

A Paradigm Shift: Leveraging Paralegal Title for The Benefit of the Developing World and the Surveyors Who Map It

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SUMMARY

In today's world every profession struggles to attract new talent. How do we motivate young people to consider surveying? One way is create opportunities to affect the lives of others. Take poverty. Dr. Hernando de Soto, in "The Mystery of Capital," observes that most people in developing countries only hold informal title to land. Moving land ownership from the informal to the formal sector allows persons to take the first step toward alleviating poverty by achieving economic prosperity. While the legal and bureaucratic framework for land ownership exists in many developing countries, the governments are failing to deliver on the promise of land ownership/occupation rights because the process is too complicated, expensive or litigious. Why should we await government's action to formalize land rights when the private sector can act first?

A private sector led approach is based on the premise that the formalization of land is not an end in itself, but rather a means to an end. Such private sector actions include: documenting "de facto" as well as "de jure" ownership, streamlining the demarcation of properties using GPS and related technologies, issuing paralegal title to access microfinance, micro-mortgages and credit, and facilitating the conversion of paralegal title into formal title.

By paralegal we mean that all information normally required for formal registration is collected including: property description, owner/occupant information, and adjudication with community leaders or other appropriate persons but formal registration is withheld until a future date. No direct government action is required until incorporation into the formal registry. Accelerating the engagement of surveyors and facilitating their early payment (making their work a precursor to and independent of government action) means large numbers of people will be able to secure a timely and cost effective description of their land and at the same time determining the ownership using very practical methods. This approach to surveying leverages technology to streamline the process.

The procedure underlying the paralegal title approach depends upon trust in the reliability of the information, in the process to obtain "formal" title, in the intentions and actions of government, and in the lender providing funds; developing a true public/private partnership.

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1 BACKGROUND

In the recently released World Poll study by the recognized polling authority Gallup Inc, a startling discovery is recognized – what the world wants is a good job. “Walking down the street in Khartoum, Tehran, Berlin, Lima, Los Angeles, Baghdad, Kolkata or Istanbul, we would discover that on most days the single most dominant thought carried around in the heads of most people you and I see is, ‘I want a good job.’” (article “Global Migration Patterns and Job Creation,” Jim Clifton, CEO Gallup Inc, 2007) This revelation was uniform despite the economic conditions of the individuals and their surroundings.

In today’s world every profession struggles to attract new talent. The competition for attention by the best and the brightest is not new in business but seemingly it has acquired new dimensions. Since the dawn of the new millennium each year has brought greater and greater focus on employers and their need to find ways to inspire intelligent employees and applicants to join their company. The demand is for a balanced existence, blending profit making plans and programs with those that allow the individuals and the company to “make a difference.” The mantra of industry-leading companies has become – doing well by doing good.

Land surveying is no exception. The challenge for the profession is to motivate young people to consider a career in surveying and, for those who have already joined, to continue to find ways to make them secure in the knowledge that they made the right career choice. One way to meet both objectives is to create opportunities that positively affect the lives of others giving the surveyor dual reward for his or her work – compensation for determining property dimensions and description; satisfaction for providing assistance that goes beyond metes and bounds. For the second reward, we must look to more fundamental issues and their solution.

Take poverty. Dr. Hernando de Soto, in *The Mystery of Capital*, focuses on the roots of poverty worldwide and found a common element in the emerging markets. He observes that most people in developing countries only hold informal title to land. In speaking of the position of the developing world, de Soto observes that:

(t)he poor inhabitants of these nations - five-sixths of humanity - do have things, but they lack the process to represent their property and create capital. They have houses but not titles; crops but not deeds; businesses but not statutes of incorporation. It is the unavailability of these essential representations that explains why people who have adapted every other Western invention, from the paper clip to the nuclear reactor, have not been able to produce sufficient capital to make their domestic capitalism work. (de Soto 2000, 6)

De Soto goes on to reflect that lack of attention to this kind of capital in developing countries is shrouded "in a series of five mysteries." They are summarized as follows (*Id.*, 11)

- "The Mystery of the Missing Information" - Those focused on the hopelessness of the poor miss documenting their capacity for accumulating assets.
- "The Mystery of Capital" - What is it? How is it produced? How does it relate to money?
- "The Mystery of Political Awareness" - Why don't governments tap into the "dead capital" that lies undiscovered in most developing countries?
- "The Missing Lessons of U.S. History" - The U.S. and Europe found ways to recognize squatters rights and other means of establishing inchoate property rights and capital interests of its people, those lessons can be brought to the developing world.
- "The Mystery of Legal Failure" - Why property laws are ineffective to enable the poor to realize their potential capital and asset accumulation.

In the end, de Soto identifies an overriding common element in solving each of these mysteries - the formalization of property rights leading to capital identification, recognition, valuation and wealth building for the poor. It is on that premise that our work is founded.

By moving land ownership/occupation rights from the informal to the formal sector de Soto believes we allow these individuals to take the first step toward alleviating poverty and achieving economic prosperity. It starts with something as simple as having a mailing address and ends with the ability to use the land as security or collateral for borrowings – often the first step toward building an income stream. Microfinance has emerged as a means to jump start the poor by giving them small loans for short periods of time – typically \$100 to \$500 for six months. This is enough capital to buy a sewing machine or basket weaving material or other elements of an in-home business. This is likely the first capital investment by a family and the first return on such capital they have experienced.

This paper will explore the working model that we have developed and are in the process of implementing in Ghana providing a path to land ownership.

Like microfinance, the ownership of land, when recognized, becomes a factor in changing the way people think about themselves and their future. With assets, one begins to contemplate ways to improve those assets, use those assets and secure those assets – all of which leads to greater feelings of worth. While not all of our worth is tangible, the tangible components of worth serve as building blocks for the less tangible elements. A woman in Africa feels better about herself because she is supplying clothing, made from the sewing machine she bought with a microfinance loan that others like and buy from her. With the addition of property rights, that same woman may become eligible for a larger loan – perhaps a loan sizable enough to start a private school or own a shop.

While the legal and bureaucratic framework for land ownership exists in many developing countries, the governments are failing to deliver on the promise of land ownership, because often the process is too complicated, expensive or litigious.

There is no shortage of land registry systems¹ throughout the developing world yet in many places, both developing countries and even in some cases in the developed world as well, the systems do not serve the purpose for which they are intended. They lay dormant, incomplete or worse yet, they are activated to serve the purposes of a few to accumulate greater wealth in the form of land rights to the unfair detriment of the less fortunate. In many cultures, land rights are treated as the unquestioned rights of those in power, often resulting in and from corruption that takes many forms. Whether it is a government official that believes they are entitled to a personal fee for transfer of land rights or a bureaucracy that seeks to restrict land ownership to a selected group, the result is the same; the breeding of a lack of trust furthering despair and the continuing cycle of poverty for a large segment of the population.

Even if governments do not actively use their land registry systems for ill gain, still many such systems often sit without activation. There is money to build them because that process is identifiable and quantifiable, that is to say capable of budgeting and financing. But what to do with a built system is a question that is a lot harder to answer. It takes action and planning, not just technology and funding.

The “if you build it they will come” or supply side philosophy that has dominated the landscape of land surveying and titling processes often does not work. There must be reasons and motivations of governments to act to implement the systems they have built or have had built, and individuals must be given a sense of trust and incentives to create the momentum needed to get them to pursue formalizing their land ownership interests.

Land registries have, of course, many different functions, but economically it can be argued that it's most significant function is to provide security of tenure and allow the efficient transfer of rights in land as support for land markets. Yet many governments fail to recognize this purpose and rather view registration systems as a means of regulating and controlling land resources, and as a mechanism for the collection of real estate taxes. This serves as one of the greatest disincentives for people to actively participate in registration, even where it is required by law. This is where private industry can help.

The private sector in most businesses is driven to action by profit motives, growth expectations, collaboration of interests, and intellectual challenges, all of which are promoted in the open environment experienced in most private industry. Although such thoughts are often associated with “free” societies, private companies play the role of catalyst even in less

¹ That is the formal processes and infrastructure (including personnel, hardware, software, office facilities, power, communications, training, and finances) needed to receive, verify, state, and publicize the rights in real property.

free places around the world. So the question presents itself: Why should we await government's action to formalize land rights when the private sector can act first?

We have embarked on a private sector led demand approach that is based on the premise that the formalization of land rights is not an end in itself, but rather a means to an end. As De Soto alludes to, it is what one does with those rights that makes a difference. But in order to see that impact, we need to start with the acquisition/recognition of land rights by those who historically have not been afforded nor could afford those rights. Jump starting the process through private industry engagement is made possible by, and is predicated upon:

- Documenting “de facto” as well as “de jure” ownership;
- Streamlining the demarcation of properties using GPS technologies;
- Issuing paralegal title to access microfinance, micro-mortgages and credit; and
- Streamlining the conversion of paralegal title into formal title.

Although “legal or formal title” is the standard we are all used to using in the Western world the truth is that such a designation is really just a means to demonstrate we have proven “de facto” ownership to a sufficient enough level to justify the “legal” designation. In truth it is the facts and circumstances surrounding each property and its heritage that make up the elements of true “legal” ownership.

Even if paperwork does not exist to evidence legal title holdings, often the mere passage of time works to the benefit of the would-be landowners to establish the *bona fides* of their interests. In most countries, if one openly possesses a piece of land for enough time title vests in that person. The social value of this principle is that the land is put to productive use and contributes to the economy as a whole. It is good public policy to ensure that those who have productively used the land for a sufficient period of time acquire the ownership based upon this use. This kind of legal determination brings order and this example is a good way to show how “factual” holdings can become “legal” holdings. There are other legal theories, such as lost document and un-administered inheritance that also support findings of legal ownership based upon provable facts.

But often the poor are not equipped to “prove up” these facts since they are unfamiliar with the process and unlikely to explore their rights given their natural distrust for the government. And, even if they are ready to take on that challenge, the process of registration is often too expensive, complicated, and time consuming. Many may want to formalize their interests but they are afraid to open the discussion for fear they might lose – lose the factual argument, lose the legal argument, lose their money to taxes imposed, lose their ability to farm or do what they have historically been doing on the land they occupy unchallenged and to which they claim ownership.

There is also fear on the government’s part. Fear that they will have unsolvable problems or that by making a decision they will be held accountable. Multiple claimants for each property based on inadequate records or, worse, corruption in prior administrations that has led to

multiple holders of deeds to the same property. But here again, we cannot be hamstrung by the worst problems, but rather we should be attacking and resolving the majority of cases which tend to be simpler, i.e. don't make the exceptions the reason not to do something. The more difficult problems will certainly need government action, but there is no reason to hold off recognition of those property rights that can be established. Progress leads to more progress and demonstrating that some owners are seeing the benefits of formalized land rights will suggest to the disputing claimants that a better path might be found in looking for solutions to their disputes and allowing themselves to be the beneficiaries of some form of land ownership. Agreeing to a settlement and not trying to gain more than is reasonable may be a wise decision when they see others progressing from poverty who have taken this approach.

The first step in overcoming the elements of fear held by the landowner is to have a third party look at the land and identify its boundaries and dimensions. A property survey and description is at the heart of changing the informal nature of their holdings into something they can openly discuss and demonstrate.

Enter the land surveyor. In addition to the cumbersome land registration process, it is often the case that poor land owners are inhibited from pursuing a better description of their property by the costs of such a process. Surveying is both a science and an art form. In practice, the level of detail required of a surveyor is dependent upon the ultimate use of the property. If you are building a high rise office building the surveyor and the architect and the engineer must all work together to get it precisely right. The cost of a mistake is too great to allow imprecision at the outset in identifying the precise location of the building on the property and its boundaries. But it is much different designating property boundaries for the urban or rural dwellers in Ghana. There the concern is showing there are property demarcations and coordinates that can be identified with an individual – the classic definition of a cadastral survey being nothing more than additional legal evidence to be used in the case of a dispute. There is little cost if a mistake occurs and often such mistakes reflect “de facto” lot line alterations that have already occurred between neighboring plots.

In fact, although some precision is always needed, the real value of surveying in developing lands can only be realized if a cost effective means can be undertaken to produce a result that is both timely and affordable and minimizes the potential for dispute. Determining what is enough information and detail is at the heart of a practical approach to land titling for the poor in the developing world. This is the challenge facing surveyors and it presents an opportunity for a somewhat esoteric profession to provide real tools that can change lives.

The practical implications are staggering. Accelerating the engagement of surveyors and facilitating their early payment (making their work a precursor to and independent of government action) means potentially large numbers of people will be able to secure a timely and cost effective description of their land.

In the continued spirit of engaging the private sector, the boundaries of specific properties can be established pursuant to general boundary principle using hand held GPS² and an integrated digital camera to begin to rapidly create a GIS database of the sites. Private surveyors are well versed in the use of GPS and require little or no training to determine the boundaries of properties using this equipment.

A measurement-based cadastre can be developed, which can be updated on a sporadic basis as more detailed surveys are performed in the future. The graphic map or plan in this measurement-based cadastre becomes merely an instrument for showing the measurement data and the topology and shape of the properties as individual entities and in relation to one another. In this type of cadastre there is no requirement for a base map. To the extent that existing mapping systems and data are available and appropriate, this information will be used to quickly define the properties in question.

Once a basic identification of the property is available, the next step is the preparation of a site plan that can be used to identify the property, the land owner and the details of ownership for recall at any time in the future. Like surveying, for determining title in the past it was assumed that the same standard of care needed to be applied to the least sophisticated transactions as was afforded the most complicated of properties. But as with surveying, we believe an alternative exists to streamline the titling process. The answer we believe is “paralegal” title.

By paralegal we mean that the title is good and valid and the property description accurate, but instead of immediately entering the formal recording and registration process, an alternate route is undertaken for the landowner through a trusted broker. The legal impact of formal title is, when broken down, really only that third parties recognize the rights of the land owner in that land. Why can't such determinations be done on a business level by a neutral third party who has a financial interest in making sure the land and owner are as represented?

Like traditional financial institutions around the world, microfinance lenders must rely on the ability of their borrower to repay the loan. In making an underwriting decision on that borrower, they must look at all available information to determine their “creditworthiness.” This includes a look at their assets.

Our premise is that if a responsible lending institution is shown evidence of title being properly in the name of the borrower and they are willing to make an underwriting decision based on that evidence, the borrower has something of value. Reliance by that financial institution on the evidence presented, even if that evidence has not been reduced to formal registration of that land in that borrower's name, demonstrates commercial trustworthiness of the land holding information. This translates into another form of “de facto” title.

² Including a fixed reference station.

The financial institution now vested with its own financial interests in seeing the title formalized, and acting on behalf of the borrower/landowner, can assist in streamlining *formal* registration. Though no direct government action is required until incorporation into the formal registry, the microfinance institution can act as facilitator and consolidator for collections of paralegal title evidence/certificates which can be delivered to the government in accordance with a predetermined plan according to pre-determined procedures.

Technology provides the vehicle to eliminate needless or nonsensical steps. It is not about simply streamlining the way surveying has been done, it is about leveraging technology to alter what the process “means.” Likewise, it is not about weaving countless independent land registration systems into a fabric that is confused and incapable of cost effective use by the poor, but rather leveraging technology and common sense to achieve a simplified result.

This has the real potential of bringing about global impact, but it depends on trust. Trust in the reliability of the information, in the process to obtain “formal” title, in the intentions and actions of government, and in the lender providing funds; developing a true public/private partnership based on that trust.

2 OUR DEMONSTRATION PILOT IN GHANA

There are two overriding principles at the heart of determining paralegal title in the Demonstration Project in Ghana: 1) that properties can be properly identified and delineated along general boundary principles, and 2) that though both customary rights and common law rights exist in Ghana, both are sufficiently well-defined to be legally recognized, valued, conveyed, and pledged as collateral securing the loans in the program. The program relies on a high degree of support by the local administration, as well as family, social and tribal institutions.

The use of licensed surveyors and appraisers to establish the boundaries and determine the paralegal title information will ensure that this information is readily accepted technically by survey and registry offices during a later phase when the paralegal title might be formalized.

Throughout the pilot and during any roll out the program implementers will work with the Government of Ghana to help it modernize formal registry services and technology so that it will be in a position to ramp up to deal with increased demand for formal title, which we anticipate will result from the initial issuance of paralegal titles. We stress that we must work in partnership with Government and seek a long term relationship that benefits all parties.

a. Streamlining the demarcation of properties using GPS;

Although the location of boundaries is important to the legal cadastre, there is, in general, little need for highly precise measurement in maintaining such a legal cadastre. This principle is recognized in the widespread use of general boundaries in countries with the most active real estate markets in the world. In the pilot, property descriptions are established using hand held GPS equipment sufficient for identifying a property for the sake of issuing paralegal title. Surveyors in the pilot area in Ghana are already familiar with the use of GPS technology and therefore the field teams will only need minimal orientation in conducting GPS measurements to record parcel locations. In some cases, the data established using GPS will be complemented using tape measurements. It is anticipated that the main body of the real property object can be readily defined and identified. The flexible accuracy requirements³ are especially appropriate in an environment of widely varying real estate object types and values, such as those in the pilot area in Ghana.

A property survey based upon these principles will be completed and a site plan will be prepared by a licensed private surveyor. This data will be submitted to the Director of Surveys for approval and in this fashion the survey department will be able to update the data files that it maintains.

b. Documenting “de facto” as well as “de jure” ownership;

In our pilot the primary objective is a system for registering of rights in land to standards which ensure the good management of the land and the people who occupy it. The system should be capable of solving most of the problems most of the time at a minimum of cost. The determination of paralegal title relying on data collected in the field should not be made more complicated than it needs to be. It is very likely that there will be ready agreement regarding the rightful owner sufficient to issue a paralegal certificate based upon a rapid collection of data from the field, since the local stool or clan/family members will be an integral part of the field data collection process.

A mainstay of the methodology in determining paralegal is based upon the premise that many of the legal procedures found in statutory registration systems are designed to provide “due process” and a reasonable appeal process, which, although reasonable for formal title, rarely contribute to the accuracy of field determinations of title. These protections will be afforded at the time a paralegal title holder migrates from paralegal title to a formalized legal title.

Despite the initiation of this activity by the private sector, the procedures are consistent with established legal precedents, thus increasing the likelihood that the paralegal title can be subsequently registered by the land registry. The determination of paralegal title will be made by the local stool or clan/family members with the assistance and concurrence of private sector surveyors doing the field data collection.

³ Scaled for value of property.

In the case of family land, the occupant will present written consent from a family head, witnessed by the principal members of the family. In the case of stool/skin land, the occupant should present written consent from the stool (skin) Chief, witnessed by the principal members of the stool (skin). Additionally consent from the Lands Commission (Concurrence Letter) will be issued for a transaction against skin/stool land.

c. Issuing paralegal title to access microfinance, micro-mortgages and credit;

Paralegal titles will be documented and maintained using the infrastructure provided and supported by the private sector (physical plant, security, IT, staff etc.) to provide a desk for one stop land services such as survey, stool adjudication, filing of forms, payment of fees etc., related to the new loan product. This private infrastructure, however, will be sufficient to accept this pledge of the paralegal title as security for the respective loan.

d. Streamlining the conversion of paralegal title into formal title;

The issuance of paralegal title and its maintenance in a private data system, although satisfactory for the loan program, is not the end, but only the beginning of the process. The goal is that these paralegal titles will be upgraded to registered legal title on a streamlined basis that will be worked out with the local registry officials. Therefore, from the beginning there will be cooperation with the land registry. Paralegal titles will subsequently be submitted in bulk to the land registry for formal registration, which will assist the land registry in the formal registration of the properties. The formal procedures for first registration are much the same as found in registration procedures world-wide, consisting of publication requirements, reasonable time periods for objection, and statutes of limitation upon claims, once a formal certificate of title has been issued.

3 CONCLUSION

The paradigm shift that this program will employ is the initiation of the titling process using the private sector i.e. a demand driven approach. Some of the largest land registry systems around the world function because the private sector, driven by market forces, is able to make determinations as to the ownership and other rights and obligations affecting a parcel of land, often creating its own private standards for the determination of title. The standards that are set are often followed by legislation called curative acts that follow these private title standards. These curative acts are a statutory recognition that titles invariably cannot be perfectly deduced, but that many of the imperfections in the record are merely “paper defects”, which pose no significant risks for the real estate market.

It is very difficult to change the approach, much less the systems driving it that exist in developed countries where vested interests drive results. Even if motives are good and there is popular will, it is hard to alter or streamline procedures that have evolved over decades and have large numbers of personnel implementing them daily. It is human nature to resist change, particularly where those humans are part of an ever growing and self-sustaining bureaucracy.

So for all of the professions involved in this project, the prospect of implementing this approach for the developing world holds the promise of real change, intelligent change; change brought about by common sense application of new tools and technological capabilities. It is here that the developing world can surpass the developed world.

REFERENCES

de Soto, Hernando. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. First Edition. New York: Basic Books, 2000.

BIOGRAPHICAL NOTES

Peter Rabley is the President of International Land Systems Inc. He is a Geographic and Land Information Systems (GIS/LIS) senior systems analyst with more than 20 years of worldwide experience. He has designed, developed and implemented information technology applications with a particular focus on land registries and cadastral applications in a variety of working and data conditions, including in developing and transitional economies. Mr. Rabley has a Masters Degree in Geography and Economics.

Samuel Aboah studied economics and econometrics at Princeton University- USA. He has had postgraduate training in the IT field largely remote sensing and Geographic Information Systems in 5 countries. He has 20 years project management experience largely in the African context. He has supervised the design and implementation of most of the GIS projects in the sub-region. Apart from being a member of five Corporate Boards, Mr. Aboah also serves on the Governing Council of the University of Ghana, the International Steering Committee of the United Nations Environment Program's African Environment Information Network, and until November 2005 was Vice Chairman of EIS-Africa.

Craig DeRoy is president of Corporate Initiatives Development Group, LLC and former president of The First American Corporation. DeRoy was instrumental in launching some of First American's most significant initiatives, retiring from the company in 2007 to pursue philanthropic and other business interests. While at First American and continuing today, DeRoy was responsible for the innovation and development of new products/services aimed at emerging markets within the U.S. and abroad. With nearly 25 years of legal and management experience, DeRoy currently leads a consortium of companies in a land titling project in Africa directly resulting from the CGI commitment made on behalf of First American. He is a graduate of the University of Southern California and Loyola University School of Law. He also holds an LL.M. in taxation from the University of San Diego School of Law.

Nigel Edmead is an information technology (IT) training specialist with over 20 years of experience in Land Information Systems (LIS) and Geographic Information Systems (GIS) systems applications in the urban and environmental sectors. Mr. Edmead is Director of

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