies. The effective planning of every implementation stage is vital.

During the implementation process, problems with the law may be identified, analysed, then resolved. In the implementation process, other problems may also surface, so it is iterative.[1027] Public participation during the implementation may take different forms.

[1026] Para 9.5.2
[1027] Althaus and others (n 1015) 128.

Stakeholder reference groups or other advisory bodies may monitor and feedback on the legislation's operation.

Nevertheless, the most important forms of citizen engagement during law reform implementation are public education and awareness-raising. The latter seeks to inform and educate people in order to influence their attitudes, behaviour and beliefs regarding a defined purpose or goal.[1028] It concerns "social change" marketing, which refers to the practice of communicating or selling a 'good idea' to the community, which may prove challenging.[1029]

In a secured transactions law reform, awareness-raising is essential for its effective implementation. It is usually coupled with training for the relevant stakeholders about the reform.[1030] The need for post-enactment education or awareness-raising is emphasized by the UNCITRAL Legislative Guide for Secured Transactions.[1031]

Awareness-raising activities primarily target groups like borrowers, lenders, and general stakeholders, as well as the public, using instruments like the radio, television and mass media. Indeed, different stakeholders will be most effectively reached by specific means.

The training of stakeholders, such as lenders, registry staff, regulators and judges, also focuses on different aspects of the reform. Changing attitudes towards the use of movable property as collateral, lending practices using movable assets as collateral, an introduction to secured transactions law with a focus on creating security rights, perfection, priorities, enforcement as well as the use of the registry may be particularly relevant for lenders.[1032]

Training judges on a law reform is important, because they may still view transactions through the lenses of the old law. The reform's scope, the legal requirements for creating a security right, and the resolution of priority and enforcement might be emphasized during judicial training. Judges' training might be more effective when delivered by peers, rather than an international legal/registry expert, who might play a secondary role.[1033]

The regulators should be trained on the impact of the reformed laws on the financial institutions' operations, particularly with respect to the use of movable assets as collateral.

[1028] Richard Sayers, *Principles of Awareness Raising for Information Literacy: A Case Study* (UNESCO 2006) 1. It seeks to mobilize public opinion on an issue and influence political will.
[1029] Ibid.
[1030] World Bank (n 4) 97.
[1031] UNCITRAL Guide, Chapter 1: Introduction, Paragraph E (4); Gullifer and Neo (eds) (n 1008) 450
[1032] Dubovec and Gullifer (n 106) 436; Sample documents to help the parties to draft the necessary agreements and notifications are useful for training and building the capacities of the stakeholders; see.
[1033] The Guide, Chapter 1: Introduction, Paragraph E (4), p. 106

The Ghanaian reform's implementation involved similar training for key stakeholders, like bank employees and judges, even though this was deemed inadequate.[1034]

9.3.1.4 Review

The law reform process ends with the review stage, in which public participation again features. This stage involves the examination of the legislation to determine whether (a) it is operating as intended; (b) there are any unanticipated consequences; and (c) it could be improved through an amendment, or repealed.[1035] If an amendment is recommended, new emergence formulation stages are then set in motion, which reinforces the law reform's iterative nature.

9.4 Empirical Findings

9.4.1 Interviews

To gauge the stakeholders' participation in the reform to include land in a PPSA framework and how it influenced their understanding of the regime, the chapter draws on the interviews conducted.[1036] The participants' salient views on public participation in the reform are reported in the following as sub-themes.

9.4.1.1 The general public's limited knowledge about the reform, including borrowers

It was widely perceived that the general public's awareness of the reform was minimal, due to their low level of sensitization, despite the fact that this group forms the bulk of borrowers in the economy. The interviewees commented:

> "The Bank of Ghana has focused so much on the industry players forgetting the public... I don't think that education has gone out for the public, but it has gone out for the banks. If the public know, I don't think they will be putting impediments in our way; they don't".[1037]

Representatives from the borrowers' associations[1038] agreed:

[1034] Para 9.4.1.4
[1035] Nheu (n 1004) 44.
[1036] Paras 2.1; 2.1.4.3
[1037] GB71. This view was shared by almost all the participants from the 24 banks. The banks concluded, from their engagement with borrowers and the public in general, that there was insufficient public education on the reform. Lawyers, they thought, exploited this ignorance (and sometimes their own ignorance) and frustrated or delayed realization efforts, which is akin to the challenges associated with judicial sales under the prior regime.
[1038] Para 2.1.3.1.4

"this thing is not known to most of us". I think these things are interesting and I am glad they came up with some of these things. But the collateral laws are not known to many, and government should sit up. I think I have to make it known to members".[1039]

9.4.1.2 The key state agencies' limited participation and lack of buy-in

It was widely perceived that the land registry and company registry were not engaged by the reformers at the relevant stages of the process, leading to the passage of Act 773 and Act 1052. This was said to account for these institutions' lack of appreciation of the reform and the turf protection. An interviewee from the Land Title Registry stated:

"I think we met just once, about 5 years ago. That has been a long time. We discussed our challenges and what they also go through with titles over there, yeah that is all we discussed".[1040]

This absence of engagement with these state agencies was confirmed by another interviewee from the company registry, who identified the processes followed by the Bank of Ghana as partly to blame:

"…you know, Bank of Ghana too is a public institution. They hold that oath of secrecy and so sometimes they are not ready to share".[1041]

This inadequate consultation during the reform's formulation and implementation stages resulted in a limited understanding, grandstanding and turf protection among these state agencies, as well as a nonchalant attitude towards any consequences of a deficient law, including the concurrence of the reform legislation with the prior law,[1042] and any attendant inefficiencies. Participant YL summed up this nonchalance and the turf protection attitude, when asked about their view on having to register security interest over land at both the Collateral Registry and the Land Registry) simultaneously:

YL: Oh, I think it is okay because we, as an institution, we need records and they also need records for their department as well, and so it is a good thing. I don't think there is a conflict.

Interviewer: The question has been with respect to this: that in the event that a person registers at the Collateral Registry, but does not register here, and another

[1039] RT1, reechoed by RT2, RS1, RS2, RC
[1040] YL
[1041] YR
[1042] Para 7.3.3

person registers here, but does not register there (Collateral Registry), who takes priority? Is the charge still valid? By your parent law, they are supposed to register here, and by Act 773 (now Act 1052), they are to register at the Collateral Registry,) you know, and….

YL: And we also by our law, we are also registering.

Interviewer: So, if the person registers here and does not register there…that kind of thing. Which one takes precedence? That has been the problem.

YL: Oh, which one will take precedence? Why should one take precedence over the other? One shouldn't take precedence over the other. We have our law they have their own law as well. So, we are complying with our law and they are also complying with theirs. There is no conflict; for me I don't think there is a conflict. We are trying to build records; they are building records as well so where is the conflict?"[1043]

9.4.1.3 Contested views on the adequacy of certain stakeholders' participation

Another category of interviewees (labelled the green category in this thesis)[1044] confirmed the group's consultation and sensitization regarding Act 1052 in particular, but diverged regarding the sufficiency of their involvement in the reform process:

> "the banks were involved, the judges were involved and the associations[1045] were also involved. Before, there was already, as you mentioned, the initial draft and we did some sensitization programs. I think you were even in all of them at the Labadi Beach Hotel for the banks.[1046] After that we had to do one of the sensitization programs for the banks on the changes that we had made and the judges also looked at it".[1047]

Another interviewee from the green category emphasized the satisfactory stakeholder consultation during the formulation stage of Act 1052, stating that "to me it is well crafted, and we had a stakeholders' discussion before it was passed. I took part in the discussion. So, I understand the policy, as well as the letter of the law".[1048]

[1043] YL. Participant YR also exhibited similar attitudes towards the same issues.
[1044] Para 2.1.3; Para 9.5
[1045] Referring to the Association of Ghana Industries, Participant RC's principals.
[1046] The interviewee was referring to some of the public engagements over the reform at the formulation stage of Act 1052, at which the author of this thesis is said to have been present.
[1047] GD2. This was corroborated by GD3, GD1, GE2, RC, GA1, GA2, GA3, GA4, GA5, GC1, GB101 and the many other interviewees from the banks.
[1048] GA1

This claim regarding the adequacy of the public consultation over Act 1052 and its outcome was queried by the banks (as members of the green category), mainly on the basis that:

> "given the problems, which we encountered under the old Borrowers and Lenders Act 2008 (Act 773), we should have learnt some lessons from there and then engaged more and provided for more in the present Act".[1049]

There was, thus, a desire (among this bank sub-category) that the fate of Act 773 would not eventually befall Act 1052, and that: "if, like I said, there was enough sensitization; and the judges knew and appreciated; and most importantly, they were involved, even in the promulgation of the law, it would have been easier than it was eventually. And we all hope and pray that the new Borrowers and Lenders Act that is in place, may make it easy. At least, it seems to spell out more exhaustively, some of the things you can do to realize after the No Objection".[1050]

Nonetheless, the reform promoters felt frustrated with the banks, perceiving them as unduly critical of themselves. The banks were said to have been consulted, but failed to raise certain issues about which they later complained:

> "Because, before and when the Act was passed, we did some series of sensitization programs for the banks and the judges. I think it was a two-day event at Alisa Hotel, and we discussed some of these things. So, I ask myself: 'we actually engaged you, and you didn't come up with any of these challenges or concerns that you are now talking about. The Act has been passed, you are now saying it is supposed to be this and that'".[1051]

9.4.1.4 Consensus on sustained public participation's benefits

Despite the division amongst the green category members regarding the sufficiency of the public engagement in the various stages of the reform (especially the formulation stage), the interviewees from all categories agreed unanimously on the need for the stakeholders' sustained awareness-raising and training. The widespread belief was that:

> "what can be done is to educate more on it; a lot of people don't understand the process. Even most banks don't know that you can go under the B&L Act and go and

[1049] GA3
[1050] GB101. Also see Para 8.3.2.2
[1051] GD2

enforce. A lot of banks still go under the old procedure. In fact, many banks. If you take banks in Ghana, I can say 80% still use the writ system".[1052]

The interviewees all agreed that the most significant, urgent component of the sustained efforts at sensitization was judges' training, since that holds the biggest hope for entrenching the reform and making it successful. It was a deeply-held view that:

> "our main challenge is with the court and I think it can be cured to an extent by engaging the judiciary more on this law and what this law seeks to do and I don't know if it is separation of their role but I think it requires that we do some more engagements with the judiciary on the objectives of this law and I think with that it should help in effectively implementing this law".[1053]

9.4.2 Documentary evidence

As part of the data collection, documentary evidence was gathered from the interviewees and elsewhere.[1054] The report of the consultant contracted by the IFC to undertake a review of Act 773 was accessed. The Bank of Ghana's Internal Memoranda on the issues impinging on Act 773 were also helpful. Other documentary evidence provided by the interviewees to buttress the points made during the interviews were also analyzed.[1055]

9.5 Assessment

The interviews revealed that the stakeholders who engaged directly with the Bank of Ghana, through the Collateral Registry's outreach, were the group who displayed the clearest understanding of the reform to include land, but also the general PPSA framework. These were the participants from the banks, lawyers, judges and others.[1056] This is in line with the literature, which shows that public participation in policy or legal reform promotes a better understanding of it.[1057]

The fact that the framework is intended to function to make the taking of security over land less costly and more efficient was not completely understood or appreciated by everyone. The participants' comprehension ranged from a decent understanding of the framework, to

[1052] GB21, GE2, GC1
[1053] GE2. GA1, GA2 and GA 4, who are judges, also shared this view.
[1054] See Para 2.1
[1055] Copies of all of the documentary evidence are in the custody of the author.
[1056] See Table 1 under Para 2.1.3 for details of the categories of the participants.
[1057] Para 9.1.1.1

confusion about the existing law, to a total ignorance of the reform.[1058] Nevertheless, there existed various nuances in the understanding of the different members in these categories. Hence, the categories are designed to be flexible, and intended merely to describe a spectrum.

The participants who demonstrated a clear understanding of the framework (labelled the green category in this thesis) were from the banks, lawyers, judges and others.[1059] Constituting the Yellow Category,[1060] the land and companies' registries showed a partial appreciation of the reform, unlike the Collateral Registry, which unsurprisingly fully grasped it. The land and companies' registries also, incidentally, exhibited an attitude of turf protection, supported by their parent statutes and the non-repeal of the aspects of their business that duplicate the Collateral Registry's mandate. This attitude and their limited knowledge of the reform exemplify the cause-and-effect dilemma.

The last group was the red category,[1061] who had minimal understanding of the reform. They largely saw things as business as usual. Whereas some members of this group were completely unaware of the reform,[1062] others knew about it, but did not understand it,[1063] with the rest somewhere in between. This group largely consisted of borrowers.[1064] Although the conclusions reached about the borrowers were based on an assessment of their representative associations and leadership (rather than the members themselves), they are nonetheless revealing.

From the interviews and the evidence gathered in the study,[1065] public participation in the law reform at issue can conveniently be discussed under the two pieces of legislation that have so far sought to enact the reform: Act 773 and Act 1052.

[1058] Whereas Participant RCI displayed the least knowledge about the reform, Participants YL was aware of it, but had failed to grasp its essence, unlike Participant GB71, who fully appreciated its meaning.
[1059] See Table 1 under Para 2.1.3
[1060] Ibid.
[1061] Ibid.
[1062] Participants RT1, RS1, RS2. These participants had no knowledge about the reform and also claimed that an overwhelming number of their members shared this ignorance.
[1063] Participant RT2 claimed to have heard a radio discussion about the reform, but did not understand it. He emphasized that most of the people whom he represented, like him, knew very little, if anything, about the reform.
[1064] See Chapter II. Three main typical business types in the private sector, who are borrowers, were identified: (1) corporations (big businesses); (2) small and medium scale businesses (regular SMEs), some of whom engage in manufacturing and services; and (3) Trader Associations (mostly individuals in very small businesses, largely engaged in the importation of goods, which are in turn traded in the country. These are brisk business activities, employing a substantial number of Ghanaians).
[1065] Para 9.4.2

9.5.1 Act 773

The evidence[1066] reveals that Act 773's emergence,[1067] formulation[1068] and implementation stages were dominated by expert and bureaucratic approaches to policy-making or law reform,[1069] with little or no public participation. In the past, this approach's strength, particularly regarding economic and financial policy-making, was defended by the World Bank, which argued that the success of neoliberal reforms introduced by the Bretton Woods Institutions (especially in developing countries), depended on governments' ability to act in a "courageous, ruthless, and perhaps undemocratic government" fashion, paying no heed to public views or interest groups and social forces.[1070] The stance on this issue has however changed, as the World Bank now insists on citizenry involvement in the policy-making process when funding projects in developing countries. They use civil society organizations to generate feedback, and measure the efficiency, transparency and accountability.[1071] This vote for citizen participation in policy-making is supported by what its deficiency or absence can cause in the law-making process, as seen in the omission in Act 773 of key features of the secured transactions law.[1072] It can also lead to a lack of understanding and buy-in regarding the reform, as Act 773 also demonstrates.[1073]

Act 773's implementation[1074] and review,[1075] as the evidence shows, enjoyed some degree of public participation, albeit this was not optimal.[1076] A series of stakeholder participatory engagements was organized to sensitize and train the stakeholders, including the banks and judges.[1077] The overall assessment of such engagements and effect was that they were inadequate and that further action was required.[1078]

Finally, citizen participation at the review stage of the Act was seen as satisfactory, as the experiences gathered during the implementation stage were articulated to the reformers at various times, including a report by the legal consultants commissioned by the IFC[1079] to pave

[1066] Documentary, particularly reports and internal memoranda from the Bank of Ghana; Para 4.4.3.1
[1067] Para 9.3.1.1
[1068] Para 9.3.1.2
[1069] Para 9.1.1.2
[1070] Deepak Lal, *The poverty of development economics* (2nd ed, MIT Press 2000) 33.
[1071] Esau (n 1010); Para 9.2.3
[1072] Paras 9.4.1.2; 9.4.1.3
[1073] Para 9.4.1.2
[1074] Para 9.3.1.3
[1075] Para 9.3.1.4
[1076] Para 9.4.1.4
[1077] Para 9.3.1.3
[1078] Para 9.4.1.4
[1079] Para 9.4.2; GC2. A copy of this report is on file with the author.

the way for a new Act. This is in line with the review stage's essence in the law reform process.[1080] Ordinary citizens, including borrowers, can have contributed only little however, as the evidence shows that their knowledge about the reform is weak.[1081]

The act's review stage also provided an opportunity to educate and sensitize stakeholders about the reform, which was fully taken up by the promoters, with the IFC's support.

9.5.2 Act 1052

Act 773's implementation[1082] and review stages[1083] dovetailed into Act 1052's emergence and formulation stages with respect to public participation.[1084] Indeed, comments and inputs from stakeholder engagements during Act 773's implementation stage fostered Act 1052's emergence and formulation stages. There were also inputs from international experts,[1085] who produced a draft bill after extensive engagement with the stakeholders.[1086] This enriched Act 1052 in all respects, including public participation, although challenges with the inside-parliament process,[1087] including the low levels of public participation, left the law deficient.[1088] Indeed, how far parliament consulted the Land Registry as a major stakeholder is unclear. Civil Society's participation[1089] was also neither consciously nor vigorously pursued. However, overall, the interviewees perceived that the stakeholder participation, especially by the green category, was decent, with some dissent.[1090]

Notwithstanding, the borrower/ordinary citizen participation in Act 1052's emergence and formulation stages was deemed generally to be low.[1091] Its implementation stage is ongoing, as is the public participation. At the time of the data collection, Ghana had just passed Act 1052,[1092] which repealed and replaced Act 773. Although this new law was technically in force, its full operationalization was still outstanding, as the participants were yet to do business under

[1080] Para 9.3.1.4
[1081] Para 9.4.1.1
[1082] Para 9.3.1.3
[1083] Para 9.3.1.4
[1084] Paras 9.3.1.1, 9.3.1.2
[1085] The IFC's Secured Transactions Reforms Team was appointed to help to implement the Ghanaian reform
[1086] This included lenders, lawyers, judges, land administrators, Attorney General's Department, etc.
[1087] Para 9.3.1.2.2
[1088] Para 4.2.9
[1089] Para 9.2.3
[1090] Para 9.4.1.3
[1091] Para 9.4.1.1
[1092] The collection of data for the thesis started in May 2021, five months after the new law (the Borrowers and Lenders Act 2020) came into effect, on 29th December 2020.

it. Thus, the interviewees' views were largely based on the Act 773 framework,[1093] although consistent references were made to the new Act by many who were familiar with the new law's principles and provisions or the events and processes leading to its passage.

The (green category) stakeholders' participation during Act 1052's implementation stage was seen as satisfactory,[1094] but further engagement, awareness and training were thought to be desirable to ensure the reform's success.[1095]

Because law reform is an iterative process, Act 1052's review stage[1096] has indirectly started. Already, a major concern with the law relates to its concurrence with the prior regime,[1097] and also the ease with which the law's extrajudicial enforcement remedies are overreached.[1098]

9.5.3 Empirical findings versus LTT and practice

The empirical findings reveal the importance of public participation and the problems that arise in its absence. It also provides insights into the difficulty of achieving public participation in countries like Ghana that are seeking to adapt a legal transplant.

The public's understanding of the reform was seen as inadequate,[1099] which reduced their acceptance of it, as cautions by the LTT.[1100] This challenge, besides the reform's bureaucratic origins,[1101] was attributed to the public's low level of sensitization. Also, the public engagement programmes were perceived as poorly planned and implemented, contrary to the conventional methods and approaches,[1102] as they were thought to be skewed in certain stakeholders' favour.[1103] This deficient engagement programme was said to account for not only the reform's unpopularity, but also the turf protection and grandstanding among certain key stakeholder institutions.[1104] However, the reform's promoter, the central bank, is adamant that they carried out extensive public engagement about the reform.[1105] This view is denied

[1093] Because the provisions and processes of Act 773 were fresh in the respondents' minds (having been repealed only five months previously), the majority of the respondents touched on the repealed legislation, but were apparently unaware of the new law (Act 1052).
[1094] Para 9.4.1.3
[1095] Para 9.4.1.4
[1096] Para 9.3.1.4
[1097] Para 7.3.3; 7.4.2
[1098] Para 8.4.3
[1099] Para 9.4.1.1
[1100] Para 1.2.2.2
[1101] Para 9.1.1.2. Also see Para 4.4 a discussion of the challenges related to enacting the reform.
[1102] Paras 9.1-9.3;
[1103] Para 9.4.1 (GB 71)
[1104] Para 9.4.1.2
[1105] Para 9.4.1.3

by certain stakeholders, to the frustration of the promoters, who wonder how else public engagement could and should be effected.[1106] Even among interviewees like the judges and bankers who showed a better understanding due to their better engagement with the reform promoters, deficiencies that can be explained by their attitudes could be spotted.[1107] This confirms how difficult it is to conduct a legal transplantation when prior legal culture is entrenched, especially where the transplant is to adapted.[1108]

The deficient public engagement in the reform, as revealed by the empirical findings, impacted on the law's overall quality. This necessitates a further reform of the law. In the interim, however, more education, training and sensitization for the relevant stakeholders are thought to be needed,[1109] even 15 years after the reform.

9.6 Conclusion

The chapter examined public participation in Ghana's secured transactions reform, with a focus on the inclusion of land in a PPSA framework. It shed light on the nature of the stakeholders' involvement at the relevant stages of the law reform process. Beyond discussing the importance of public participation in public policy-making, including law reform, and the means of, or instruments for, achieving this,[1110] the chapter underscored the relevance of public participation when doing legal transplantation (and indeed adapting the transplant) by including land within a PPSA framework, with all the conceptual and practical challenges that it raises, including the challenge of public education itself.

In an attempt at clarity, public participation in the reform was examined separately under the distinct pieces of legislation that have sought to enact it. Whereas public involvement of any kind was largely absent during Act 773's emergence and formulation stages, its implementation and review stages involved some public engagement, although this was inadequate for the lenders, lawyers, judges and other stakeholders. For borrowers and the general public, their involvement in the Act 773 process was minimal.

[1106] Ibid. This demonstrates how public engagement about the reform under consideration in this thesis can, itself, be a practical challenge with such an adaptation of a legal transplant.
[1107] Para 9.4.1.3
[1108] Para 1.2.2.2
[1109] Paras 9.4.1.4, 9.5.3
[1110] Para 9.1, 9.2, 9.3

The expertise of the WBG (IFC), which was sought during Act 773's implementation, not only promoted stakeholder education and involvement during the implementation stage, but also initiated the review stage, which was thus associated with greater stakeholder involvement, as various participatory mechanisms were deployed. Notwithstanding, there was a general sense that the ordinary citizens, including borrowers, were never sufficiently accessed. Since the reform did not emanate from the law reform commission,[1111] organized civil society's extensive involvement[1112] should have been the minimum action taken.

The situation with Act 1052 was far better, although still inadequate. Act 1052 emerged from an attempt to resolve the challenges associated with Act 773. Bureaucratic policy-making was combined with public involvement to produce a decent bill to enact the original reformers' intentions. Nevertheless, challenges during the formulation stage, including the entrenched legal culture leading to failure to reflect the drafting instructions accurately, as well insufficient inside-parliament public consultation, resulted in certain deficiencies within the law.

This law's implementation stage achieved better stakeholder engagement, but this was largely seen as inadequate. The judges' training was identified as the most important aspect, since their appreciation of the framework remained incomplete. This charge was largely levelled by the lenders. How much of this charge has arisen due to the lenders' failure to have their own way in court is unclear. That said, it is undeniable that the training of important stakeholders, such as judges, is crucial given their attachment to the prior legal culture. The general public, including borrowers, who were the least sensitized group, should also receive education via the various awareness-raising mechanisms.

Given the conceptual and practical issues associated with the reform to include land in a PPSA framework of modern secured transactions, all forms of public participation should be deepened. Judges and other stakeholders like lawyers and bankers, should be trained, and the public vigorously sensitized. This level of public engagement is essential when undertaking legal transplantation to ensure the best outcome,[1113] particularly where the reform is substantial, requiring, *inter alia*, the entrenched legal culture's dislodgement, as the case studied shows.[1114]

[1111] Para 9.2.4
[1112] Para 9.2.3
[1113] Para 1.2.2.1
[1114] Para 1.2.2.2

Chapter X

Improving Security over Land in Ghana: Normative Considerations

10.0 Introduction

This chapter briefly explores how to improve the current law on taking security over land in Ghana. It, firstly, considers how the Ghanaian inclusion framework, and experience thereunder, could be improved and, secondly, provides a background to the discussion in Chapter 11[1115] of the key lessons that may be learnt from the Ghanaian experience by ASA countries that might be planning to reform their secured transactions law to include land within a PPSA framework.

This chapter adopts the position that improving the regime for taking security over land under a PPSA framework in Ghana is a function of enhancing the benefits identifiable, and addressing the challenges associated, with that inclusion. Thus, this chapter summarises the benefits and challenges of the inclusion framework in Ghana from the perspectives of the participants in the qualitative study,[1116] considers how to enhance the benefits of such inclusion, and also address the challenges associated with the reform.

The benefits identified include the framework's ability to mitigate some of the land administration challenges,[1117] and some problems with the Pre-B&L Act law.[1118] Another benefit is the more efficient taking of security over land through computerization,[1119] centralization[1120] and effective enforcement.[1121]

These benefits are, however, undermined by certain challenges posed to the framework, including the phenomenon of informality, which leads to concerns regarding the certainty of title to land presented as collateral.[1122] The benefits are also diminished by the overreach of

[1115] Para 11.2.2
[1116] Para 2.1
[1117] Para 10.1.1
[1118] Para 10.1.2
[1119] Para 10.1.3
[1120] Para 10.1.4
[1121] Para 10.1.2
[1122] Para 10.2.1

the existing extrajudicial mechanism for enforcement,[1123] and the confusing relationship between the reforming law and the prior law,[1124] *inter alia*.

To improve the framework, this thesis proposes certain measure aimed at tackling the identified challenges, including addressing the problem with certainty of title by: reducing the informality within the economy; strengthening the customary structures' land documentation functions; and honing the registry platform's potential (in conjunction with the CLS system) to evolve a register of unregistered land over time.[1125] Augmenting the technology that undergirds the registry's electronic template, including deploying GPS systems to identify burdened land effectively, would also prove helpful. A Borrowers and Lenders' court, applying specially-crafted civil procedure rules, could also be established to address the overreach of the extrajudicial mechanisms for enforcing security agreements.[1126] The repeal of the mandates of the other registries in relation to security interests over land under the Pre-B&L Act regime would clarify the relationship between the prior law and the reform framework,[1127] in addition to the other measures suggested for redressing the problems identified under the inclusion framework.[1128]

The chapter is organized as follows. Section 10.1 briefly summarises the benefits of the inclusion of land within the PPSA framework in Ghana. Section 10.2 considers the various challenges associated with the inclusion framework and offers suggestions regarding how to address these. Section 10.3 concludes the chapter.

10.1 The benefits from including land within a PPSA framework in Ghana

This section summarises some of the benefits of including land within the B&L Act framework, as acknowledged by the interviewees. It is largely descriptive in nature.

10.1.1 Mitigating the land administration's failures and improving access to credit.

First, the participants praised the inclusion framework for making feasible the taking of security over about 90% of Ghana's land mass. This addresses some of the land administration failures in Ghana.[1129] The benefits were said to arise from the facility for

[1123] Para 10.2.2
[1124] Para 10.2.3
[1125] Para 10.2.1.1
[1126] Para 10.2.2.1
[1127] Para 10.2.3.1
[1128] Paras. 10.2.4.1, 10.2.5.1, 10.2.6.1
[1129] Para 6.4.2

creating and perfecting security interests under the inclusion framework: the electronic template, which accepts unregistered, as well as registered land, unlike the pre-B&L Act regime.

The mechanism for recording security transactions over land[1130] makes credit transactions with any land (registered or unregistered) feasible, which is a major benefit. This means that farmers, who own most of the rural land, can create security interests over it to access credit to support their agricultural businesses.

Furthermore, the framework generally makes it possible to bring into the economy undocumented land (such as customary law interests in land, and unregistered land both within and outside the registration districts),[1131] making credit over such land possible. Such land remained in informality, since the few past attempts to formalise it under the Pre-B&L Act regime failed.

10.1.2 Confronting problems with the real property mortgage law

The qualitative study[1132] reveals that the use of the PPSA framework for taking security over land also addresses some of the challenges associated with the Pre-B&L Act mortgage that are detrimental to accessing finance, including the imposition of lengthy court proceedings on all enforcement processes, which makes accessing credit expensive.[1133]

The inclusion framework ensures the speedy, efficient enforcement of security interests over land. Lenders do not need to initiate court proceedings to realize burdened land in the event of borrower default.[1134] This is typical of a PPSA regime, which protects lenders' investments in borrowings. Under the Pre-B&L Act regime, however, one could not enforce security interests in land without strict court supervision, which caused (courses) delays and avoidable expenses.[1135]

Also, the inclusion framework solves some of the challenges associated with the Pre-B&L Act mortgage law by simplifying the priority rules and including in the B & L Act comprehensive provisions regarding priority, dealing with all conceivable priority questions

[1130] Including oral or informal customary transactions, coupled with the possibility of registering land with only basic details about it (Para 6.3.2), as distinct from technical details from the land registry, including land coordinates given by the Customary Land Secretariats, and also uploaded pictures of the land.
[1131] Para 6.0;6.1.6; Paras 6.1.6.1, 6.1.6.2, 6.1.6.3
[1132] Para 8.0; 8.4.1; 8.4.2
[1133] Para 8.0;8.4.1; 8.4.2
[1134] Para 8.3.2.2.
[1135] Para 8.4.2

specifically and generally.[1136] This is unlike the applicable rules for the priority of security interests under the Pre-B&L Act mortgage regime, which are steeped in unclear common law and equitable principles.[1137] For instance, Section 19 of the Mortgages Decree 1972 states that the basic rule of priority is 'the first in time prevails', but there are exceptions, which shows the relative dependence of the Pre-B&L Act law of mortgages on English law.[1138]

10.1.3 Efficiency through computerization and digitization

According to the participants, cost and time savings are achieved by the digitization of secured transactions over land.[1139] Since the regime is electronic and web-based, information is easily processed and more accurate. Searchers can obtain real-time, up-to-the-minute information on registered transactions to aid decision-making. This is unlike the land registries' systems, which are purely manual and encourage corrupt practices. Middlemen who extort money from land registry system users, under the pretext of facilitating the processing of their documents,[1140] are checked when registering land on the collateral registry, due to the latter's electronic, web-based system.[1141]

10.1.4 The benefit of centralization

A further benefit of the inclusion framework, as acknowledged by the interviewees, is that it creates an opportunity to take security over land under a comprehensive, unified legal and institutional framework, rather than a disjointed, uncoordinated regime involving the mediation of multiple state agencies and legal instruments. This was seen not only as more convenient, but also as essential for the economy, including access to finance.[1142]

All encumbrances created over land (and indeed movable assets) are publicized at the Collateral Registry. This centralization enables searchers and lenders to obtain information about parties' credit transactions over land in real-time without needing to visit three other registries (the land, deeds and companies' registries). When one adds movable assets to the centralization equation, the benefit becomes enormous.

[1136] See Act 1052, ss. 33-50
[1137] The priority rules were rarely mentioned during the interviews, but the participants indirectly referred to them during their discussion of the perfection (registration) of security interests and their consequences, and the general understanding of the law.
[1138] The subject of the priority of security interests is difficult to grasp, even under English law. See Goode and Gullifer (n 299) para 5-01.
[1139] Paras. 7.4.1; 5.4.5; 7.5
[1140] Para 5.4.3
[1141] Para. 7.4.1
[1142] Paras. 7.4.1; 7.5

Nevertheless, despite its noble intent, the B&L Act framework failed to repeal the Pre-B&L Act regime, thereby failing to realize centralization, which has led to duplication and confusion regarding the Collateral Registry's relationship with the other registries with a mandate over land, thus negatively impacting access to credit.

10.2 Challenges with inclusion and suggestions about redress

Despite the inclusion framework's benefits, it faces significant challenges. Whereas most of these challenges are specific to land's inclusion, a couple emanate from the problems with the regime generally, but bear heavily (directly or indirectly) on land. They reflect the general challenges associated with legal transplantation, and the issues that accompany the adaptation of 'modern law' to suit local contexts.[1143] The following briefly discusses some of these challenges and possible solutions to them, which are to be construed in the wider context of effecting a successful secured transactions law reform,[1144] but applied to land.

10.2.1 Challenges associated with the certainty of title

The liberal means of recording security interests over land through the registry's templates[1145] pose a significant threat to the certainty of title, and therefore access to credit. Although, under the reform, vast swathes of land could be brought into the economy through the Collateral Registry's processes,[1146] lenders assume a significant risk in accepting unregistered land from both the regulatory[1147] and business[1148] standpoints. The Bank of Ghana's position is also relatively unclear here. The challenge with ascertaining the ownership of unregistered land is not immediately resolved by the framework, even if this is possible in the long run, particularly through the coordination and collaboration with the CLS system.[1149]This may partly explain lenders' muted enthusiasm about accepting unregistered land that was reported by the interviewees.[1150]

[1143] Para 1.2; 1.2.1; 1.2.3
[1144] Para 1.2.2.2
[1145] Para 10.1.1
[1146] Paras 6.3.2; 7.3.2
[1147] Para 5.4.1
[1148] Para 5.4.2
[1149] Paras 5.4.3; 5.3.2.1; 5.5
[1150] Para 6.4.3

10.2.1.1 Addressing the certainty of title challenges

To address the challenges associated with the certainty of title, it is important to recognise, first, the Ghanaian economy's endemic informal nature,[1151] which can be neither wished nor legislated away.

Second, a comprehensive, nationwide land registration programme could be implemented by the government and accelerated. Although earlier attempts to do so across ASA have not proved entirely successful,[1152] lessons from that experience could inform future attempts.

Meanwhile, however, the ability of Collateral Registry platform (in conjunction with the CLS system) to build a parallel land register in the long run[1153] could be meticulously honed. This has become more realistic with the CLSs' statutory recognition, whose role here would be crucial.[1154] Although this prospect may take a long time, and, moreover, the 'register' may be less comprehensive and reliable than the official land registry one, it could realistically solve some of the ownership uncertainties in regard to the title to unregistered land.[1155]

Thus, the Customary Secretariats' role, which have been statutorily recognized by Section 14 of Land Act 2020, could be supported with staff, logistics and resources to enhance their efficiency and competence with regard to land matters, which would enable them, for instance, to produce accurate site plans and other land documents that may be crucial for the Collateral Registry's processes. Public education, supported by the agencies of state or regulators, would engender greater public support for their activities and, directly or indirectly, increase access to credit using land as collateral. This public engagement would have the added advantage of soothing many lenders' persisting unease regarding the security of their investments secured by land that are covered by the Customary Land Secretariats' documentation.[1156] However, much education and vigilance would be required to avoid depositor funds being lost to poor investments by lenders. Lenders could thus be reticent about this prospect, even if it were to succeed.

Additionally, to address the challenges related to the certainty of title under the inclusion framework, the efficacy of the mechanism for the registration of security interests over

[1151] Paras 6.1.5; 6.1.6.
[1152] Toulmin, Camilla. "Securing land and property rights in sub-Saharan Africa: The role of local institutions." Land use policy 26.1 (2009): 10-19.
[1153] See Paras 5.3.2.1; 5.5
[1154] Para 5.4.4
[1155] Para 5.0
[1156] Paras 9.4.1.3, 9.4.1.4

registered and unregistered land—the Collateral Registry's electronic templates—could be improved,[1157] by exploring other state-of-the-art technologies for capturing information on all parcels of land in as much detail as possible. This could help lenders to make business decisions. Thus, in addition to the current practice of using pictures of the burdened land and uploading them onto the registry's registration templates, the templates could also be GPS-enabled to improve the burdened land's identification. Accordingly, the collaboration between the parent institutions of the Collateral Registry and Land Registry, anticipated by Section 76(1) of Act 1056, could be activated.[1158]

Furthermore, the framework's treatment of oral agreements[1159] must be specifically stated in the statute. The conclusion that Act 1052 deals with oral agreements through the electronic template[1160] must not be based simply on an interpretation of the relevant sections and actual operations of the Registry. The law must be specifically stated and clear on a matter as important as the formalization of land security interests. Given the proportion of the population who are served by oral transactions, one hesitates to advocate their suppression, despite the difficulties associated with the absence of writing,[1161] but it is essential that its negative effects are reduced. In this regard, it is gratifying to note that Section 37 of the Land Act, referring to the First Schedule, makes provision for the recording of customary (oral) grants of security interests in land at the Customary Land Secretariat, where available. It remains unclear, however, how independent the witnesses and the recording officer must be in order to serve as effective witnesses.[1162] It is suggested that an independent party (chosen by the illiterate borrower at the cost of the lender) should be required to certify the accuracy of what is being uploaded onto the registry's electronic platform.

There are drawbacks to this suggestion. First, there would be costs associated with appointing an independent person, which, in practice, would eventually feed into the cost of the credit, to be borne by the borrower. Secondly, it delays a simple credit transaction, which could undermine the debtor's business. Third, borrowers might not fully understand their transactions, even with the assistance of agents (or sometimes might feign misunderstanding

[1157] Para 10.2.1
[1158] This collaboration could include linking the electronic systems of the two registries so that the Collateral Registry, which does not register absolute interest in land, would be able to verify the identity of land involved in registrations on its system.
[1159] Paras. 6.3.2; 6.1.2
[1160] Para 6.3.2
[1161] ibid.
[1162] Para 6.2.2.2.1

in order to force disputes). Additionally, it would complicate what should be a simple transaction by involving too many players or actors. This conflicts with best practice regarding secured transactions, which requires simplicity in the creation and attachment of security interests,[1163] although this criticism may be mitigated by the fact that, under the current arrangement, the lender can quickly reduce the substance of the agreement with the borrower on the registry's template.[1164]

The proposed system's advantages are as follows; (a) it would serve as reasonable evidence of oral transactions between the credit parties; (b) it could forestall, although not eliminate, post-transaction or post-registration disputes between the credit parties; and (c) it would serve as a check on lenders to ensure that the correct terms were uploaded onto the registry's platform. This would reduce the credit parties' costs.

Finally, the courts' record-keeping practices and lenders' access to these records could be enhanced. Since lenders visit the courts and elsewhere, as part of their due diligence, to confirm land ownership, in order to make business decisions over it,[1165] it should be easy for lenders to access such places to obtain such information. The challenges here are that it could be abused by people using such information for different purposes, and also that such information might be unreliable.

10.2.2 Overreach of extrajudicial enforcement

Another significant challenge associated with the inclusion framework in Ghana is the overreach of the extrajudicial enforcement mechanisms under the framework, which are fundamental to its success. Borrowers may undermine the lenders' right to realize burdened land outside the court.[1166] Lenders who seek to enforce security over land extrajudicially are almost always brought back to a willing but inefficient court, which assumes jurisdiction even in cases that are inappropriate.[1167] This partly emanates from the judges and other actors in the legal profession's mentality: they are accustomed to the pre-B&L Act system of taking all enforcement cases involving land as security through the courts.[1168] Moreover, the

[1163] UNCITRAL Model Law, Article 6. This Model Law however requires writing for every security agreement, except where the secured creditor has possession, so the proposal herein would only be an alternative for illiterate people.
[1164] Paras 7.3.2; 6.3.2
[1165] Para 5.2.2.2
[1166] Para 8.4.3 (GB11 and GE2)
[1167] Para 8.4.3
[1168] Para 8.4.2

enforcement of security interests over land is always emotive.[1169] Borrowers have a proclivity to do everything possible to save their landed property that is about to be realized as security. In addition, there are general areas in the enforcement regime that could be improved.

10.2.2.1 Addressing the Challenges Associated with and Improving Enforcement

To deal with the overreach of the extrajudicial enforcement mechanisms under the framework, address some of the salient challenges, and improve enforcement generally, the following suggestions are offered. Some of them are adapted from the UNCITRAL Legislative Guide on Secured Transactions, which sets out broad principles for movable property contexts, but here they are applied to land.

First, designing special rules that detail the circumstances under which the court's jurisdiction could be appropriately seized, and the various reliefs that could be sought, might help to reduce the frequency with which the jurisdiction of the court is frivolously seized upon during the enforcement of security. This is however not a panacea, as the implementation of these rules could pose further challenges. Thus, any rules fashioned must, as far as possible, be diligently operationalised.

Second, the setting up of a Borrowers and Lenders Court that applies the special rules of civil procedure noted above, which accommodate the essence of the reform legislation, might be the surest way to arrest the overreach of enforcement processes by borrowers. This would avoid the delays that are still experienced with the enforcement of security interests. This court could, however, also be run inefficiently. Thus, sufficient attention should be paid to this court's applicable rules and their administration. There is literature considering the merits and demerits of creating specialized courts, which argues strongly for the former by highlighting that specialized courts: (i) foster improved decision-making by having experts decide complex cases; (ii) reduce pending case backlogs in the generalist courts by transferring select categories of cases to specialized courts that are better able to deal with them; and (iii) decrease the number of judge hours required to process complex cases by having legal and subject-matter experts adjudicate them.[1170]

Third, the risk of resistance and violence against enforcing creditors, that potentially or actually accompanies the enforcement of security outside the court, could be addressed by highlighting the right to extrajudicial enforcement mechanisms, such as possession and

[1169] Para 8.4.3
[1170] Markus B. Zimmer, 'Overview of Specialized Courts' (2009) 2 IJCA 46

possible sale outside the courts in the legislation, and also by educating stakeholders, including the police[1171] about this right. It is clearly set out in international instruments such as the UNCITRAL Model Law.[1172]

10.2.2.2 Strengthening enforcement generally

To enhance the benefit of the speedy, cost-effective enforcement introduced by the reform framework, the following measures could be explored.

First, better, more effective guidance on accessing the courts for the purpose of expedition could be provided in the framework. Act 1052 merely states that recourse to the court for any remedies should be done "in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I.47) or the District Court Rules (C.I. 59)".[1173] The interviewees perceived this to be vague, unhelpful guidance, since there are many processes under the High Court rules by which the courts' jurisdiction can be seized.[1174] In line with the reformers' principles, it could be clarified that recourse to the court can be done by a summary procedure,[1175] but the efficacy of this would depend on how well the judicial system, and judges in particular, appreciate the need for speed and cost effectiveness under the inclusion framework.[1176]

Second, the appropriate relationship that should exist between the oft-conflicting goals of the secured transactions law and the insolvency regime could be clarified in the Ghanaian framework to ensure certainty. Currently, the Borrowers and Lender Act 2020 (Act 1052) is categorical about the protection it gives a secured creditor against third parties, including administrators,[1177] while the Corporate Insolvency and Restructuring Act 2020 (Act 1015) places a temporary freeze on the creditors and other claimants' rights against a distressed company,[1178] *inter alia*.[1179] The right balance should be struck and stipulated, as neither statute contemplates or anticipates the other. The UNCITRAL Model Law, which places a moratorium during insolvency and simultaneously protects secured creditors,[1180] could provide useful guidance here.

[1171] Paras 8.4.2 (GB53); 8.3.2.2.1
[1172] Para 8.2.1
[1173] Act 1052 s.84
[1174] Para 8.3.2.3; 8.4.2
[1175] Para 4.1.3
[1176] Para 9.4.1.4
[1177] Act 1052, s. 14
[1178] Act 1015, s. 30
[1179] Para 8.3.2.4
[1180] Para 8.2.6

Fourth, the image of the enforcement process in Ghana as belligerent or militarized,[1181] arising from uniformed, gun-wielding policemen's ongoing involvement, could be improved to encourage access to finance. The police's assistance (with a court warrant),[1182] is sought where a lender is potentially or actually unable to enforce a right of possession in a peaceable manner.[1183] This police involvement could be reduced to the minimum, i.e., where there is a breach of the peace, rather than being a regular feature of enforcements, with the accompanying fanfare and sensationalism. The challenge here, however, is that the enforcement process could be violent and negatively impact lending. Diminishing some of the safeguards for lenders in such an environment, including reducing the police presence during enforcement, might bode badly for credit delivery from the lenders' perspective, with accompanying consequences for costs and credit availability.

Furthermore, to facilitate transparency and simplicity, the legislation could require a short summary of the parties' transactions and the state of affairs at the material moment of default to be included in a default notice.[1184] In order to provide, at a glance, a comprehensive picture of the state of the transaction between the credit parties, the summary could include: (1) a description of the collateral; (2) the nature of the default; (3) information about whether the creditor has accelerated the maturity of the debt (as provided by the security agreement); (4) the debtor's right to cure the default and the deadline for this; (5) the method by which enforcement will be effected, as chosen by the creditor (on the basis of the security agreement); and (6) the right of the debtor (or otherwise) to any surplus from the sale as well as any liability for any deficiency.

This notice of default's suggested content could be replicated (subject to the necessary modifications) in the notice of intention to realize security extrajudicially,[1185] unless the default is cured.

Finally, and more generally, the Collateral Registry's legal risk, arising from its involvement in enforcement,[1186] could be curtailed. The registry's certification of every extrajudicial

[1181] Para 8.4.4
[1182] Act 1052, s.64 (1)
[1183] Para 8.3.2.2.1
[1184] Section 60 of Act 1052 merely mentions the fact of default in the notice of default to be served on the debtor/borrower. Apart from the manner of serving the notice of default and other ancillary matters that are provided for under Section 60 of Act 1052, the content of the notice is not specified in either the statute nor the Registry Rules. This content could be made more comprehensive.
[1185] Act 1052, s. 62 (2)
[1186] Para 8.3.2.2

enforcement potentially brings the Collateral Registry to the very centre of disputes resulting from realizations. The registry, for instance, issues the CR7,[1187] essentially based on the creditor's claim, for example, that the borrower has been served with all relevant notices. The Registry does not and cannot verify this claim. Employees in a typical web-based secured transactions registry do not interfere or intervene in registrations, nor in the subsequent processes.[1188] Aggrieved borrowers often join the registry to suits against creditors. The registry could, therefore, be removed from the enforcement process, leaving it for the credit parties to handle, in line with the UNCITRAL Model Law, where the secured transactions registry plays no part in enforcing security interests.

10.2.3 The confusing relationship between the prior and new laws

A further challenge associated with the inclusion framework is the conceptual and practical challenge of determining and defining the appropriate relationship between the inclusion framework and the prior regime for the taking of security interests over land. The research participants perceived that this was undermining the Ghanaian reform by introducing confusion and cost.[1189] The perfection of security interests in land under the B&L Act framework is achieved by registration at the collateral registry for the purpose of third-party effectiveness.[1190] However, the Pre-B&L Act regime remains in force and also mandates that such perfection be done at the land registries.[1191]

10.2.3.1 Addressing the challenge with parallelism or concurrence regarding the prior and the reforming laws

To address the confusion, cost and inefficiency arising from the concurrence of the B&L Act framework with the prior regime, necessary amendments are required to make the former the only applicable framework for the taking of security over land, in line with the original reformers' intentions.[1192] It would enhance the benefit of centralization,[1193] and also clarify the relationship between the B&L framework and the prior law. The law could expressly provide for the Collateral Registry's sole mandate for the registration of all encumbrances over land (*inter alia*) and abolish that function from the remits of the land and company

[1187] ibid
[1188] See Footnote 4, IFC Toolkit on Secured Transactions and Collateral Registries System 2010, page 69, paragraph 2.4
[1189] Para 7.4.2
[1190] See Act 1052, ss. 18, 19 and 22; Para 7.3.2.
[1191] Para 7.2.1
[1192] Para 4.1.3
[1193] Para 10.1.4

registries (or indeed any other registry). This would entail a redefinition of the mandates of the relevant registries, and would leave the credit parties clear about the applicable law for their transactions and how conflicts between laws should be settled.[1194]

However, it could be argued that keeping all transactions over land, including ownership and encumbrances, at the land registry provides a better picture of the various interests (if any) affecting a particular land parcel in one place. Nonetheless, the land registries' inefficiencies defeat this argument. It takes a long time for encumbrances over, and any other interests in, land to be searched and discovered, if this is even possible.[1195] Moreover, there are three different registries that dealt with encumbrances over land (under the Pre-B&L Act regime).[1196] Depending on whether the land was in a registration district or whether the owner of the interest in the parcel was a company, a transaction over land would need to be registered at the land, deeds and companies' registries.

That said, the original reformers acknowledged the utility of the idea of having, at any point, all of the information on land at the land registry (for what it is worth).[1197] They intended an arrangement whereby the three registries would be obligated to collaborate electronically, so that essential details about registrations at the Collateral Registry would immediately be sent electronically to the others, without the parties having to register at the different registries. A similar interoperability of systems is recommended by the UNIDROIT's best practice secured transactions registry guide.[1198] In this way, the records at these other registries may constantly be updated. Under this envisioned arrangement, the applicable framework for the creation, perfection, priority, and enforcement of security interests in land would be the Borrowers and Lenders Act framework. Thus, the analogous provisions in the Pre-B&L Act regime could and should have been repealed. Although Section 76 (1) (c) of Act 1052 hints at this idea of the reformers, the section legislates this important arrangement incompetently.[1199]

Without expressly repealing the pre-reform regime's relevant sections, but emphasizing that, in the event of a conflict, they are subservient to the B&L Act framework[1200] is not the best way to define their relationship, and has led to vagueness as well as interpretative challenges.

[1194] Para 10.1.4
[1195] Paras 5.2.2.1.2 (Last Paragraph); 5.4.5
[1196] The Land Registry, the Land Title Registry and the Company Registry.
[1197] Para 4.1.3
[1198] UNIDROIT Best Practice Registry Document: Guide on Best Practices for Electronic Collateral Registries A functional critical performance factor framework (ctcap.org) p. 33, accessed 7 May 2022.
[1199] ibid. The original draft legislative instructions of the reformers referred to these issues.
[1200] Act 1056, s. 86

Judges might still be tempted to defer to the traditional framework, with which they are familiar.

It must be acknowledged that the common law/statutory mortgage's abolition in favour of the PPSA is likely to generate curiosity and sentimentality, given the settled nature of the law of mortgages. However, stakeholders' effective education would address any concerns.

10.2.4 Challenge associated with public participation and sensitization

The practical dilemma of how to attract stakeholders' support for such a substantive, significant reform, that replaces the familiar statutory/common law mortgage with the novel PPSA framework, is another problem associated with the inclusion of land. Employing the PPSA for the same purpose, and in fact replacing the mortgage system with a PPSA framework, is unique. Stakeholders are accustomed to using the common law/statutory mortgage as a legal device for taking security over land. Thus, such a reform might prove problematic, even with the deployment of impeccable public engagement, sensitization and participation programmes. This means that any palpably deficient public participation efforts, such as those revealed by the interviewees,[1201] are doomed to malfunction, if not failure. This is not however to diminish the reform's achievements to date, but to say that its full potential has not yet been realized, partly due to the deficient stakeholder participation and engagement in the various stages of the process.

Effective public engagement can not only ensure that a reform has sufficient drivers, but also avoid deficient laws. However, influencing policy-makers and stakeholders, and promoting an understanding of a reform, requires effort, focused on the correct audience and communication channels.

10.2.4.1 Addressing the challenge associated with public participation

To address the challenge associated with public participation in the Ghanaian reform, it is important to recall that the reform's origin was steeped in bureaucratic policy-making;[1202] i.e., it emerged onto the legislative agenda without adequate public or private sector stakeholder consultation, and such stakeholders were poorly represented on the Technical Working Group that developed the draft legislation.[1203] This is inconsistent with international best practice on the public involvement, awareness-building and training necessary for a

[1201] Paras 9.4.1.1; 9.4.1.2; 9.4.1.3
[1202] Para 9.1.1.2
[1203] Paras 9.5.1; 9.6

successful law reform.[1204] Consequently, some of the stakeholders' understanding and ownership of the framework, including the public, remains deficient.

Accordingly, the following steps could be taken to address the challenges associated with public participation

First, a tailored education programme could be implemented to shift the stakeholders' mindset towards appreciating the business case for the reform, and encourage their buy-in. While how much could be achieved by taking this step now is unclear, it would be better late than never.

Second, the leverage of development partners like the IMF and World Bank could be procured to deepen the government's commitment to the reform, and release the required resources for the reform's imperatives, including reaching out to and disseminating the understanding of the reform among various stakeholders. This, however, would pose a risk of giving credence to the perception that the reform was compelled by development partners, rather driven by an economic or strong business case.[1205] Also, the government resources, especially since the Coronavirus pandemic and the war in Ukraine, are stretched. Despite this, stakeholder engagement and awareness-raising about the reform must be supported by every means possible, both locally and internationally.

Third, stakeholder dialogue among public and private sector players could be explored for the review stage of the law.[1206] The resultant draft amendment from such engagement could accommodate the local conditions, customs and idiosyncrasies, and encourage the stakeholders' ownership of the reform. The reform of the Philippines' secured transactions law over movable property is said to have benefitted substantially from such stakeholder dialogue before the reformed law was passed.[1207] This form of public engagement can cause delays and require huge resources. Thus, the most effective instrument, which suits the particular target and specific reason for the engagement, must be objectively considered and deployed.

[1204] UNCITRAL Practice Guide to the Model Law on Secured Transactions at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10910_e.pdf.
[1205] Para 9.3.1.1
[1206] Para 9.3.1.4
[1207] Louise Gullifer, 'Conclusion', in Gullifer and Neo (n 1008).

Finally, beyond the need to build the capacities of the various stakeholders who interact with the new inclusion framework,[1208] training for judges and those in charge of the judicial system is vital, given that the judicial system is the most castigated for the enforcement challenges existing within the framework.[1209] The new inclusion framework is not only unfamiliar to the players in the Ghanaian finance sector, but too few judges—who play an important role in enforcement—possess a specialised knowledge of secured transactions. This is similar to the experience with the secured transactions reforms in Asia,[1210] where the judges and lawyers had to be specially trained to facilitate the reform's implementation.

10.2.5 Diverse interests in land and uncertainty over the proprietary nature of interest in land

The diversity of interests in land and uncertainty regarding the proprietary nature of interests in land are additional challenges associated with the inclusion framework. The granting of security interests over unregistered land under the B&L Act framework, and the extrajudicial enforcement mechanisms available can lead to the attachment and sale of the wrong persons' interests in the land in the event of debtor default. This can only be resolved, if at all, through considerable expense, time and resources.

This arises from the fact that, at the stage of registering the security interest, there is no requirement in the rules that the interest burdened (the debtor's specific interest in the land) is indicated on the registry's platform. This is considered an ownership issue that the land registries are supposed to solve, or the credit agreement is expected to keep. It is, rather, the land parcel that is liberally described on the registry's platform.[1211]

There exists, however, a fundamental conceptual problem, which the above issue exposes. Interests in land as subjects of security interests are diverse, ranging from allodial to customary law tenancies.[1212] They can also be either legal or equitable. The lessor of land for a specified period, for example, could have a reversionary interest abiding the lease's determination. In addition to issues regarding which of the existing interests are adequately proprietary or alienable (especially considering that land rights in Africa are always mired in

[1208] Para 9.5
[1209] Para 8.4.2; Para 8.6
[1210] Gullifer (n 1207)
[1211] Para 6.3.2
[1212] Paras 321; 312.

communal complexities),[1213] difficulties can emerge due to the fact that two or more interests in a parcel of land can co-exist or be enjoyed concurrently.

Thus, a security interest over, or potential alienation of, one's concurrent interest could significantly affect the other's subsisting interest, unless care is taken. Although these are purely land law questions and thus equally relevant to the Pre- B&L Law framework, they are of particular concern in the B&L Act framework, given the nature of the registration process and the available extrajudicial enforcement mechanisms, which aim at speed and therefore risk the possibility of glossing over, misapprehending and wrongly attaching such concurrent interests. The land registries' regime diminishes this difficulty through the registration of encumbrances against pre-existing land certificates, evidencing the absolute ownership of the interests,[1214] as well as through the compulsory, court-supervised enforcement.

10.2.5.1 Addressing the challenges associated with a diversity of interests in land.

To address the conceptual challenges regarding which of the interests in land security interests can be taken over, it is suggested that the *status quo* should be maintained: security interests can be permitted on all interests in land provided that they are proprietary and alienable. The law, thus, gives the general legal position and rightly leaves the market to make choices.

However, to guide searchers on the registry's platform and aid lenders' due diligence, the registration of any security interest over land at the Collateral Registry must require a statement of the nature of the interest carrying the burden of security. Such an important detail must not be left to the parties' security agreement alone. Third parties and others must be given such a detailed notice on the registry's platform, particularly since there is no statutory provision that empowers a third party to request and obtain further, more accurate particulars about the parties' security agreements. Moreover, any steps by lenders to ascertain the title of the borrower to the land at issue must be thorough in order to investigate the extent of the title.

10.3 Conclusion.

This chapter considered some suggestions about improving security interests over land under a PPSA framework in Ghana

[1213] Para 3.1.2
[1214] Para 3.2.4.1.1.2

To achieve this, the chapter has summarized some of the key benefits[1215] and challenges[1216] associated with the Ghanaian inclusion framework from the interviewees' perspectives, as a basis for suggested improvements. Indeed, this chapter argues that the existing framework and the experiences under it can only be improved by deepening the framework's identifiable benefits as well as addressing the issues that undermine the reform. Accordingly, various ideas for meeting the challenges[1217] as well as enriching the benefits[1218] have been examined.

[1215] Para 10.1
[1216] Para 10.2
[1217] Para 10.2
[1218] Para 10.2

Chapter XI

Relating Empirical Finding to Anglophone sub-Saharan Countries

11.0 Introduction

This chapter relates the empirical findings discussed in chapter 5 to 9 to ASA countries, taking account (albeit generally) of the land tenure system, land administration and real property mortgage regimes in these countries compared with that in Ghana. It normatively draws attention to what will make a reform based on the Ghanaian example feasible, and also what may be done to make reforms is these other countries achieve the best possible results.

It is important to clarify that a detailed comparative law analysis of how the various legal systems resolve the legal problems at issue is not provided in this thesis due to reasons of space. However, the relevant considerations in such discussions inform the treatment herein, and enable the argument in this chapter to be constructed.

This chapter argues that there exist significant similarities between the land tenure, administration and real property mortgage regimes in other ASA countries on the one hand, and those in Ghana on the other.[1219] These similarities and differences, and the general conditions in ASA, could thus support reforms along the lines undertaken in Ghana (with the necessary adaptions) particularly where the Ghanaian experience provides some lessons, which could serve as a normative guide for other reformers.

First, interests in land are identical and similarly construed across this region.[1220] These interests are administrated by the state and customary structures, using state law and customary law.[1221] The common/statutory law mortgage and indigenous law devices are the main devices used to take security interests over land in the jurisdictions under consideration.[1222]

[1219] Para 3.0
[1220] Para 3.1.2
[1221] Para 3.1.3
[1222] Para 3.1.4

Secondly, many lessons from the Ghanaian experience could be learnt in order to make similar reforms in other ASA countries beneficial. One lesson that may be deduced from the Ghanaian experience, and is hereby also offered as a normative guide,[1223] is that the inclusion of land within a PPSA framework would have a high chance of succeeding if it anticipates the conceptual and practical issues associated with that step, including: (i) facing up to concerns about certainty of title that arise from the inclusion of customary land, and therefore mandating a centralized system for registration and searching for encumbrances; (ii) dealing with the challenge of determining which interest in land could be a subject of security interest by permitting security interest over any interests in land that is alienable; (iii) resolving the issue of the relationship between the prior law and the reform legislation by requiring the reforming legislation to be the only regime for the taking of security interest over land; and (iv) providing for, and preserving, the integrity of extrajudicial enforcement, which can be easily overreached in the absence of carefully crafted rules circumscribing the jurisdiction of the court, and possibly establishing a specialized court to oversee cases related to the enforcement of security agreements.

The rest of the chapter is organized as follows. Section 11.1focuses on the lessons that may be learnt by sub-Saharan African countries from the Ghanaian experience of the inclusion of land within a PPSA framework. Section 11.2 considers the particular example of Zambia to examine the interventions that might be necessary to promote the taking of security over customary land in Zambia (and other ASA countries with similar issues). This stems from the peculiar abhorrence to monetary transactions over customary land under customary law in Zambia.[1224] Section 11.3concludes the chapter.[1225]

11.1 Lessons from Ghana for ASA Countries

This section briefly deals with what the empirical findings about the Ghanaian reform could teach other ASA countries who decide to reform their secured transactions law to include land within a PPSA framework. This proceeds on the premise that the similarities and differences between the law of other ASA countries and that of Ghana, permit the reform of

[1223] Para 11.1.3
[1224] Para 3.1.2.5
[1225] Para 11.3

the former's law along the law of the latter.[1226] This is despite some very few and sharp differences that may be identified, as the example in Zambia regarding customary law's abhorrence of monetary transactions over customary land shows.

This section, in addition to noting the benefits of the inclusion framework, touches on some of the conceptual and practical challenges related to the inclusion of land within a PPSA framework, as experienced in Ghana, as well as how these challenges might be addressed, and any benefits enhanced. It, therefore, constitutes a normative guide for jurisdictions planning to reform, based on the Ghanaian example.

11.1.1 Feasibility of the common rules for movable property and land

First, although this study focuses on security interests in land, the perspectives gathered from the participants on the entire regime during the study, revealed that modern secured transactions rules relating to movable property are applicable to, and might be expected of, immovable property. Thus, a modern secured transaction regime, operating under common rules for both movable and immovable assets, is feasible.

Thus, there should exist no technical barriers to the inclusion of land in modern secured transaction reforms since fragmentation on the basis of the type of asset under various reforms has largely been a question of emphasizing lending with movable assets (in light of lenders' apparent excessive preference for landed property as security for credit) and also sheer convenience, but there is no reason why it should be impossible for a person or business to use all of its assets, including land for credit, in a single, simple, efficient and cost-effective manner instead of having to do so under distinct or separate regimes. At the same time, however, special rules may be required to deal with any aberrations in the same-rules principle to facilitate lending with land as security.

11.1.2 Inclusion informed by local factors

The second lesson learnt from the Ghanaian experience is that the inclusion of land within modern secured transactions reforms should be driven by such factors as local peculiarities, including the general state of the land law, and how inclusion might facilitate access to credit. Where the land formalization or title registration is ineffective or virtually absent in a jurisdiction that is steeped in indigenous traditions and concepts (as are most African countries), inclusion could make access to finance available to the majority of businesses and

[1226] Para 3.3

individuals who have various interests in land which are not covered by the existing land registration regime. This is at the heart of legal transplant theory.[1227]

11.1.3 Conceptual and practical challenges related to inclusion

Despite the feasibility of the inclusion of land within a PPSA framework and its associated benefits, there exist conceptual and practical challenges related to this step that are worth noting as lessons from the Ghanaian example.

First, the Ghanaian experience indicates that bringing customary land into a PPSA framework causes challenges for lenders related to the certainty of title to land which is presented as security for credit.[1228] This arises from the need to accommodate liberal descriptions of burdened land in the design of the registry system in order to enable all land, registered or unregistered, to be used as security. This is particularly important if customary land, most of which is unregistered, is to be brought into the economy. However, unless other avenues for verifying ownership to land, which are helpful under the pre-B&L regime in Ghana (including site visits and check with the courts for any litigation over a parcel in question),[1229] are used to augment what the Collateral registry provides (which is certainty with respect to encumbrances), other reforming countries in the region would not achieve the best possible outcome in this respect.

This concern about certainty of title also emanates from the fact that customary landholding in ASA is riddled with uncertainties regarding land ownership and incidents of this ownership. As the Ghanaian experience shows, this could pose challenges for the taking of security over land under a legal framework that is noted for expedition and also for thriving on certainty.

This notwithstanding, a great deal could be built on how the right of a member of the community to land in sub-Saharan Africa (especially in Zambia) is strongly asserted (even in allodial interest terms),[1230] to address this certainty concerns. Lenders could thus be encouraged by this aspect of customary law.

Also, the role of the customary structures in the land administration in the region could be enhanced. The controlling influence of the state structures over the traditional chief and

[1227] Para 1.2.2
[1228] Para 5.4.3
[1229] Para 5.2.2.2
[1230] Paras 3.1.2.2; 3.1.2

headmen in Zambia, for example, could be relaxed to enable them truly to control the customary land, as the CLS does in Ghana.[1231]

Secondly, it is clear that, as in many ASA countries,[1232] the endemic informal nature of both the land sector in Ghana and the economy as a whole, cannot be legislated away by any law reform. This reality must be embraced by any country that plans to reform its secured transactions to include land. Such an acknowledgment would enable appropriate solutions to be carefully devised. Incidentally, the inclusion of land within a PPSA framework could go a long way towards formalizing the economy and capitalizing customary land, which is essentially dead capital. Attempts to achieve formalization through the PPSA is far superior to the common law mortgage, which is the existing framework for the taking of security over land in Anglophone sub-Saharan Africa.[1233]

On the whole, the Ghanaian experience shows that the inclusion framework improves certainty of title by making it easier to search for encumbrances on land through the electronic platform, which ought to accompany the reform architecture. Ownership questions over customary land are not immediately resolved, but progress may be made over time in that respect.[1234] There should thus be no room for manual registrations and searches for encumbrances over land in the reform architecture. The registry must be fully automated and web-based in order to achieve real time registrations and searches which enhance the certainty of title.

Another lesson that can learnt from the Ghanaian experience is that the extrajudicial mechanism for enforcing land security interests, that distinguishes the Ghanaian inclusion framework, and could be overreached if the circumstances under which the jurisdiction of the court could be seized in a security transaction involving land[1235] are not clearly circumscribed, in order to discourage frivolous recourse to the courts to undermine the remedy of extrajudicial enforcement. A specialized court, adjudicating cases between borrowers and lenders, could be considered.[1236] The absence of this in Ghana contributes to delays in enforcement cases before the courts, who face numerous pending frivolous enforcement cases.

[1231] Para 5.4.4; 5.2.2.1.3
[1232] Paras 3.1.1; 6.1
[1233] Paras 6.4.2; 6.3.2
[1234] Para 5.5
[1235] Para 8.4.3
[1236] Para 10.2.2.1

Yet another lesson from Ghana, which could or ought to guide any reform in ASA countries based on the Ghanaian example, is that any reforms must contend with the conceptual problem of deciding the interests in land to be subjects of security interests.[1237] This can pose difficulties, as interests in land are diverse. Issues may arise regarding which of the existing interests is proprietary, alienable or suitable for the framework, especially considering that two or more interests in a parcel of land can co-exist or be enjoyed concurrently. Ghana permits security interests to be taken over any interests in land that is proprietary and alienable. In relation to concurrent interests in land, the question arises regarding what a charge over, or potential alienation of, one's interest would mean for the other's subsisting interest. Reformers would have to consider this issue carefully, given that land rights in ASA are mired in communal complexities.[1238]

A further conceptual and practical issue which is likely to arise for countries in ASA is the determination of the relationship between the land registry and the collateral registry, as well as the related prior law and the new law. This is a perplexing subject, with the potential to disrupt the settled law of the country, including its land law. For example, would registration at the land registry of an African jurisdiction be a constitutive act, necessary for the creation of a security interest in land at the envisaged secured transaction registry, or would execution of the credit agreement in which land is identified as security be sufficient to attach the security interest in the land? Ghana chose the latter,[1239] but this was poorly reflected in the implementing legislation. In the end, the prior law is running concurrently with the reforming legislation, leaving significant confusion in its wake.[1240] This must be avoided by countries in the region if any similar reforms are to succeed.

In light of the above, it can be deduced from the Ghanaian experience that not only should any reform in the region based on the Ghanaian example have economic drivers, but the process of reform itself must also be meticulous, and involve the active participation of all stakeholders,[1241] in order to avoid a deficient reform legislation, whose implementation is fraught with many challenges. The reform legislation should be sufficiently detailed as to reflect all of the essential ingredients of the reform, as envisioned by the original reformers.

[1237] Para 10.2.5
[1238] Para 3.1.2
[1239] Para 4.3.1
[1240] Para 4.2.7; 7.4.2
[1241] Para 9.4.1.4

Closely related to the above, every stage of the reform process should be closely monitored, including the law-making process in the legislature. The Ghanaian experience has taught that lapses can occur at any stage of a reform process.[1242] The drafting instructions could be poorly reflected, law-making in parliament may be insufficiently thorough to correct any deficiency in a bill, and the stakeholders may require continuous engagement at all stages of the law reform: the emergence, formulation, implementation and review stages.

The next paragraph considers the peculiar challenge regarding customary law reticence regarding monetary transactions over customary land in Zambia (and other parts of ASA).

11.2 Necessary interventions to facilitate security interests over customary land

This section considers the relevance of the empirical findings (from Ghana) for Zambia and other countries with similar challenges in Anglophone sub-Saharan Africa, focusing on the interventions that might be necessary to promote the taking of security interests over customary land.

Zambia's indigenous law and cultural abhorrence for monetary transactions over customary land,[1243] together with doubts over the ownership of certain interests in land,[1244] pose formidable challenges. Customary land has no value, cannot be sold, and no security can be taken over it.[1245] This difference between Ghana and Zambia is particularly significant, as it threatens any reform efforts which attempt to capitalise customary land in Zambia. Although this absence shows the stage of development of Zambia's customary law, it is difficult (although not impossible)[1246] to envisage social and economic change orchestrating customary law recognition for the taking of security over customary land. This is particularly so where a customary law device for such is completely unknown. However, a great deal could be leveraged on Zambian customary law's acceptance of the selling of improvements to land, the transfer of land for service [1247] and the giving of a prepared parcel of land to another to cultivate and share the proceeds (temporary acquisition).[1248]

[1242] Paras 4.4.2, 4.4.1; 9.5
[1243] Para 3.1.2.5.
[1244] Paras 3.1.2.2; 3.1.2.1
[1245] Para 3.1.2.5
[1246] Given that customary law is dynamic in nature.
[1247] Para; C.M.N White, 'Factors Determining the Content of African Land Tenure Systems in Northern Rhodesia' in Daniel Biebuyck (ed), *African Agrarian Systems* (Routledge 1963).
[1248] Land Chapter 3.1.2.5

Consequently, reforming the secured transactions law in Zambia to include land within a PPSA framework of modern secured transactions (as happened in Ghana) might require far more than legislative intervention. It might, among other things, require a change in the traditional attitudes and legal concepts regarding customary land, occasioned by social and economic factors, some of which are already at play but which need to be meticulously and purposefully harnessed or facilitated if the majority of Zambian land, which is currently "dead capital", can be leveraged to improve access to credit for businesses, particularly SMEs.

Indeed, indigenous land rights, under the impetus of market forces, are capable of significant evolution, as well as sustaining changes in traditional concepts and attitudes over land and facilitate security interest over customary land in Zambia. Such evolutionary outcomes, however, must be supported by governmental interventions, designed to formalize and consolidate the prevailing system of private property rights. [1249] This argument is made within the development paradigms discussed below.

First, due to the daunting challenges posed by communal concepts underpinning certain sub-Saharan African landholding systems, some have proposed the use of the might of the state through legislation and coercive enforcement to address the negative impact of these on the economy. [1250] It is believed that such an approach is the panacea for all ills, but it has the disadvantage of over concentrating on land titling which, although a necessary condition for resolving the economic challenges associated with land in sub-Saharan Africa, is not a sufficient one.[1251] Moreover, local people are capable of frustrating imposed policies and programs that they dislike. Impositions in land matters can have particularly bad outcomes, as they involve interference in socio-cultural systems, that can prove emotive.

The difficulties with the state interventionist approach make the consideration of the evolutionary view of land rights in Africa sensible. The essence of this view is that the impact of the increasing population pressure and market integration drives land rights towards individualization and land titling, which can be harnessed to promote economic growth.[1252] In

[1249] Jean-Philippe Platteau, 'The evolutionary theory of land rights as applied to sub-Saharan Africa: a critical assessment' (1996) 27 (1) Development and change, 29.
[1250] William Arthur Lewis, *Theory of Economic Growth* (1955) London: George Allen and Unwin; F. Falloux 'Land Management, Titling and Tenancy' (1987) in T. J. Davis and 1. A. Schirmer (eds) Sustainability Issues in Agricultural Development, 190.
[1251] Shem Migot-Adholla and Others (1991) 'Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity? The World Bank Economic Review, Volume 5, Page 155.
[1252] Platteau (n 1249).

sub-Saharan Africa, this pressure has, since colonial times (when commercial crops such as palm oil, cocoa, coffee, cotton, groundnuts, etc., were introduced), caused a gradual but steady drive towards the enhanced individualization of land tenure. In Zambia (as in many sub-Saharan African countries), there have been many incidences of land sale transactions (initially disguised, then increasingly open), and the increased use of money in connection with land loans.

What is, therefore, needed is the facilitation of this evolutionary process to support the changes in the traditional concepts and attitudes related to land. This must take into account the supply and demand factors in the customary land equation. The demand factors relate to the measures that would increase the capital value of customary land in Zambia. Opening up Zambia's rural economy (and indeed the economy as a whole) would spur the value of, and create a market for, customary land. Also, systems must exist to make customary land be accepted as reliable collateral. It should be easy for lenders to realize the security in customary land in the event of default. This will involve making the judicial system efficient, including strengthening the local capacities for management, information, and dispute settlement.

On the supply side, land titling should be vigorously pursued. However, local innovation supported by development partners, which leads to title certificates from local chiefs,[1253] should be supported. This will, arguably, enhance title security, and promote the use of customary land as security for credit. Again, the landowning authority of the chiefs and headmen must be clarified[1254] so that lenders will be aware who has to approve what. This will increase access to credit using customary land.

Further, the Zambian state's shackles on customary land could be loosened to facilitate more control of the traditional structures over their land. This will enable land markets to develop, including access to credit using land as security.

11.3 Conclusion

This chapter has examined the implications of the empirical findings from Ghana for sub-Saharan African countries in the event of a reform of their secured transactions laws based on

[1253] Erik Green and Milja Norberg, 'Traditional Landholding Certificates in Zambia: Preventing or Reinforcing Commodification and Inequality?' (2018) 44 (4) Journal of Southern African Studies 613.00
[1254] Para. 3.1.2.1

the Ghanaian example.[1255] It has identified several conceptual and practical issues related to the inclusion of land within a PPSA framework, as experienced in Ghana. It has also touched upon how such challenges have been confronted, which could serve as a normative guide for Zambia and other reformers.[1256]

The inclusion of land within a PPSA framework in Ghana offers many benefits over the traditional common law/statutory mortgage used in ASA.[1257]

These and many more advantages stand to be gained by countries in ASA if they reform based on the Ghanaian example. This kind of reform is indeed feasible in Zambia and other ASA countries, given the similarities between their laws and that of Ghana regarding the relevant issues, including land law, customary land law, and real property mortgage law,[1258] particularly where the existing variations (some minimal, some major) do not disable the reforms, but rather illuminate the reasons for and the advantages of each system in its own environment.[1259]

In relation to the challenges with customary law's position on customary land as a subject of security interests in Zambia, it has been argued that any attempt to reform Zambia's secured transactions framework to include customary land would have to leverage on: (a) the strongly asserted individual's right to unoccupied land at custom, which is superior to its Ghanaian equivalent; (b) evidence of the evolving shift towards the individualization of customary landholding, including the disguised sale of land and increased use of money in land transactions.[1260] These changes in the traditional attitudes and legal concepts related to land are attributable to social and economic pressures, which must be honed and facilitated (partly through the PPSA framework itself) in order to capitalise on the majority of Zambian land.

[1255] Para 11.2
[1256] Para 11.2.2
[1257] See Para 10.1 for a summary of the benefits of the inclusion framework
[1258] Paras 3.0; 3.3
[1259] Allot, Anthony. N. (1968) 'African Law'. In: Derrett, J.D.M (ed.) An introduction to legal systems. London: Sweet & Maxwell, pp. 131-156
[1260] Para 11.2.1.

Chapter XII

Conclusion

12.0 Introduction

Through a qualitative case study and a doctrinal analysis, this thesis has critically examined the inclusion of land within a PPSA framework of modern secured transactions in Anglophone sub-Saharan Africa (ASA), using the Ghanaian experience as an example of the discourse. This consideration has been in the broader context of the LDT,[1261] LTT[1262]and TCT.[1263]These highlight one of the main intellectual debates about secured transactions law reform, namely; how far it is legitimate to take a legal framework from one country and transplant it into another with different social and economic issues, as well as a different legal culture.[1264]

This conclusion explains how the research question has been answered by this thesis.

12.1 Thrust and significance

The issues in this thesis have been considered against the backdrop of the exclusion of land from all modern secured transactions transnational and national instruments, a practice from which the Ghanaian reform framework deviates. The thesis argues that the inclusion of land within a modern secured transactions framework (the PPSA), is feasible, albeit having conceptual and practical challenges. The thesis identifies the conceptual and practical issues associated with the inclusion of land within a PPSA framework (a legal transplant) in ASA countries, and the ways to address such challenges to realize the benefits from such inclusion for countries in ASA with land administration and real property mortgage law challenges. Thus, this thesis has contributed to the discussion on legal transplantation by offering a case study of how the PPSA can be modified to expressly address the needs and issues of a state or set of states. It has shown that the Ghanaian case study affirms the legal transplant theory and more specifically advances the argument and practice relating to the transplantation of the PPSA

[1261] Para 1.2.1
[1262] Para 1.2.2
[1263] Para 1.2.3
[1264] The other debate, which is not really dealt with in this thesis is: whether and how secured transactions reform produces economic benefit, through an increase in certainty and reduction in transaction cost.

framework.[1265] First, the PPSA framework which underpins the Ghanaian reform is a modern law that was borrowed from the West, because it was believed that it can, for instance, improve access to credit through simple and efficient means of creating and enforcing security interests.[1266] This affirms the fact that systems of rules, norms, and legal traditions have always been transferred from one society to another, especially where foreign law is considered superior and capable of facilitating development. However, whether the reform has achieved its intended economic benefit, has not been the focus of this thesis as this thesis is not an economic study, but only deals with the legal benefits of the Ghanaian reform that could lead to any economic benefits. This thesis has, thus, underscored the facilitative role of law in development, as canvassed by the LDT through LTT.[1267]

Secondly, as one of its contributions, this thesis has demonstrated the feasibility (and sometimes the propriety) of a theoretical adjustment (or extension) of a legal transplant in a manner that captures the true essence of the LTT as a vehicle for law and development. The Ghanaian case study, thus, both bears out and advances the LTT.[1268] It, first, stresses the importance of taking account of local peculiarities when adopting a foreign law. Informality is identified by the thesis in chapter six as a local phenomenon that cannot be legislated away but should instead be confronted. It secondly shows the method of response that the local context requires: an effective and accommodating law reform strategy; and/or meaningful legal transplantation, which essentially adjusts the legal transplant and accords with the LTT.[1269] This thesis has offered insight into the fact that the adaption of the PPSA framework in Ghana to include land was designed to mitigate the failures of land administration by functionally abolishing the distinction between registered and unregistered land. This makes it possible for untitled land to be leveraged for credit, thereby making capital from the vast tracts of land which have been "dead capital".[1270] Thus, the inclusion of land within a PPSA framework in and of itself alien to the PPSA concept, and to that extent an advancement of the concept. Also, the adaptation of the PPSA rules on the creation and perfection of security

[1265] Para 1.2.2
[1266] The reform has enabled the application of some of the best practices from the PPSA (such as extrajudicial enforcement, and clear and comprehensive priority rules, certainty and the associated economic benefits) to the regime for security interest over land, thereby encouraging lending using land as security.
The reform was, indeed, intended to fill some of the gaps in the real mortgage property laws of Ghana, particularly, by enabling the registration of customary law interests in land which were unregistrable, and over which it was difficult to take security (within the Pre-B&L Act framework)
[1267] LDT refers to Law and development Theory, while LTT means Legal Transplant Theory. See Para 1.2
[1268] Para 1.2.2
[1269] Para 9.0
[1270] Paras 6.5.1 to 6.5.4

interests to accommodate the informality within the Ghanaian economy, and to generally address land administration challenges and problems with real property security interest law. These accord with the legal transplant theory.

This consideration has been particularly important against the backdrop that the common law mortgage (a colonial transplant) and the related land administration regime that was inherited during the colonial rule in Ghana have proved ineffective over the overwhelming bulk of the nation's land stock,[1271] which de Soto describes as "dead capital". The adaption of the PPSA considered in this thesis was to address this challenge and is consistent with the LTT.

Nonetheless, substantial challenges arise from such an adaptation of the PPSA, and this thesis has also shed light on these.[1272] These challenges have been identified as not just conceptual and practical issues associated with the adaptation of the transplant, but also capable of undermining access to finance. They, thus, form the bases for the further reform and refinement of the reform law in Ghana.

They include, first, the certainty of title concerns that are raised by the adaptation of the PPSA system.[1273] The reform framework makes it possible to take security over the vast tracts of unregistered land in the nation (even just by oral agreement, and to register the security interest at the Collateral Registry using electronic templates that allow for both a minimal and expansive description of the burdened land. However, lenders have few or no avenues to ascertain the ownership of unregistered land, particularly,[1274] which, by the frameworks' innovations, can be conveniently used as collateral for credit. Research participants identified this as raising regulatory issues and business prudence concerns, which have the potential to undermine the reform and access to finance generally.[1275] This deficiency of the B&L Act framework is a lesser evil, compared to the state of affairs under the pre-reform regime, where unregistered land, which forms the bulk of the nation's land stock, was 'dead capital', as it was hardly used, or accepted as credit, given that there was (or is) no opportunity to record such transactions, even where lenders were willing to accept this unregistered land. It is, nonetheless, made clear that the inclusion framework significantly improves the certainty of title concerning

[1271] Paras 3.3; 3.1.4.1
[1272] Para 10.2
[1273] Paras 5.41, 5.4.2
[1274] Para 5.3.3
[1275] Para 5.4.1; 5.4.2

the ascertainment of encumbrances over registered or unregistered land that is presented as collateral.[1276]

Secondly, the thesis has highlighted the fact that the adaptation of the PPSA in the Ghanaian reform does not sufficiently secure the enforcement of security interests, as characteristic of the PPSAs.[1277] The enforcement mechanisms available in the inclusion framework, especially the extrajudicial mechanisms, are susceptible to overreach.[1278] This is particularly concerning for a modern secured transaction framework like the PPSA that prioritizes speed and efficiency in enforcement. This is discouraging for access to finance, especially as lenders had hoped to fully realize the promise of the reforming framework. The court's jurisdiction is frequently frivolously asserted, turning extrajudicial enforcements into full-fledged lawsuits that take a long time to resolve in court. Although the court system's inefficiency and the desperation of the borrowers can be held responsible for this, the judges' and other legal professionals' mentalities, which are accustomed to the pre-B&L Act system of handling all enforcement cases involving land as security through the courts, play a significant role in this overreach.[1279] Applying best practices for the enforcement of movable assets (including the judicial and extra mechanisms) to land per se is not enough.

Indeed, this raises a third practical challenge of how to adequately engage public participation and win stakeholders' support for a substantive and significant reform (like the adaptation of the PPSA transplant) that replaces the well-known statutory/common law mortgage with the novel PPSA framework. This highlights one of the pitfalls in the legal transplantation process identified in the literature: public involvement and sensitization, as well as stakeholder education and buy-in, which, in themselves, can be challenging to, and potentially disruptive of, the legal transplantation efforts if they are in any way deficient. This is the thrust of chapter nine. In addition to the fact that stakeholders are accustomed to using common law or statutory mortgages to acquire security interests in land, using the PPSA for the same purpose—and doing away with the mortgage regime in favour of a PPSA framework—is novel and it is difficult to educate, enlighten, and persuade stakeholders about it.[1280] The

[1276] Paras 5.4.5; 5.6
[1277] Para 8.0 read together with Para 4.1.2.1
[1278] Paras 8.4.3; 8.5
[1279] Para 8.4.3
[1280] Para 9.5.3 (newly created)

tendency for bureaucratic policymaking makes it even harder to embark on a reform relating to issues of the type considered in this thesis.[1281]

Fourthly, the adaptation of the PPSA to include land has been shown in chapter 10 to embed a conceptual and practical challenge of determining over which of the interests in land security interests can be taken. This emanates from the nature of the registration process and the available extrajudicial enforcement mechanisms under the framework, which prioritise speed (and run the risk of glossing over, misinterpreting, and incorrectly attaching such competing interests). Because interests in land that can be used as security are diverse: ranging from allodial to customary law tenancies,[1282] if care is not taken, a security interest over, or potential alienation of, one's concurrent interest, could have a major impact on the other's subsisting interest. These concerns are especially important in the context of the B&L Act even though they are land law-related and equally relevant to the Pre-B&L Law environment. This introduces confusion and undermines access to finance.

Fifthly, this thesis has further identified conceptual and practical issues that relate to determining and defining the appropriate relationship between the inclusion framework and the prior regime for the taking of security interests over land.[1283] Research participants in the qualitative study constituting this thesis have, in the various chapters but particularly in chapter seven, shared their experiences with the concurrence of the reforming framework and the prior regime, highlighting associated costs and confusion. This is perceived to be undermining the Ghanaian reform and access to finance generally.[1284]

Having considered these challenges with the inclusion framework as bases for further reform and refinement of the reform law in Ghana, both on the books and in practice, this thesis has identified and normatively considered some solutions to the challenges,[1285]including clarifying the relationship between the prior law and the reforming framework.[1286] It is submitted that the repeal of the mandates of the other registries over land security interests under the Pre-B&L Act regime would eliminate the confusing relationship between the prior law and the reforming framework, as it makes the reforming framework the only regime for taking of security over land.[1287] Although the benefits of such a repeal or unification are not

[1281] Para 91.1.2
[1282] Para 3.1.2
[1283] Para 7.0
[1284] Para 7.4.2
[1285] Para 10.2
[1286] Para 10.3.1
[1287] Para 10.4.3

too difficult to see, any potential drawbacks should be competently anticipated. Further, augmenting the technology that undergirds the registry's electronic template, including deploying available technology such as GPS systems for effective identification of burdened land, has the potential to improve the system.[1288] The changing nature of technology makes this a moving and challenging target, but a worthwhile one. Additionally, reducing informality in the economy through universal education; strengthening the land documentation functions of the customary structures; and honing the potential of the registry platform to evolve a register of unregistered land with time and effectively address challenges with the certainty of title, are also recommended for improving the framework.[1289]The complexity of informality and its endemic nature in the region, however, makes this a tall order, although not an impossible one. Also, a Borrowers and Lenders' court, which applies specially crafted civil procedure rules, could be established to effectively address the overreach of the extrajudicial mechanisms for accessing the court,[1290]and generally, strengthen enforcement of security interests by giving better guidance on how to speedily and efficiently access the courts.[1291] This can go a long way to advance the reform and the framework. This, however, requires a very strong, but rare political will to interfere with settled rules of court, including its jurisdiction.

These suggestions impel a further attempt at enacting the reform and must anticipate and address the challenges of the previous efforts. Public engagement and participation before, during, and after the legislation should be carefully planned and executed. Although this might not be foolproof, it will go a way to enact and implement the best law possible that achieves the original reformers' intentions and promotes access to finance with land as security. It is contended that these measures could secure the achievement of the significant benefits of the inclusion framework,[1292] including making security interests possible over about 90 percent of the country's land stock, which is customary land and unregistered.

Concerning the feasibility of the inclusion of land within the secured transactions law of other ASA countries, this thesis has maintained that the general similarities in land and mortgage laws of ASA countries, make a reform along the Ghanaian example feasible and beneficial. This is despite striking differences in countries like Zambia where there is cultural

[1288] Para 10.3.2
[1289] Para 10.4.1
[1290] Para 10.4.2
[1291] Para 10.3.4
[1292] Para 10.1

reprehension for the sale[1293] of, or monetary transaction over customary land,[1294] which limits what the interest holder can do over the land. These are however not impossible, differences.[1295] It is argued that in such an environment like Zambia, any attempt to reform the framework of the secured transaction to include customary land would have to leverage on: (a) the strongly asserted individual's right to unoccupied land at custom, which is superior to its Ghanaian equivalent; (b) evidence of the evolving shift towards individualization of customary landholding including the disguised sale of land, and the increased use of money in land transactions.[1296] These changes in traditional attitudes and legal concepts over land are attributable to social and economic pressures, which need to be honed and facilitated (partly through the PPSA framework itself) to make capital of the majority of Zambian land.

It is, however, advised that an assessment of the suitability of the inclusion of land in the secured transactions regime of any particular ASA country with land administration and real property and mortgage law challenges like Ghana be before any transplantation of the Ghanaian system.

12.2 Conclusion

In conclusion, this thesis claims that a PPSA framework for security interests operating with common rules for both movable and immovable assets is both desirable and workable for countries in ASA that have land administration and real property mortgage law challenges. This is even though significant, but not impossible, challenges attend such a law reforms. Being the first thesis of this kind, it has given a case study of how the transplantation of the PPSA can be adapted (to include land) to suit local peculiarities. It has also specifically given a basis for the further reform of the law in Ghana with normative considerations. Countries in ASA who might want to reform along the Ghanaian example are also guided.

[1293] Para 3.1.1.
[1294] Ibid.
[1295] Para 5.4.
[1296] Para 3.1.1.

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