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**FORMALIZING PROPERTY RIGHTS IN SOUTH SUDAN**

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**Abstract**

The world’s newest country; the Republic of South Sudan, gained its independence on July 9th, 2011. Coming out of a long civil war, the government is faced with great challenges regarding the country’s economic prosperity. Hernando de Soto, in his book “The Mystery of Capital”, argues that developing countries can secure economic growth for all sections of society through the formalization of informal property arrangements. This thesis therefore sets out to test whether formalization of property rights can be achieved in the current context of South Sudan.

**Keywords**: Hernando de Soto; South Sudan; Property Rights; Formalization; Customary Tenure Systems; Economic Growth.

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Appendix 1

Appendix 2

1. **Introduction** *(Charlotte and Denise)*

On the 9th of July 2011 the world’s newest country gained its independence: The Republic of South Sudan. Along with the excitement surrounding the country’s independence, came the sobering reality of the challenges that awaits this new state. With a population that is amongst the poorest of the world, and being in a region devastated by civil war, South Sudan is additionally struggling with land issues. In fact, not only is there a growing need for land to resettle returnees and internally displaced people (IDP), there is also growing pressure to make use of the abundant land resources for private commercial use in order to jump start the economy. Additionally, there is a need for land for public infrastructural and development purposes (Shanmugaratnam, 2008, p. 3). Despite these competing claims for land, as well as the numerous other challenges and obstacles that currently face the country, South Sudan has not lost hope for a better and prosperous future.

The government of South Sudan is faced with competing demands on land for the accommodations of returnees and IDP’s as well as the need for land to run post-war development. Research has indeed shown that property rights institutions play a crucial role when it comes to determining a country’s long-run growth, investment and financial development (Acemoglu and Johnson, 2005, p. 949). A prevalent theory on how developing countries can secure this type of economic development was authored by Hernando de Soto in his ‘Mystery of Capital’. In his book, De Soto claims that property is the mediating device that makes a market economy run, as property rights not only enable the creation of credit, but they additionally generate investments (de Soto, 2000, pp. 63-64).

De Soto is not alone in linking property rights with spurs of economic development; research done on this field has indicated that, without property rights, individuals neither possess the incentive to invest in physical or human capital, nor the motivation to adopt more efficient technologies (Acemoglu, 2009, p. 120). Economic institutions, meaning rules, laws and regulations, also play an important role in facilitating these incentives and motivations (Acemoglu, 2009, p. 120). However, like many African countries, South Sudan has a colonial past whose legacy is the existence of a multiple legal systems consisting of both formal and customary law practices. This challenges de Soto’s economic development precondition, which is the formalization of informal property arrangements.

In order to test whether de Soto’s property rights theory can be applicable to South Sudan, as well as contribute to the country’s economic development and growth, this thesis will be based on the following problem formulation: **Is it possible to apply de Soto’s thesis on property rights formalization to South Sudan?**

In order to answer this question, an in-depth analysis will be conducted, and this requires that de Soto’s argumentation be divided into four subsections. Since de Soto argues that the basis of property rights formalization should be the extralegal social arrangements within a society, social contracts will therefore be the first focus area that will be explored. Once this is done, the feasibility of this social contracts formalization will be discussed as the second area of focus. According to de Soto, government should be the advocate for property rights formalization. The government ability to perform this task is thus the third focus area. The fourth and last area of focus is how such property rights formalization will affect the economic sector in South Sudan.

There are four theorists who write on the relation between government, property law and citizens. The works of John Locke, David Hume, Jean-Jacques Rousseau and Immanuel Kant were therefore used to further the analysis of de Soto’s thesis. Due to the fact that South Sudan just recently gained its independence there is limited literature available on the current state of affairs. In order to secure access to this type of information, interviews were conducted with several field experts.

More specifically, this thesis will be consisting of the following chapters: Chapter 1 (Introduction) provides the background for this thesis’ choice of problem formulation. Chapter 2 (Methodological Approach) describes the methodological approach that is used to structure the thesis. Chapter 3 (Four Theories on Property) presents the theories used in this thesis. Chapter 4 (South Sudan, Land and Legality) gives both a historical and legislative background to the current situation of South Sudan. Chapter 5 (Analysis) presents the findings regarding the application of the problem formulation. Finally, Chapter 6 (Conclusion) summarizes the main findings of this thesis.

1. **Methodological Approach** *(Denise)*

To answer this thesis’ problem formulation on whether Hernando de Soto’s thesis on property rights can apply to South Sudan, a qualitative research method was used, as this is a method that is concerned with collecting and analyzing information in as many forms as possible (Blaxter et al, 2001, p. 64). Its aim is to achieve depth rather than breadth as this chiefly non-numeric approach tends to focus on exploring a topic in as much detail as possible (ibid, p. 64).

Although doing interviews is the most popular style of doing qualitative research and will be this thesis’ principal source of data when it comes to discussing the application of de Soto’s theory in the context of South Sudan, qualitative research also involves the scrutiny of documents of various kinds (The Have, 2004, pp. 5-6), which, in turn, requires some kind of contextual interpretation.

Our areas of focus have been spread on three different levels, the macro state level, the meso community level and the micro individual level. The reason for including these three focus areas is connected to the fact that few resources today are completely without property rights, which means that, technically, all land belongs to someone whether it be an individual, community or state (Heltberg, 2002, p. 193). The macro level, for example, looks at national property legislation in South Sudan and other government policies and actions that affect the population. The meso perspective of the thesis includes a look at how rural and urban communities in South Sudan deal with issues regarding property rights when it comes to common property. The micro perspective relates to what de Soto argues in his thesis; that the inclusion of extralegal individual property rights into the formal legal systems in developing countries will empower the marginalized, as well as develop and strengthen a country’s economy.

 Collecting and working with data from different sources and areas of research therefore contribute towards a more multidimensional analysis of these different levels and the different subject areas that are touched upon. Indeed, “interdisciplinary research and education are inspired by the drive to solve complex questions and problems, whether generated by scientific curiosity or by society, and lead researchers in different disciplines to meet at the interfaces and frontiers of those disciplines” (CFIRNASNAE, 2004, p. 16).

The problem formulation in this thesis touches upon several disciplines. It not only looks at the legal aspects regarding rights and property, but it also includes an economic perspective, looking at how capital and property rights are related. The problem formulation also requires an understanding of South Sudan’s history and background regarding land and property, as well as a political and societal comprehension of its past and current situation.

To help guide the data collection search and analysis, the theoretical framework that was used for this thesis will be described and presented in the next section.

* 1. Theoretical Framework *(Denise)*

“Theories are often used to explain *why* specific events and patterns of events occurs as they do” (Wellington and Szczerbinski, 2007, p. 37, italics in original), and although constructed by human beings, theories contribute towards perceiving, visualizing or understanding certain events. Additionally, theories can just as much predict as explain (Wellington and Szczerbinski, 2007, p. 39). This section will first present the theoretical framework of this thesis before describing the background for its problem formulation and ensuing analysis.

* + 1. John Locke, David Hume, Jean-Jacques Rousseau and Immanuel Kant *(Denise)*

Despite the fact that Locke, Hume, Rousseau and Kant died over 200 years ago, their theories are still valid when it comes to the issues concerning and regarding property rights. When their work was published is not relevant; Newton, for example, was born over 300 years ago, and his theories still have a widespread applicability and practical value (Wellington and Szczerbinski, 2007, p. 38). Although this example stems from natural rather than social law, it is still a valuable illustration of how “the existence of an established theory (…) can shape or determine the way we subsequently ‘see’ things” (ibid, p. 38). The information found in these early works have not only shown their ability to travel in both space and time, but also their current applicability (Ten Have, 2004, p. 89).

John Locke, David Hume, Jean-Jacques Rousseau and Immanuel Kant were all Enlightenment philosophers. Characterized as the ‘Age of Reason’, the Enlightenment was an intellectual movement distinguished by critical, analytic, and scientific concerns, and it claimed that the power of reason could improved human condition (Withers, 2008, p. 1). Locke, Hume, Rousseau and Kant were specifically chosen due to their extensive works on property rights as well as their theories’ relevancy to this thesis’ problem formulation:

*Figure 1: Four perspectives on government, property law and citizens.*

The above figure (1) illustrates the four theorists’ perspectives on the relation between citizens, the origins and basis of property law, as well as what the subsequent role of government should be. Locke, who bases his property rights argument on Natural Law, sees government as a legislative organ whose purpose is to rule according to a society’s mutual understanding; a society’s social contract (Locke, 2000, p. 121). Hume, on the other hand, argues that mutual consent is not stable enough to rule by, advocating for the necessity of unalterable rules to govern by (Hume, 1999, p. 339).

Kant, like Locke, bases his property law argument on Natural Law. However, Kant argues that property rights will only be provisional if they are solely based on mutual understanding. Government is therefore needed to secure property rights and its main role is to function as a neutral arbitrator regarding property law enforcement (Kant cited in Hodgson, 2010, p. 62).

Rousseau agrees with Kant that property is only secured through formalized law. He is, however, critical to the concept of property ownership in relation to the advancement of civilizes society. This led him to develop a theory on how an ideal society should maintain a healthy social contract, and how a society should deal with property rights legislation and enforcement.

This unique combination of theories fits perfectly with Hernando de Soto’s thesis that likewise discusses what the basis of formal law should be, as well as debates the role of government in regards to the formalization of extralegal property arrangements. De Soto’s property rights theory will be further discussed in the following section.

* + 1. Hernando de Soto *(Denise)*

Hernando de Soto is a Peruvian economist and one of the world’s leading public intellectuals. This thesis’ problem formulation has its origin from de Soto’s book entitled “The Mystery of Capital”, a book that has been “tremendously influential in shaping discussions about development economics and related fields throughout the world” (Barros, 2010, p. 1). Although de Soto’s work has received praise as well as criticism from politicians and academics, his arguments regarding the necessity of a formal property system for a functioning market economy have received little, if any criticism (Barros, 2010, p. 2).

Although de Soto’s “Mystery of Capital” is the basis of this thesis’ problem formulation, the sixth chapter of his book has been particularly emphasized whilst designing the research question and analysis strategy for this thesis. In this chapter, de Soto tries to find out why citizens cannot convert savings into capital through their country’s legal channel (de Soto, 2000, p. 12). He does this by demonstrating how the exclusion of extralegal arrangements in developing countries when it comes to property and property rights, hinders the creation of capital, marginalizes the poor, and impedes economic development and growth. One of his main arguments is lifting the bell jar in these developing countries’ societies. This will be explained further below.

What de Soto is referring to is French historian Fernand Braudel’s bell jar. Braudel was trying to look into why significant capital formations were possible only in certain sectors of society. He wondered why it would seem as if a small section of a society, cut off from the rest as if living inside a bell jar, benefit from a capitalist system which serve the privileged few inside that bell jar (de Soto, 2000, p. 66). De Soto believes that the answer to Braudel’s question lies in the restricted access to formal property; that “[t]he great majority of people, who cannot get the fruits of their labor represented by the formal property system, live outside Braudel’s bell jar”(de Soto, 2000, p.67). De Soto fears this exclusion of the majority, and the reality of ‘capitalist apartheids’ within a society will keep being the norm unless legal and political systems that prevent the majority from entering the formal property system are changed, and the bell jar is lifted.

In his “Mystery of Capital”, Hernando de Soto argues that the institution of property is not only necessary to the proper functioning of a market economy, but that bringing the assets held by the world’s poor into formal property systems will lead to radical improvements in their wealth and wellbeing (Barros, 2010, p. 1). The following sections will present four of the areas de Soto believes are essential in order for the opening and formalization of property systems to be successful in developing countries. Moreover, these four areas will be this thesis’ analysis focus in chapter 5.

* + - 1. On Social Contract *(Denise)*

Developing countries’ governments have tried to lift their bell jars and open up their property systems to the poor without much success. De Soto argues that this is due to the lack of integration and incorporation of extralegal arrangements, and other forms of social contracts, in these countries’ property policies (de Soto, 2000, p.154). He defines social contracts as understandings upheld by a community as a whole, and these contracts are usually enforced by authorities selected by the community (de Soto, 2000, p. 28). These arrangements are often “a combination of rules selectively borrowed from the official legal system, ad hoc improvisations, and customs brought from (…) places of origin or locally devised” (de Soto, 2000, pp. 21-28).

Since members of a social contract are not accountable to authorities outside their own social contract (de Soto, 2000, p. 87), they are not integrated into the formal property system. As a consequence, they are left outside their country’s official financial and investment circuit. According to de Soto, creating a national social contract on property is necessary in order to lift the bell jar in developing countries. He believes that by assembling extralegal social contracts, these will build a property and capital formation system that will be recognized and enforced by society (de Soto, 2000, p. 163). The creation of a national social contract on property requires codifying extralegal social contracts and formalizing them:

Creating one national social contract on property involves understanding the psychological and social processes – the beliefs, desires, intentions, customs, and rules – that are contained in these local social contracts and then using the tools that professional law provides to weave them into one formal national social contract. (de Soto, 2000, pp. 156-157)

The process of weaving the extralegal into the legal is called formalization, and this process will be explained further in the next section.

* + - 1. On Formalization *(Denise)*

Since de Soto defines law as the instrument that fixes and realizes capital (de Soto, 2000, p. 157), lifting the bell jar in developing countries becomes a legal challenge as “an integrated national social contract will be concretized by laws” (de Soto, 2000, p. 158):

Without formal property, no matter how many assets they accumulate or how hard they work, most people will not be able to prosper in a capitalist society. They will continue to remain beyond the radar of policymakers, out of the reach of official records, and thus economically invisible. (de Soto, 2000, p. 159).

Changing a country’s legal system by formalizing informal agreements is a political responsibility that requires a government that is willing and able to find out what and why the local conventions works, and how strong these conventions actually are (de Soto, 2000, p. 163).

Reforming property law is nevertheless not enough, as these policies still need to be adhered to in order for them to have the anticipated effect on capital. Property law reforms also require a perception of government and its policies as legitimate from the people inside and outside the bell jar: they “need government to make a strong case that a redesigned, integrated property system is less costly, more efficient, and better for the nation than the existing anarchical arrangements” (de Soto, 2000, p. 159). It is therefore the task of government to advocate property rights formalization as will be elaborated on in the next section.

* + - 1. On Advocacy *(Denise)*

Formal property law loses its legitimacy as long as people continuously resort to the extralegal sector to cater their property needs; “[i]f the law does not help them, then they will help themselves outside the law” (de Soto, 2000, p. 169). In order for formal property law to be considered as legitimate for people operating in the extralegal sector, government need to advocate for a bridge to be built where legal and political structures are anchored in these people’s own extralegal arrangements and social contracts (de Soto, 2000, p. 173). By rooting formal property law in already existing social contracts, widespread acceptance will be achieved and resistance to the reformed property law system will be overcome (de Soto, 2000, p. 174).

True political leadership is essential to change the status quo of property rights systems. Governments need to be able to convince those inside and outside the bell jar that a reform in the property law system will benefit both parties; “that it is a win-win exercise for all segments of society” (de Soto, 2000, p. 206)

Creating a property system that is accessible to all is primarily a political job because it has to be kept on track by people who understand that the final goal of a property system is not drafting elegant statutes, connecting shiny computers, or printing multicolored maps. The goal of formal property is to put capital in the hands of the whole nation. (de Soto, 2000, p. 206)

In the following segment, the economic benefits that a formalized property rights system can have in developing countries’ economies will be explained.

* + - 1. On Economic Development *(Denise)*

De Soto argues in his ‘Mystery of Capital’ that a modern market economy is inconceivable without a formal property system that includes the extralegal, and which all members of society adhere to (de Soto, 2000, p. 164). He also argues that property rights are the mainsprings of economic growth (de Soto, 2000, p. 219). Formalizing the extralegal will therefore, according to de Soto, lead to an increase of capital-creating activities:

Builders and construction material manufacturers will find their markets expanding, as will banks, mortgage companies, title agencies, and insurance firms. Formalization will also help the suppliers of public utilities to convert home addresses in liable terminals. It will provide governments and businesses with information and addresses for merchandising, securing interests, and collecting debt, fees, and taxes. In addition, a formal property system supplies a database for investment decisions in health care, education, tax assessment, and environmental planning. (de Soto, 2000, 196)

Property in a functioning uniform property law system therefore becomes an economic asset that will benefit both its owner and the country’s economy; “[t]he connection between capital and modern money runs through property” (de Soto, 2000, p. 63). According to de Soto, capital is created by people cooperating through a property system, allowing them to use their assets in order to increase their economic potential.

De Soto’s point is that formalizing extralegal property arrangements has a greater impact on developing countries than just determining official property ownership; it is an “indispensable process that provides people with the tools to focus (…) on those aspects of their resources from which they can extract capital” (de Soto, 2000, p. 218). Formalizing property rights thus raises a society’s productivity as well as generating surplus value (ibid, p. 218).

In short, Hernando de Soto’s thesis is about formalizing and codifying extralegal arrangement as well as other established social contracts regarding property. In South Sudan, this entails the formalization of social contracts between pastoralists and agriculturalists, as well as returnees, IDPs local and communities in urban and rural areas. These different social contracts will be discussed further in Chapter 5. Furthermore, based on de Soto’s thesis, the formalization process in South Sudan must start from the top down, as it is the government that has the formal authority to change the national statutes regarding property rights. The issue of government advocacy is additionally important as politicians need to convince those inside and outside the bell jar that property rights reform will benefit both sides, and that formalizing property rights will lead to a positively enhanced economic environment, leading a country and its society towards further economic development and growth.

To conclude this section, the questions that were designed for our interviewees reflect these four different categories: social contract, law formalization, advocacy and economic development. This way of structuring the interview questions reflects how the analysis will be constructed in chapter 5. The interview and analysis structure of this thesis will be described in section 2.4.

* 1. Collecting Data *(Denise)*

Carrying out a competent literature review is paramount when it comes to research as it makes it possible to compare the research topic with what has already been done, as well as paving the way and providing a framework for further research (Blaxter et al, 2001, p.120. Indeed, research preparation not only shows how a topic has been explored, thought and written about, but it also develops and refines the thesis’ research area (Matthews and Ross, 2010, p. 93)

A research process determines the reliability and dependability of the investigation that is being made (Matthews and Ross, 2010, p. 11). The way information is taken from one context and used in another is a critical part of the process, as this determines the credibility of the research. It is therefore important that our interpretation of the collected written data can be scrutinized and tested by other researchers, and that the same methods used on the same group of interviewees will achieve similar results. This is done through thorough referencing, as well as adding the audio files of the interviews that were done in the appendix.

The intention with having multiple ways of gathering data that go alongside the chosen theoretical framework is to better be able to answer this thesis’ problem formulation. The following two sections will go further into detail on the use of both primary and secondary data.

* + 1. Primary Data *(Denise)*

Primary data is usually collected to answer a particular problem formulation. This is done through the design and use of specific data collection tools (Matthews and Ross, 2010, p. 51). The sources include the classic works of John Locke, David Hume, Jean-Jacques Rousseau and Immanuel Kant. The reason for including these philosophers is due to the fact that much of data collected on property rights reference these philosophers’ classical works.

Depending on one’s comprehension of language, vocabulary and conventional meanings used by the original owner, there is a possibility of subjectively interpreting and analyzing classical texts in a way that was not intended (The Have, 2004, p. 91). To avoid this, we have crosschecked our understanding with other researchers and authors that have likewise based their publications on the same classical works.

Other types of primary data that were included in this thesis are Sudanese and South Sudanese government policies regarding property. Since the concept of law is inherent in the social order of man and societal coexistence (Falcón y Tella, 2010, p. 23), this thesis is not only going to present what official documents say about property, but it will also present what social customs in South Sudan also say about this subject. The reason for this inclusion is that, in the same way a failure to comply to formal law result in sanctions, so does failures to comply to social customs and contracts common to a society (Falcón y Tella, 2000, p. 34).

Although personally traveling to South Sudan in order to collect primary material could have been an important addition to this thesis, this was unfortunately not been possible due to the limited time and resources. Field and deskwork from Denmark should not, however, be underestimated, especially considering the development of information and communication technologies. An example of this is that we were still able to conduct expert interviews over the phone and Skype with interviewees currently living in South Sudan. The interview design will be discussed further in section 2.4.

* + 1. Secondary Data *(Denise)*

Secondary data is data that has been gathered by other researchers, which is then made available for further analysis (Matthews and Ross, 2010, p. 51). To get an idea of the range of views in our area of research, we tried to read as much and get as many different kinds of sources of texts as possible. Information from books, journals, reports, as well as magazines was gathered from the economic, political, legal and social sciences. Because the problem formulation touches on so many different areas, it was essential to carefully manage the time used on searching for information as well as make sure that the gathered information was relevant to our research topic. One way of doing this was actively searching the bibliographies of books and articles that we found quintessential to our work.

It was also important that most of the collected data, especially data gathered from journals, have been subject to a peer review. We felt this gave the selected articles a ‘quality seal’ since articles that are peer reviewed are sent to a number of people who are experts in a particular field to be reviewed before being published (Matthews and Ross, 2010, pp. 94-95). However, we have also made use of data that has not been subject to such a review, as they still are able to “provide different perspectives on a particular topic or area and may be written by people with experience, for example, of practice or work in that area” (Matthews and Ross, 2010, p. 95).

Finding information that was as up-to-date as possible was also of particular importance, and because South Sudan is a new country, and not much has been published on the country’s property rights issues, the use of NGO publications have been imperative to this thesis’ research. Keeping a critical mindset to the gathered and reviewed information was therefore crucial, as this is an important part of the research process. Indeed, critical reasoning is an important research skill as it shows an ability to recognize, analyze and evaluate the reasoning and forms of argumentation used in the collected data (Blaxter et al, 2001, pp. 115-116).

* 1. Key Concepts *(Denise)*

This section will be presenting some key definitions of terms that will be employed throughout the thesis. This is to make clear to the reader what meaning we have assigned the principal terminologies, as researchers use them differently. This meaning demarcation is additionally necessary, as it will affect how these topics will be analyzed in chapter 5.

* + 1. Property *(Denise)*

According to de Soto, property is the realm where assets are identified, explored and combined with other assets, and formal property is what provides the process, forms and rules that turn fix assets into active capital (de Soto, 2000, pp. 46-47). Property is therefore more an economic and social concept rather than a mere physical object:

The proof that property is pure concept comes when a house changes hands; nothing physical happens. Looking at a house will not tell you who owns it… It looks the same whether I own it, rent it or sell it to you. Property is not the house itself but an economic concept *about* the house, embodied in a legal representation. This means that a formal property representation is something separate from the asset it represents. (de Soto, 2000, p. 50)

Accordingly, de Soto views property law as the instrument that “detaches and fixes the economic potential of assets as a value separate from the material assets themselves” (de Soto, 2000, p. 157). In other words, property law gives legal property documents the power to create surplus value.

Property rights refer to the rights or power of individuals to consume, obtain income from, and alienate these assets (Barzel, 1989, p. 2). What governs the exchange of property rights are contracts, whether they be oral or written (Shippy, 2003, p. 1). These contracts, which are simply agreements that define a relationship between one or more parties, can be made by individuals acting on their own behalf, organizations such as firms, governments, communities, and families, or a combination where there are contracts between individuals and such organizations (Barzel, 1989, p. 7).

Informal property is also a property aspect that should be included when discussing property rights. Open access property, for example, is property that lacks both ownership and control. Access to this type of property is free and unregulated, making this type of property vulnerable to exploitation, over-use and degradation (Heltberg, 2002, p. 193). Common property refers to resources under communal ownership “where access rules are defined with respect to community membership.” (ibid, p. 193)

How these different types of properties relate in the case of South Sudan will be presented in chapter 4. It is important to note that when discussing property, this thesis does not take into account the natural resources or properties associated to it. As de Soto points out several times in his book, the value of property does not come from the physical attributes of the property, but by man’s ability to fix that property’s economic potential into a form that can be used to initiate and generate additional value (de Soto, 2000, p. 45). The process of converting natural value into economic value should, according to de Soto, be governed by a set of detailed and precise legal rules.

* + 1. Law *(Denise)*

What makes a piece of property formal or informal depends on whether state law recognizes its owner or owners. There are, however, two other property systems besides the formal one that governments in development countries need to include in the formal property sector.

In many developing countries, extralegality is the norm, as “[n]obody really knows who owns what or where, who is accountable for the performance of obligations, who is responsible for losses or fraud, or what mechanisms are available to enforce payment for services and goods delivered” (de Soto, 2000, p. 32), making people’s resources, according to de Soto, commercially and financially invisible:

It is a world where ownership of assets is difficult to trace and validate and is governed by no legally recognizable set of rules; where the assets’ potentially useful economic attributes have not been described or organized; where they cannot be used to obtain surplus value through multiple transactions because their unfixed nature and uncertainty leave too much room for misunderstanding, faulty recollection, and reversal of agreement …. (de Soto, 2000, p. 32)

The extralegal sector is a gray area that shadows and has a long frontier with the legal world (de Soto, 2000, p. 87), especially when the cost of obeying the law outweighs the benefits. The size of extralegal arrangements activity is exploding in many developing countries, and de Soto argues that codifying this extralegal sector will benefit a developing country’s economic and financial stance.

 Customary law is a second body of law that exists parallel to statutory law. It affects individuals as members of kinship groups and lineages, governs land tenure arrangements, and regulates issues such as marriage, inheritance and disputes (Joireman, 2008, p. 1235). Customary law was developed in the context of colonization as a political tool by dominated groups to assert power during colonialism, as they were able to use customary law as a way to “reclaim some of the independence and control that [was] lost due to colonization”(ibid, p. 1235).

Where customary and statutory laws diverge is that customary law does not find the coexistence of both community and individual rights problematic: “the existence of one [does] not necessarily preclude that of others (Mamdani, 1997, p. 139):

For example, the individual has the right to clear and cultivate uninhabited arable land, often without the permission of any tribal authority, and to capture all benefits that result from the use of his resources to cultivate such land. The tribesman owes his political allegiance to the native authority, but the only condition for tenure on land that he has cleared is his occupation and use of the land. By doing so, he converts his communal rights into private rights which typically include the right to pass his use and occupancy rights to his heirs. If he abandons this section of land, the tribal authority can allocate the land to other members of the tribe in accordance with customary law.” (Ault and Rutman, 1979, p. 170).

Codifying extralegal arrangements and activities in the case of South Sudan, as well as formalizing the country’s customary property systems are challenges that will be further analyzed in chapter 5.

* 1. Interviews *(Charlotte)*

Interviews are in essence a conversation between two or more people and as Kvale rightly states; “an interview is literally an inter-view, an interchange of views between two persons conversing about a theme of common interest” (Kvale, 2007, p. 5). The use of interviews, or conversations, on a specific theme of interest is used more and more as a method for developing or expanding knowledge production. The type of interviews aimed to achieve this are called research interviews, since ”the research interview is an inter-view where knowledge is constructed in the inter-action between the interviewer and the interviewee” (Kvale, 2007, p. 1).

The purpose with using interviews in this thesis is to gain access to up-to-date information on South Sudan. One possible method for gaining this type of information could be to travel to South Sudan and conduct interviews and/or surveys with a representative number of individuals. This method was, however, not an option due to resource and time constraints. Instead, the method of using ‘experts’ as interviewees was adopted, as these could equally well be used to gain up-to-date information on the current situation in South Sudan. Furthermore, interviews could be conducted without traveling to South Sudan.

This thesis agrees with Bogner and Mens (2009) that ““Expert” remains a relational concept inasmuch as the selection of persons to be interviewed depends on the question at issue and the field being investigated by the researcher” (p. 54). Since the area being investigated in this thesis is South Sudan, the individuals to be interviewed were required to possess knowledge of the country. Furthermore, the purpose with this thesis is the testing of de Soto’s theory, hence, the interviewees were required to be able to speak on at least one of the four themes selected for analysis as explained previously in this chapter.

The experts selected for this thesis were thus not chosen purely on the basis of their professional education, but also on the basis of expertise gained through active participation. A criterion for selection is thus active participation in South Sudan, for example through conducting humanitarian or development work. Thus, the “special knowledge acquired through carrying out such functions is the subject matter of the expert interview” (Meuser & Nagel, 2009, p. 24). This way “… experts are people who are set apart from other actors in the social setting under investigation by their specific knowledge and skills” (Gläser & Laudel, 2009, pp. 117-118). In this thesis, the expert interview is thus used “…as a method of qualitative empirical research, designed to explore expert knowledge…” regarding South Sudan and the four selected analysis areas (Meuser & Nagel, 2009, p. 17).

The type of expert interviews used in this thesis are ‘qualitative’ which means that it does not use word counting as an analysis strategy. Instead, ”the qualitative interview seeks qualitative knowledge as expressed in normal language, it does not aim at quantification” (Kvale, 2007, p. 11). This means, however, that there is no readymade schedule to follow when preparing, conducting or analyzing such interviews; “the very virtue of qualitative interviews is their openness. No standard procedures or rules exist for conducting a research interview or an entire interview investigation” (Kvale, 2007, p. 33). The following will therefore explain the preparation and conducting of this thesis’ interviews as well as provide a background on the interviewees.

* + 1. Preparing interviews *(Charlotte)*

The methodological choice for this thesis is a mixture of explanatory and systematizing methods. The explanatory method was chosen as the expert were thought of as “…someone who posseses “contextual knowledge”” (Bogner & Mens, 2009, p. 46). This way, the questions were general questions of interest to the topic under investigation and the experts were intended to provide relevant up-to-date information of the current situation in South Sudan.

The explanatory method was combined with the systemizing method as the systemizing method “…is oriented towards gaining access to exclusive knowledge possessed by the expert. The focus here is on knowledge of action and experience, which has been derived from practice, is reflexively accessible, and can be spontaneously communicated” (Bogner & Mens, 2009, p. 46-47).

To be able to absorb as much of the experts’ knowledge as possible, it was of key importance that the interviews were conducted in a flexible manner. The interviews were thus prepared as semistructed interviews since “semistructured interviews are flexible in that the interviewer can modify the order and details of how topics are covered. This cedes some control to the respondent over how the interview goes, but, because respondents are asked more or less the same questions, this makes possible comparison across interviews” (Bernard, 2010, p. 29). This way flexibility was secured, yet the ability to compare the interviews when conducting the analysis was retained.

During the rapport process, which is the “process of establishing and sustaining a relationship between interviewer and interviewee by creating feelings of goodwill and trust” (Stewart & Cash, 2008, p. 77), the interviewees were contacted via e-mail. They were provided in the initial e-mail with a short description of the purpose of the thesis and with a description of the four focus areas. Each of these areas had been given a few broad questions and each interviewee was asked to focus on one of the four areas. Naturally, he or she was also told that information regarding any of the other focus areas was more than welcome.

In line with the explanatory-systematizing method of conducting semi-structured interviews, the interviewer developed an interview guideline. The guidelines consisted first of all of open, neutral questions. These questions were also sent to the interviewees during the rapport phase described above. These questions were used as opening questions during the interviews to ensure familiarity with the questions as well as to give the interviewees possibility to prepare answers.

Thus, purposefully the first opening questions were open questions as “open questions are expansive, often specifying only a topic, and allow the respondent considerable freedom in determining the amount and kind of information to provide” (Stewart & Cash, 2008, p. 51). They were also neutral questions as “neutral questions allow respondent to decide upon answers without overt direction or pressure from questioners. For example, in open, neutral questions, the interviewee determines the length, details, and nature of the answer” (Stewart & Cash, 2008, p. 61). Thus, the interviews provided “room for the interviewee to unfold his own outlooks and reflection” (Meuser & Nagel, 2009, p. 31).

The interview guideline had furthermore a number of sub-topics to be covered along with questions specific to the four focus areas. This part of the guideline was not made available to the interviewees. They were solely used by the interviewer to secure that all areas of interest were covered during the interviews. Yet, the choice of conducting semi-structured interviews allowed flexibility to follow the interviewees’ line of logic and mode of providing information. Thus, the same topics were covered during the interviews but not necessarily in the same sequence (Kvale, 2007, p. 65; Stewart & Cash, 2008, p. 84).

When conducting expert interviews using an exploratory-systematizing semi-structured method, the sequence of the topics addressed during the interviews are not important. The only issue of interest is what is said to the different topics during the interview. Thus, the analytical focus is on the thematic units scattered all around in the interviews. The transcription process thus focuses on the relevant passages in the interviews; “transcriptions of thematically relevant passages are a prerequisite for the analysis. A transcription of the whole recoding – in contrast to working with biographical interviews – is not standard. The transcription is also less detailed; prosodic and paralinguistic elements are notated only to a certain extent” (Meuser & Nagel, 2009, p. 35)

* + 1. Preparing Interview Questions *(Charlotte)*

The most important part of preparing expert interviews is for the researcher to acquire as much knowledge as possible. In order to build up a knowledge base, all relevant published material regarding South Sudan was thoroughly scrutinized as was mentioned previously in section 2.2. It is during this process the interviewers must do their utmost to become quasi-experts in their field of investigation (Meuser & Nagel, 2009, p. 31; Pfadenhauer, 2009, pp. 86-90), as it is on this knowledge base that the interview questions are prepared.

The first area of focus was called the ‘social contract’. De Soto defines social contracts as “collective understandings of how things are owned and how owners relate to each other” (de Soto, 2000, p. 156), and de Soto argues that it is vital that the social contract be incorporated into the formal property rights law system for formalization to be successful (de Soto, 2000). The interviewees were asked to relate this argument to the state of affairs in South Sudan. More specifically, they are asked if they find it realistic to incorporate customary social contracts into one formal uniform property rights legislation in South Sudan.

The second area of focus was ‘formalization’. De Soto argues well in his book for the many advantages that both the state and the people who function in the extralegal sectors on a daily basis would gain from property rights formalization (de Soto, 2000). In South Sudan the notion of formal property rights was introduced during the Anglo-Egyptian Condominium (Johnson, 2003, p. 12). Formal property rights did not replace customary legal systems. Consequently, South Sudan has plural legal systems. It therefore seemed relevant to ask the interviewees if they believed a uniform formalization of property rights to be indispensable for a country to function, or if it is possible to have plural legal systems within one nation.

The third area of focus was ‘advocacy’. De Soto argues advocating property rights formalization is the job of government because it is important that there is a relatively broad consensus on the benefits of formalizing property rights in order for people to adhere to new legislation (de Soto, 2000, p. 158). The questions relating to South Sudan in this regard are if South Sudanese politicians are the most legitimate actors to advocate property rights formalization, or if other actors such as local chiefs or the international community can be the main advocates. In essence, the interviewees were asked who they believed were the most legitimate actors to advocate property rights formalization. Furthermore, considering the diversity of South Sudanese society it was deemed relevant to ask them if there is a common perception on this matter.

The fourth and last area of focus was ‘economic development’. According to de Soto, formalizing private property rights is necessary in order to secure long-term economic development (de Soto, 2000). On the other hand, the government of South Sudan is claiming to do the same by leasing large land areas to investors (African Business, 2011, p. 16). The question asked was if the government of South Sudan should be prioritizing land leasing to investors to secure economic development or if they should focus on securing a formalized individual property rights system which would allow for individual stakeholders to make decisions regarding land leasing of their property.

* + 1. Conducting interviews *(Charlotte)*

Each interview session started with a briefing were interviewees were informed about the purpose of the interview, the length of the interview and permission was asked to record the interview and to use the interviewee’s full name. This information has naturally also been provided during the rapport phase but for sake of clarity and to start the interview in a decent manner, a briefing session was used (Stewart & Cash, 2008, p. 78; Kvale, 2007, p. 55-56).

Since there are two authors writing this thesis is was agreed that only one person should be the main interviewer per interview conducted. This arrangement was made for several reasons. First of all it was to make sure that one interviewer was having the overview of the questions and making sure that all topics and sub-topics on the interview guideline were addressed sufficiently. Secondly, since interviews were conducted both in person, via face-to-face interaction, and via telephone or Skype, it was necessary to ensure that the interviewee would not get confused. Thus, having one person or one voice asking questions would enhance clarity. Lastly, the interviewers felt that the having a clear-cut role as either the main interviewer responsible for asking questions, or the main role as the person in charge of electronic equipment and of taking notes, contributed to a clearer focus during the interviews.

The main interviewer was thus also responsible for asking follow-up or secondary questions during the interview. A wide range of secondary or follow-up questions was used such as :‘direct questions’ to introduce a new sub-topic to ensure coverage of a sub-topic, ‘structuring questions’ to indicate when a topic had been exhausted and a new one should be introduced, and ‘interpreting or reflective questions’ to secure correct understanding of the answer by the interviewer (Kvale, 2007, pp. 61-62; Stewart & Cash, 2008, p. 58). These were used to ensure that the interviewees were talking on a topic of relevance for the purpose of this thesis, and for the interviewees to elaborate on a relevant topic until it was deemed to be exhausted (Kvale, 2007, p. 61).

* + 1. Interviewees *(Charlotte)*

The interviewees were selected on the basis of a combination of their expert background and their hands-on experience with South Sudan. The following provides a short presentation of the interviewees chosen for this thesis.

Mrs. Agyedho Bwogo was born and raised in South Sudan and she has been working intensively with humanitarian work in South Sudan both as Deputy Director for Emergency Relief and Voluntary Repatriation for the Sudan Council of Churches, and as a Consultant for Dan Church. Based on her work and personal background, Mrs. Bwogo could provide in-depth insight into the current situation of the social contracts and its applicability in relation to de Soto’s thesis (CBS, 2009).

Mr. Torben Brylle has several times been appointed highly important political positions in relation to South Sudan. Most importantly, he was appointed EU Special Representative for Sudan from 2007 till 2009. One of his main tasks during this period was “to facilitate the implementation of the Comprehensive Peace Agreement and to promote a South-South dialogue” (Katz-Lavigne, 2008). On the basis of this work, Mr. Brylle was able to inform on the challenges relating to the political situation in South Sudan, both in a current and historical perspective (Katz-Lavigne,, 2008).

David K. Deng worked as the director of a project concerning the relation between local communities and land acquisition in South Sudan. The result of the project was highly relevant to this thesis and Mr. Deng was an adequate interviewee as he had worked with “investors, community members, and government officials” throughout the yearlong project implementation (NYU, 2010). As a trained lawyer with extensive working experience in South Sudan regarding property rights, Mr. Deng provided unique information and perspectives on de Soto’s thesis in relation to South Sudan.

As Mrs. Sandra Fullerton Joireman Ph. D. was working with the precise same combination of focuses as de Soto; the relation between economic development and property rights, and since it was evident through her article publications that she had been engaged with de Soto’s thesis in various contexts, she was able to provide a broad and nuanced perspective on several aspects of this thesis’ problem formulation (Wheaton, n.d.).

Mr. Tiernan Mennen is the founder of Hakí (which means justice in Arabic and Swahili), a legal empowerment institute. He has served as senior manager for development projects in Sudan and has been working for various institutions such as the UNDP, the World Bank, and USAID. Mr. Mennen is a lawyer and a legal empowerment, paralegal, customary law and civil society specialist. Furthermore, “he has worked on customary justice assessments and developed community-based strategies for strengthening property rights” (Haki, 2011). Thus, Mr. Mennen could provide information on the challenges relating to property rights formalization in the specific case of South Sudan and on the issue of the thesis in general.

Mr. Gregory Norton is the manager for the Norwegian Refugee Council’s (NRC) Information, Counselling and Legal Assistance (ICLA) programme in South Sudan. The NRC is well known for its work in relation to property rights in South Sudan. The NRC was directly involved in dealing with land dispute cases and with training of lawyers in relation to community land ownership. Furthermore, the situation of IDPs, returnees and other marginalized groups were of special interest to the NRC. Mr. Norton was thus in a position to elaborate the situation of different groupings of South Sudanese society, thereby adding interesting perspectives on de Soto’s thesis (NRC, 2011).

Mrs. Sara Pantuliano was previously leading the UNDP Sudan’s peacebuilding Unit and was an observer during the peace process leading to the signing of the CPA. She has written extensively on the situation in South Sudan and on the role of property rights, with a special focus on reintegration and the situation in urban areas. Furthermore, for the purpose of this thesis she had an interesting combination of areas of expertise; “conflict analysis, transitions, fragile states, displacement, return and reintegration, land tenure, pastoralism, Africa (especially Sudan and South Sudan)” (Odi, n.d.). Mrs. Pantuliano could therefore contribute with interesting perspectives, especially regarding the relation between urbanization and property rights.

* + 1. Validity and Reliability *(Charlotte)*

There are both advantages and disadvantages with using expert interviews as a source of information. On the positive side, the experts interviewed have themselves been trained in academia and have all written larger academic assignments at some point during their schooling or academic careers. This is important for the predictive validity of the interviews, as there is no surprise regarding the method of interviewing and usage of the result of the interviews (Keats, 2000, p. 77).

Face validity has to do with “what the questions are seen to be about in the perception of the respondents” (Keats, 2000, p. 77). The majority of the interviewees expressed familiarity with de Soto’s thesis which could be seen to heighten the face validity of the interview questions, thereby contributing to more accurate answers. Furthermore, as earlier mentioned, all the interview questions for all four focus areas of the analysis were sent to the interviewees beforehand. However, the amount of time the interviewees have spent familiarizing themselves with the question is obviously unknown. Nevertheless, experts are, due to their academic training, aware of the importance of conceptual precision. Interviewees were therefore ardent on asking the interviewers to explain terminology used if it was not completely clear to them. Such clarity might not have been obtained had the information been collected through survey questions or with non-academically trained individuals.

When larger surveys are conducted, it is often the case that several different individuals work on separate parts of the production. However, the two authors were conducting all the interviews for this thesis. This enhances reliability as the interviewers were fully aware of the purpose with each question and were therefore able to elaborate on the meaning of the question if necessary, or to probe the interviewees if their answers were not sufficiently expanded on for the analysis to be conducted (Keats, 2000, p. 76).

On the negative side, the experts interviewed have been working professionally with the areas of interest, and when interviewed they often presented the results of their own research. Testing their methods of obtaining such knowledge is, however, practically impossible. Furthermore, the interviewees either have been or are currently working for different organizations. They might therefore have vested interests in giving a certain impression or it might, in some cases, put limits to their ability to speak freely. Therefore, whenever there were contradictions in the interviewees’ response with the collected data, they were included in the analysis.

In conclusion, this chapter has presented the methodological framework that will help answer this thesis’ problem formulation. Along with the collected primary and secondary data, which has been presented, a theoretical framework is also necessary in order to conduct a thorough analysis. This theoretical framework will be presented in the following chapter.

1. **Four Theories on Property** *(Denise)*

This chapter will present four philosophers’ theories on citizens, property rights, and the role of government. As mentioned in the methodology, although much has been written regarding property rights, the works are still often based on the classical works written by these four philosophers over 200 years ago. This chapter will first present Locke’s theory regarding property, before showing Hume’s view on the matter. This will be followed by a presentation of Rousseau’s more critical approach towards property ownership, and lastly, an account will be given of Kant’s theory on the formalization of law.

* 1. John Locke on Property *(Denise)*

In his essay “Second Treatise of Government”, Locke argued that every man had; a natural freedom, being equal in nature, sharing the same faculties and power. Thus every man does share common rights and privileges (Locke, 2000, p. 46). Locke also argued that every man has an innate private property right and that this individual right surpasses group or collective rights (Kelly, 2007, pp. 64-65); “though the earth and all inferior creatures be common to all men, yet every man, has a “property” in his own “person”. This nobody has any right to but himself.” (Locke, 2000, p. 116).

What Locke meant by property is “[t]he “labour” of [a man’s] body and the “work” of his hands” (Locke, 2000, p. 116).

Locke viewed property as a “common resource from which each of us is at liberty to draw what we need to secure our self-preservation” (Kelly, 2007, p. 68), and the way to claim exclusive right to this property is through labor in the sense of the force, activity, or energy used to alter a piece of land from its original, natural state:

Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. (Locke, 2000, p. 116)

The state of Nature has a law of Nature to govern it. This law applies for the whole of mankind, and teaches it “ that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions” (Locke, 2000, p. 107). Since mankind is the workmanship and thus the property of God, no one is subordinated another, and no one is authorized to destroy another as that implies destroying the property of God. Everyone is therefore bound to “preserve himself, and not to quit his station wilfully” (Tully, 1980, p. 45). It is also the responsibility of every man to preserve the life, liberty, health or goods of another. Transgressing this law of Nature would mean setting oneself apart from God’s measure, living by another rule than that of reason and common equity, thus becoming dangerous to the rest of mankind and “upon this ground, every man hath a right to punish the offender, and be executioner of the law of Nature.” (Locke, 2000, p. 108)

Building on the notion of man being the workmanship of God, and thus His property, Locke placed a considerable emphasis on the importance of labor when determining property ownership. He saw the cultivation of land as a way of feeding people, which can be read as fulfilling the duty and obligation one has towards the law of Nature, rather than a right to take as much property as one wants (Parker, 2004, p. 135). Indeed, although Locke believed that each person has the equal right to acquire the necessary means to propagate their self-preservation through property, he did not claim that this right entailed an *equal* amount of property; “as much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to other. Nothing was made by God for man to spoil or destroy.” (Locke, 2000, pp. 117-118)

This non-spoilage clause in Locke’s Treatise therefore places a limit on the portion of land that can be privately owned, as one cannot claim ownership of land so extensive that it cannot be cultivated or preserved, thereby excluding others from the opportunity of using this spoiled property to their own benefit and self-preservation (Parker, 2004, pp. 135-136). With the introduction of money, came the possibility to accumulate more than one could use and, provided that the principle of spoilage was not violated, one could increase the size of one’s property. Mutual consent between members of a society concerning exchange and settling disputes had therefore an important role in Locke’s theory; “… by consent, they came in time to set out the bounds of their distinct territories and agree on limits between them and their neighbours, and by laws within themselves settled the properties of those of the same society.” (Locke, 2000, p. 121)

“Men being, (…), by nature all free, equal, and independent, no one can be put out of his estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it” (Locke, 2000, p. 146)

Locke meant that money, which was artificial and not natural, made societies more complex, preventing the already ill-natured, passionate and revengeful nature of man from objectively following the law of Nature (Locke, 2000, p. 164; Parker, 2004, p. 144). His solution was to therefore establish laws that would regulate the use and abuse of property, in case money or issues relating to property disrupted the social order (Parker, 2004, p. 142).

Locke meant that “to avoid these inconveniencies which disorder men’s properties in the state of Nature, men unite into societies that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it by which every one may know what it is” (Locke, 2000, p. 164). In other words, members of a society collectively and trustingly give up their innate natural power to a higher legislative organ that secures the community’s well being, also when it comes to property. Although the establishment of a government by common consent would mean members of a society giving up their individual freedoms to do as they please (in accordance to the law of Nature), the government will not be able to change or interfere with property rights without the consent of the original owner, as these rights existed prior to civil society (Kelly, 2007, p. 61; Tully, 1980, p. 170).

One of the main criticisms towards Locke’s’ theory is that it presents property as a timeless, zero-sum commodity. It only considers property acquisition among a small number of co-existing individuals, without taking into account future generations; “suppose the initial individuals succeeded in distributing equal shares of the world, that would still deny all subsequent generations access to ‘…enough and as good…’ of the world’s territory of resources. “ (Kelly, 2007, p. 75).

Locke’s argument of the right to property being innate, regardless of the time one is born, seems therefore incoherent. Several theorists have criticized other aspects of Locke’s theory, including his assessment on original property acquisition. The American political philosopher Robert Nozick, for example, made a famous remark to Locke’s emphasis on labor, where he questions how mixing one’s labor with something one does not own, automatically leads to the gain of that previously un-owned thing, rather than the loss of labor; “if I own a can of tomato juice and spill it in the sea so its molecules … mingle evenly throughout the sea, do I thereby come to own the sea or have I foolishly dissipated my tomato juice?” (Nozick, 1974, p. 175).

This segment has shown how Locke “moves from an original state of freedom and equality, to the law of nature to preserve humanity, to a right to property to fulfill that law, to a labour theory of value, to the need for money, and the necessity for government to protect property” (Parker, 2004, p. 138). The next segment will present David Hume’s theory on property ownership, and how it diverges and converges with the Lockean one.

* 1. David Hume on Property *(Denise)*

David Hume distanced himself from the Lockean idea of a natural right to property. He meant that property is an artificial and moral relation, not a natural one:

Our property is nothing but those goods, whose constant possession is establish’d by the laws of society; that is, by the laws of justice. Those, therefore, who make use of the words property, or right, or obligation, before they have explain’d the origin of justice, or even make use of them in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation. (Hume, 1999, p. 335)

According to Hume, justice is the determining factor of a man’s possessions, not natural law. Property rights should therefore be based on rules that are unchangeable and inflexible, and not solely on mutual consent like Locke proposes. Hume believed that it was only by following rules that there could be predictability and social coherence, as individuals could then expect members of a society to behave uniformly (Berry & Meadowcroft, 2009, p. 44).

Property must be stable, and must be fix’d by general rules. Tho’ in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order, which it establishes in society. And even every individual person must find himself a gainer, on balancing the account; since, without justice society must immediately dissolve, and every one must fall into that savage and solitary condition, which is infinitely worse than the worse situation that can possibly be suppos’d in society. (Hume, 1999, p. 339)

The mutual consent clause is not the only point where Hume disagreed with Locke; he had also troubles accepting the Lockean notion of original acquisition. Hume meant that the rightful owner of a piece of property is the person that has been in possession of it for such a long time that it would be natural for that person to own it (Hume, 1999, pp. 345). Hume therefore disregarded Locke’s labor theory on property as the determining ownership factor (Hume, 1999, p. 430). He meant that personal connection, “sentiments”, and “being connected in an intimate manner to objects” were the determinants of ownership (Hume, 1999, p. 345); being in possession of something “not only when we immediately touch it, but also when we are situated with respect to it” (Hume, 1999, p. 344).

The nature of human society admits not of any great accuracy; nor can we always remount to the first origin of things, in order to determine their present condition. Any considerable space of time sets objects at such a distance, that they seem, in a manner, to lose their reality, and have as little influence on the mind, as if they never had been in being. (Hume, 1999, p. 345)

Because Hume meant that personal connection, the corruption of time, and human imperfection, made it “impossible to determine when possession begins or ends” (Hume, 1999, p. 344), he unrelentingly stressed the necessity of having rules and regulation as the only way to dealing with the instability and inconsistency that prevailed in the relationship between men and their external goods (Hume, 1999, pp. 343-344). The problem that rose with Hume’s emphasis on justice and rules, however, is that he did not put any importance into the matter of how men arrive to that common judgment and mutual acceptance of rules. He even went so far as to refer to the phases before laws becoming formal as accidental (Moore, 1976, p. 116):

In contrast to the natural lawyers who endeavoured to show that the determination of property was grounded in rules discovered by reason in the nature of things, Hume’s concern was to show that those rules have no other foundation in the understanding than the imagination and the fancy. The rules of ownership were fictions, products of the legal imagination. (Moore, 1976, p. 113)

But the contract, on which government is founded, is said to be the *original contract;* and consequently may be supposed too old to fall under the knowledge of the presentgeneration. If the agreement, by which savage men first associated and conjoined their force, be here meant, this is acknowledged to be real; but being so ancient, and beingobliterated by a thousand changes of government and princes, it cannot now be supposedto retain any authority. (Hume, 2012, II.XII.8, italics in original)

Because of the constant evolution and changes in societies, Hume considered government and their role indispensable in order to maintain legal order, not the mere consent between men:

Were all men possessed of so inflexible a regard to justice, that, of themselves, they would totally abstain from the properties of others; they had for ever remained in a state of absolute liberty, without subjection to any magistrate or political society: But this is a state of perfection, of which human nature is justly deemed incapable. (Hume, 2012, II.XII.21)

In simpler terms, Hume discarded the possibility of men justly following rules based on a social contract the way Locke does. Hume therefore argued for the necessity of a government that prevents the strong from taking advantage of the week, as well as preventing violence upon the just (Hume, 2012, II.XII.36). This includes protecting the property of the week and the just.

Although having different perceptions on the law of Nature and how societies come to organize themselves, both Locke and Hume conclude their property arguments by stating the need of rules, and the necessity of a governing body to enforce rules regarding property, ownership and protection. The following section presents Rousseau’s view regarding property ownership and how he believes the ideal social contract should look like.

* 1. Jean-Jacques Rousseau on Property *(Charlotte)*

Jean-Jacques Rousseau wrote on many different subjects, however, ”out of some ten pieces which contain Rousseau’s thinking on society and politics, two are of outstanding importance, the Discourse on the Origin of Inequality and The Social Contract” (Rousseau, 1976, vii). It is these two pieces of writing this section focuses on; the first is a profound criticism of the development of property rights and the effects it has had on civilized society, while the second is a description of an ideal society. The combination of these two writings provides both a critical and an idealistic perspective on Rousseau’s perception of the relation between property rights and society (Wraight, 2008, p. 1).

* + 1. Discourse on the Origin and Foundation of Inequality Among Mankind *(Charlotte)*

Rousseau provides a very unenthusiastic account on the relation between human happiness and equality, and the development of modern civil society and property rights. The following quote exemplifies this relation rather well;

the first man, who after enclosing a piece of ground, took it into his head to say, *this is mine*, and found people simple enough to believe him, was the real founder of civil society. How many crimes, how many wars, how many murders, how many misfortunes and horrors, would that man have saved the human species, who pulling up the stakes or filling up the ditches should have cried to his fellows: Beware of listening to this imposter; you are lost if you forget that the fruits of the earth belong equally to us all and the earth itself to nobody! (Rousseau, 1976, pp. 211-212, italics in original)

The logic Rousseau employs to reach this stance will be explained in the following.

Rousseau starts out by rolling human history back to the state of the savage man. The aim, however, is not to provide a true historical account of how life was for human beings before civilization. Rousseau argued that the historical facts themselves were unimportant, what was important was the conclusion to be drawn from the result of philosophical endeavors:

Let us begin, therefore, laying aside facts, for they do not affect the question. The researchers, in which we may engage on this occasion, are not to be taken for historical truths, but merely as hypothetical and conditional reasoning, fitter to illustrate the nature of things, than to show their true origin…. (Rousseau, 1976, p. 177)

For this very reason, Rousseau does not take up to explain man’s physical development through time; his natural savage man walks on two feet and uses his hands (Rousseau, 1976, p. 178-179). Most importantly, Rousseau describes the savage man as a happy, satisfied creature who had all he needed to get his wants satisfied; “I see him satisfying his hunger under an oak, and his thirst at the first brook; I see him laying himself down to sleep at the foot of the same tree that afforded him his meal; and there are all his wants completely supplied” (Rousseau, 1976, p. 179).

This description of humans in the savage stage before civilization is quite different from most other philosophers’ account; especially Hobbes is known for describing man’s life in the state of nature as being ‘nasty, brutish and short’ (Bunce & Meadowcroft, 2009, p. 36). On the contrary, Rousseau argues that man’s life was not any shorter before civilization; but that it was the civilized lifestyles that led to most of the sicknesses and to physical weakness, as compared to the savage man (Rousseau, 1976, p. 183 -185). Furthermore, It was not only a physical change which took place, but also a mental one. The savage man was not mean or bad. He was simply like other wild animals who are neither bad or good because they do not know the difference (Rousseau, 1976, p. 200-201). However, savage man did possess one important faculty; the faculty of improvement and the ability to make progress. This ability Rousseau terms ‘*perfectibility’*. It is this capacity which leads man to develop what resulted in civilized society (Rousseau, 1976, p. 187-8).

The perfectibility of man made him able to test new methods and to adopt new changes to his life. One of these changes was that he started cooperating with other men as they could see the advantages of doing so, instead of living in solitude. An example of this could be during hunting where more men cooperating led to greater results. However, the cooperation lasted as long as it took to fulfill the purpose of working together (Rousseau, 1976, p. 215). Nonetheless, with time, they started to stay more together and families remained united, even when the children were adults. Slowly, men started to build small family huts and with the building of these small huts, lifestyles started to change dramatically: women began to do more sedentary work while the man went hunting. “This was the epoch of a first revolution, which produced the establishment and distinction of families, and which introduced a species of property, and already along with it perhaps a thousand quarrels and battles” (Rousseau, 1976, p. 216).

Slowly, through a long period of time, families started to unite and develop into small nations. However, with men living close together, they started fighting and competing with each other. This led to the agreement among men that man needed “… a civil government to make him more gentle…” (Rousseau, 1976, p. 219). Rousseau argues that fighting did not start until a specific point in time: it started “…from the moment one man began to stand in need of another’s assistance; from the moment it appeared an advantage for one man to possess enough provisions for two, equality vanished; property was introduced…” (Rousseau, 1976, p. 220).

The moment when one man started depending on another man was with the discovery of metallurgy and development of agriculture. The reason that these led to mutual interdependence what that it led to a division of labour; some men were working with creating metal tools for the farmer but needed foodstuff in return for his tools and the farmer needed the tools and had to pay with the fruits of his labor to pay for them: “thus were established on the one hand husbandry and agriculture, and on the other the art of working metals and of multiplying the uses of them” (Rousseau, 1976, p. 222).

The result of this was that people suddenly “found themselves in possession of goods capable of being lost, there was none without fear of reprisals for any injury he might do to others. This origin is so much the more natural, as it is impossible to conceive how property can flow from any other source but work; for what can a man add but his labour to things which he has not made, in order to acquire a property in them?”(Rousseau, 1976, p. 223). This is similar to Locke’s labor theory. Consequently, to stop men from fighting over and steel property from one another, they decided to make laws to govern their interactions. To end with Rousseau’s own words; “Such was, or must have been, the origin of society and of law, which gave few feathers to the weak and new power to the rich; irretrievably destroyed natural liberty, fixed for ever the laws of property and inequality…” (Rousseau, 1976, p. 228).

Nevertheless, Rousseau did not advocate a ‘return to the state of nature’. Instead, he dedicated the writing of ‘The Social Contract’ to describe how the ideal society could look like. The important elements for this thesis; namely Rousseau’s ideas on the relation between property, government and citizens will be outlined in the following.

* + 1. The Social Contract *(Charlotte)*

In ‘The Social Contract’ Rousseau sets out to answer the question of how a group of people could live in association with each other without sacrificing the most supreme virtue of all; *freedom*. This ideal association is of a rather limited size, since Rousseau argues that every single individual forming part of the association should partake in decision making. When all the individuals of the city come together to make decisions via voting, they form what Rousseau terms the *body politic*. When individuals are gathered to vote on a topic they are supposed to consider what is best for the entire group and not just their own self interest. When they do so, they form the *general will*. The general will is the will of the body politic and Rousseau uses the metaphor of a person, where body politic is the body of the person and the general will is the intentions of the person. He calls this person the *public person* (Rousseau, 1976, pp. 17-19).

The public person is called a *state* by its members when it is passive, meaning when its members are not united to make a voting. When it is active, it is called the *sovereign*. It is the sovereign that makes law for the state, and it is only laws that are decided upon through voting, that are legitimate. Rousseau points out that it might often be the case, that an individual feels that the laws decided on are not the best for him or her as a private person (Rousseau, 2009, p. 61). Therefore, in order for the public person

not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence. In this lies the key to the working of the political machine; this alone legitimises civil undertakings, which, without it, would be absurd, tyrannical, and liable to the most frightful abuses (Rousseau, 2009, p. 61).

The organ responsible for the enforcement of laws, and with the right to use force to compel subject to obey the law, is called the *government*. Rousseau does not give any formula for the optimal composition of a government. Instead he argues that “…not only may different governments be good for different peoples, but for the same people at different times” (Rousseau, 1976, p. 61).

This entire arrangement outlined above is what Rousseau terms the *social contract.* The social contract is the answer to the question posed in the beginning of this section; it is the only way in which a group of people can live together while retaining their individual freedom. This is the case since all give up their independence to the collective, all are equal and no one dominates the other as everyone dominates each other to an equal degree (Rousseau, 1976, p. 18-19). Furthermore, it should be noted that “…the Sovereign, being formed wholly of the individuals who composes it, neither has nor can have any interest contrary to theirs” and therefore are the laws always just (Rousseau, 2009, p. 60).

The same way the individual does not lose his freedom but secures it through the social contract, an individual appears at first to give up his property but in reality he is granted a much more secure property due to the social contract. Rousseau, similar to Kant’s notions of sensible/physical and intelligible possessions, distinguishes between the concept of possession and of property. In the state of nature a man can possess a plot of land. However, this remains only in his possession as long as he is able to defend it against an intruder. As soon as a stronger man takes over the plot, he no longer enjoys its possession.

On the other hand, when the same man decides to become a member of the state, he grants his plot of land to the state, yet in return he is granted a property title which is respected by all other members, and which is supported by the entire force of the state. Consequently, the right granted under the state is much more secure in the long run than his previous right to possession (Rousseau, 1976, p. 23-25; Wraight, 2008, p. 46). Nevertheless, it remains the case that “… the right which every individual has over his own property is always subordinate to the right which the community has over all…”(Rousseau, 1976, p. 26). This means that the sovereign can decide to make use of that piece of property. However, that will only be the case if it is for the benefit of the entire community as the sovereign always acts in the interest of its members as previously mentioned.

Regarding the acquisition of property, Rousseau’s argument is very similar to that of John Locke:

 In order to legalize the right of first occupancy over any domain whatsoever, the following conditions are, in general, necessary: first, the land must not yet be inhabited by any one; secondly, a man must occupy only the area required for his subsistence; thirdly, he must take possession of it, not by an empty ceremony, but by labor and cultivation, the only mark of ownership which, in default of legal title, ought to be respected by others. (Rousseau, 1976, p. 24).

However, Rousseau does not claim that property rights necessarily need to be individual property rights: “It may also happen that men begin to unite before they possess anything and that afterwards occupying territory sufficient for all, *they enjoy it in common*…” (Rousseau, 1976, p. 26, italics added).

This following quote very nicely summarizes what has been said above; “what man loses by the social contract is his natural liberty and unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses” (Rousseau, 2009, p. 61). Kant’s theory on the formalization of laws and what he believed the role of government is will be presented in the ensuing section.

* 1. Immanuel Kant on Property *(Charlotte)*

This section analyses Kant’s theory on property rights based on all of his works but with greatest emphasis on the Doctrine of Rights as he devoted “the largest single part of his Doctrine of Right to showing how individuals ownership rights are possible” (Byrd & Hruschka, 2006, p. 218). Kant seeks to find out if it is possible, and if so, under which conditions an individual can claim ownership of an external object. As Williams (1977) states “what interests Kant most about property is its possibility in general or, as he says, “the mode of having something external to myself as my own”” (p. 32)

Kant’s entire legal argumentation is based on one fundamental principle; namely that of the external freedom of mankind. Like Locke, Kant believed that the right to freedom is the one and only natural right that each individual is endowed with by virtue of his humanity. The right to freedom is in essence a negative right in the sense that it consists of the right to move about freely without being subjugated other people’s choices. It is on this fundamental right to individual freedom that Kant based his entire legal system; ”the right to freedom is the decisive assumption we must make in order to give our concrete actions and omissions legal relevance” (Byrd & Huschka, 2010, p. 126). The fundamental right to freedom is thus the basis for developing legitimate laws (Verhaegh, 2004, p. 1; Byrd & Hruschka, 2006, p. 236).

Based on the right to freedom, Kant argued for the right of every human being to be on the earth. Since the right to freedom entails that no one is allowed to injure or kill another person, in other words to remove another person from the earth, this means that any person has a right to be somewhere on the surface of the earth. This right does not refer to any particular place but simply to the right to physically exist, as Kant states ”all human beings are originally (i.e. before any act of choice with legal effect) in rightful possession of the earth, i.e. they have a right to be where nature or fate (without their will) has placed them” (cited in Byrd & Huschka, 2010, p. 127; Williams, 1977, p. 34-35; Byrd & Hruschka, 2006, p. 223-236)

Kant argues that there therefore must have been a point in time where the earth’s entire surface was in the common possession of all human beings present at that point in time, which is also the base of Locke’s argument. This situation is what Kant terms a ‘postulate of pure practical Reason’, meaning that it is a hypothetical situation that we can only arrive at by using our ability to reason. Furthermore, since the earth is not unending but consist of a limited space, all human beings will naturally get in contact with other human beings. Thus, Kant argues, we are all part of an original community of the land; ”this physical possible interaction (commerium) defines a community (gemeinshaft) of all human beings. “Community” here means “membership of a common whole” …” (Kant cited in Byrd & Huschka, 2010, p. 129).

After having established the innate freedom of every human being and the common possession of the earth, Kant inquires how rightful individual property rights could emerge from the state of common possession of the earth. This question was indeed one of the central elements of his Doctrine of Right. At the outset there appears to be a contradiction between the innate right to freedom and the ability to make use of the fruit (for example an apple) of the earth, as this would exclude another person from using that very apple, thereby breaching his innate right to freedom. Kant points out that if no one were allowed to take possession of the apple, that would also pose a limit to his or her right to external freedom to use the external environment (Hodgson, 2010, p. 58).

Kant distinguishes between two types of possession; sensible/physical and intelligible possession. Sensible or physical possession simply means having an object in bodily possession. Using the examples of an apple, it means holding the apple in hand and thereby excluding someone else from doing the same. This, however, does not mean that someone else is excluded from picking up the apple as soon as the person lets go of his physical possession. Nor does it prevent a stronger person from taking the apple out of the hand of its possessor. The other type of possession, intelligible possession, refers to the ability to exclude another person from making use of an object even when it is not in physical possession, in essence excluding a person from taking possession of an object once it has been taking into possession by another. The later is obviously the most relevant for the discussion of individual property rights as refers to be ability to possess the apple even after dropping it on the ground (Byrd & Hruschka, 2006, p. 249; Williams, 1977, p. 32).

Kant develops the concept of ‘permissive’ law which in its essence permits an individual to exclude others from making use of an object or a piece of land. The question then becomes how the permissive law coexists with the right to external freedom as the permissive law puts others under an obligation they would not otherwise be under. Kant argues that it is the principle of reciprocity which makes it possible for the permissive law to coexist with the innate right to external freedom of all individuals (Hodgson, 2010, p. 63-71; Byrd & Hruschka, 2006, p. 220; Tierney, 2001, p. 382).

The principle of reciprocity means that two individuals are equally able to prevent the other from making use of an object or a piece of land already taken into possession. However, for property rights to become a reality, reciprocal acknowledgement of each others’ possession is needed. This means that one individual’s rights to property can by gained by accepting another individual’s possession. As Verhaegh (2004) explains; “… one must get the consent of one’s neighbors if one wants to finalize one’s property claims – a consent ostensibly to be gotten by trading away one’s recognition of *their* property claim…”(p. 2). Kant argues that the principle of reciprocity is consistent with the right to external freedom as every individual is equally able to claim property rights (Byrd & Hruschka, 2006, p. 220; Williams, 1977, p. 37); “… if we can bind each other only according to reciprocal terms, then neither of us is subject to the other’s choices, since each can bind the other only according to terms that she also allows the other to impose on herself” (Hodgson, 2010, p. 70). This is very similar to Locke’s emphasis on mutual consent (Locke, 2000, p. 146).

Interestingly, Kant, like Hume and Rousseau, argues that property rights in the ‘state of nature’, meaning without a legal state, can only be provisional. They will always depend on the neighbors accept and acknowledgement to exist. In order for property rights to become permanent, a legal state with a civil constitution is required as “…Kant regards all forms of society which do not possess a civil Constitution as being in a state of nature” (Williams, 1977, p. 38). The reason that a state with a civil constitution is needed to secure permanent property rights is that otherwise no one is effectively secured against a very strong or influential individual from taking over ones property. The function of the government is thus to ensure that property rights agreements are adhered to. In Kant’s own words; “[An] acquisition is still only provisional as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect” (Kant cited in Hodgson, 2010, p. 62). It seems as if Locke, Hume, Rousseau and Kant come to the same conclusion when it comes to the importance of government regarding the legitimacy of property rights.

It is important to note that a state in Kant’s terminology “…is a collection of individuals united under binding laws. The “government” is something else in Kant’s terms: the ruler of the state. The ruler is one of the three main ‘authorities’ in the state, the other two being the legislature and the judiciary” (Verhaegh, 2004, p. 2). Hence, only in a state based on a civil constitution can the government effectively function as a neutral arbitrator in case of disagreements. The government is thus intended to impartially impose property rights thereby effectively securing the principle of reciprocity.

The reason a neutral arbitrator is needed is that “… rational agents in the state of nature are equally entitled to follow their judgment on matters of right. No private individual has the standing to impose her judgment on others, regardless of how determinate right might be, or how confident she might be in her judgment” (Hodgson, 2010, p. 75). Thus, without a neutral arbitrator it is just one person’s valid argument against another person’s equally valid argument.

Interestingly, Kant is very clear in his argumentation that the state should *not* legitimately develop property rights on its own, rather it should enforce pre-existing rights that have come about through agreements between individuals. Moreover, Kant argues that “these agreements cannot be ignored for the sake of paternalist goals such as increased socio-economic equality or the moral betterment of the individual” (Verhaegh, 2004, p. 3).

In conclusion, although Locke, Hume, Rousseau and Kant have different starting points and views regarding who and how one acquires property, they all come to the same conclusion; that there is a need for a state and a body of law to protect property and ownership. Locke and Rousseau viewed property as a common resource from which people are at liberty to draw what they need to secure their self-preservation. Exclusive right to property is claimed through labor, and property securement is done by the unison of men into societies where mutual consent binds its members. Hume disagreed with Locke, arguing that mutual consent is not enough to base property rights on. He considered government to be indispensable to maintain legal order, and that property rights should be based on rules that are unchangeable and inflexible. Hume also disagreed with Locke’s and Rousseau’s labor theory, arguing that personal connection and sentiments are the determinants of ownership. Although Rousseau was critical towards the introduction of property rights, he argued for the establishment of a government in order to enforce property rights in the ideal state. Kant argued for the principal of reciprocity, which is similar to Locke’s emphasis on mutual consent. He, like Locke, Hume and Rousseau, also believed that the function of government is to ensure that property rights are adhered to. Kant also pointed out the importance of government impartiality.

These four philosophers’ theories on property rights make out the theoretical framework that will be used alongside de Soto’s thesis in the analysis which will be undertaken in Chapter 5. However, before this can be done, one needs a better understanding of the context in which these theories will be used. This context will therefore be presented in the following chapter.

1. **South Sudan, Land and Legality** *(Denise)*

Land was and still is at the heart of social, political and economic life in most African economies (Toulmin, 2008, p. 10). Indeed, in customary Africa, land was considered a tribal asset and access to it was a right confined to members of a tribe (Joireman, 2008, p. 1235). Although land could not be bought, it could be borrowed, and although landownership could not change hands, its possessions could (Mamdani, 1997, p. 168).

It was the European colonial powers that brought the notion of “private property” and “legal tenure” as they assumed that proprietary ownership and land rights were universal principles that were valid and applicable everywhere, in Africa as in Europe (Mamdani, 1997, p. 139). Introducing such a notion, however, to a continent where communities used to own land together, has proven to be challenging to this day.

In the Sudan, land and property access have long been central issues, not only because they meant means of livelihood and basic survival, but also due to their deep cultural and socio-political connotations. Even before independence from Great Britain in 1956, conflict was very much a part of the Sudan’s, and consequently South Sudan’s, history due to competition over land and natural resources (Pantuliano, 2007, p. 3).

Since many African countries have distinct legal and historical origins which affect their current legal, economic and financial outcomes (Acemoglu and Johnson, 2005, p. 961), this chapter will present how land and land laws have developed in the Sudan through time, from the period before the Turco-Egyptian colonial rule, up to the separation and independence of South Sudan in 2011.

* 1. History of Property in the Sudan *(Denise)*
		1. Before the Anglo-Egyptian Condomonium *(Denise)*

Before the Turco-Egyptian colonial rule between 1821-1884, there were predominantly two forms of land ownership in the Sudan: the Northern and Central regions of the Sudan operated with individual land ownership, while inhabitants living in the Southern regions held land as a community or as a tribe (Shazali and Ahmed, 2009, p. 3).

Herders and farmers in [the Sudan] have traditionally had a largely peaceful, symbiotic relationship. Herders had fairly open access to grazing land- Customary grazing rights allowed them to pasture animals on fields for a short time. Herders provided farmers with manure and milk; farmers’ fields provided fodder for the animals. Both parties gained from this trade. (Boudreaux, 2006, p. 70)

Concepts like permanent occupation and private landownership had therefore no room amongst the nomadic populations of the Sudan (Awad, 1971, p. 216). Instead, these populations functioned by the dar principle, where each tribe acquired a large territory (dar) in which they limited their movement. The dar belonged to the whole tribe, and the property custodian was the tribe’s chief (Awad, 1971, pp. 216-217).

During the nineteenth century, Northeast Africa underwent profound economic, political and social changes. This led to the invasion of the Sudan in 1821 by the Ottoman Empire that was searching for slaves, ivory and gold to finance Egypt’s modernization (Idris, 2005, p. 28). Although the Turco-Egyptian invasion led to the introduction of modern innovations such as schools and railways in the Sudan, it also led to brutal slave raiding and economic exploitation (ibid, p. 31).

It was during the Turco-Egyptian rule that a new system of administration was established and implemented in the Sudan:

The class of government land subject to no right is confined mainly to the northern, central and eastern riverain regions (…). The class of Government land subject to customary usufruct rights, on the other hand, mainly comprises the abundant rainland where usufruct rights of nomadic pastoralists and sedentary cultivators were recognised and included the whole of Southern Sudan. (Shazali and Ahmed, 2009, p. 5)

Another period of extensive interference with the system of land tenure was during the short rule of the Madhist’s between 1885 and 1898. The state transferred vast territories from disloyal circles to loyal ones. Additionally, “large areas of cultivable land turned into waste land after the occupants had been massacred or forced to migrate” (Awad, 1971, p. 218). Fortunately, these changes were short-lived once the Mahdist regime collapsed: confiscated and abandoned land reverted to their original holders (Awad, 1971, p. 219).

* + 1. The Anglo-Egyptian Sudan *(Denise)*

The British were the first to marshal authoritarian possibilities in native cultures, so when the Anglo-Egyptian Condomonium was established in the Sudan in 1899, they introduce the system of Native Administration. This system was based on British colonies following two legal systems: one modern and one customary. The seat of customary power was the local state, and its functionary was called the chief. Unlike the customary dar chiefs, a local state chief during British colonial times had judicial, legislative, executive and administrative powers (Mamdani, 1997, p. 23); “its basic principle was that the local administration of colonial peoples should be conducted through indigenous structures of authority, employing indigenous laws or custom, as far as this was consistent with British ideas of good government and justice” (Johnson, 2003, p. 11)

The former tribal system was replaced by an ethnic or religious one (Mamdani, 1997, p. 110), and customary law became an administratively driven affair. Custom therefore became a state ordained and state enforced affair, rather than a tribal one (Mamdani, 1997, p. 22). The Native Administration chiefs’ roles in the Sudan were primarily to allocate resources by regulating grazing activities, as well as delineate areas to the different tribal federations (Shazali and Ahmed, 2009, p. 6). This practically meant that grazing lines were administered, separating domains meant for cultivations and those for grazing. No farmer was allowed to cultivate north for these lines, and pastoralists were instructed to not enter cropping areas. Those who violated these rules could be liable to fines or, in some cases, imprisonment (ibid). These regulations were introduced to prevent conflicts between farmers and herders. Interestingly enough, during the first decades of British colonial rule, pastoral activities flourished and livestock mortality rates decreased considerably (Shazali and Ahmed, 2009, pp. 7-8).

Unfortunately, the colonial land tenure was also guilty of pastoralism’s downfall in the Sudan. From the mid-1920s, for example, the Sudan applied a Closed District Ordinance. Although the purpose of this policy was to eradicate Arab-Islamic influences and preserve the African identity of the South (Idris, 2005, p. 39), the Ordinance, which applied to most districts in the Southern provinces, also ended up regulating the movement of non-native persons into the South, including nomad pastoralists (Johnson, 2003, p. 12). Furthermore, in 1944, the British Soil Conservation Committee recommended that the rights of farmers would override those of pastoralists if the two groups were disputing over land (Shazali and Ahmed, 2009, p. 9).

* + 1. After 1956 *(Denise)*

On January 1st 1956, the Sudan was granted its independence. Prior to this date, elections for the first self-governing parliament of the Sudan were held, and the National Union Party (NUP) won, forming a government where Northerners were appointed to all the senior positions in the South (Johnson, 2003, pp. 26-28).

Although independent, the structure of the Sudanese state remained the same, and the notion that only a Muslim state can legitimately rule over a Muslim majority was still very much present (Idris, 2005, pp. 49-50). Politically active Southerners thus saw the country’s independence as the beginning of the Northern colonization of the South, and a widespread feeling of discontent emerged. This feeling had its roots from the British colonial times, where people of the North were shown political favors, which further exacerbated the Southerner’s fear of oppression (Boudreaux, 2006, p. 69). These fears were later confirmed, as the uneven development and economic dislocation between the North and the South that began during the colonial period, became massive in the 1970s (Sørbø and Strand, 2009, p. 221).

The Native Administration’s colonial system was abolished in the early 1970s and replaced by predominantly Northern administrators (Pantuliano, 2007, p. 3). This led to the further marginalization of the pastoralists’ rights, as their leaders lost their power to control resources in their dar (Shazali and Ahmed, 2009, p. 9). During the same period rapid agricultural expansions were introduced:

In 1970 the Unregistered Land Act abolished customary rights of land use and access to land and set the foundation for the central state leasing of land for large-scale farming schemes. In 1974 the Law of Criminal Trespass strengthened the rights of leaseholders to their lands, further restricting the right of access by nomads and smallholding farmers. (Johnson, 2003, p. 130)

Moreover, in 1980, the government declared “all unregistered rainland as common property to all Sudanese, thereby undermining the principle of "tribal homeland" on which regulation of pastoral activities was based” (Shazali and Ahmed, 2009, p. 11). These governmental reforms and policies, along with the abolishment of the Native Administration, disrupted the nomadic routes to grazing areas and water points, leading to renewed and increased tensions between farmers and pastoralists (ibid); “farmers and herders are not able to contract effectively to allocate property rights because contract enforcement mechanisms are lacking, de jure rules are ignored, and customary, de facto property rules are rejected” (Boudreaux, 2006, p. 72).

These land grabs by the government were also the reasons why so many farmers and pastoralists that saw their land assimilated into mechanized farming schemes, or simply registered in someone else’s name, joined the Sudan People’s Liberation Movement (SPLM) in the late 1980s (Pantuliano, 2007, p.3): “Prime lands were sold to Arab business people and cronies of the government, displacing entire communities from their ancestral lands. The people became aggrieved …. People of these areas were eager to join the SPLA [Sudan People’s Liberation Army] in defense and reclamation of their communal land” (USAID, 2010, p. D-3). Thus, throughout 1987 and 1988, the SPLA’s popularity increased because they were recruiting from areas throughout the South (Johnson, 2003, p. 82), and were using the appropriation of land as one of the causes they were fighting for (Johnson, 2003, p. 134; USAID, 2010, p. B-2).

During the 1990s, the government amended the Civil Transaction Act, prohibiting the recognition of customary land rights in the courts throughout the country (Johnson, 2003, p. 130). Instead, new laws concerning land tenure were developed on the principle that “unregistered land is assumed to be owned by the government unless the contrary is proven” (Pantuliano, 2007, p. 3). It even went as far as the Relief and Rehabilitation Commission characterizing traditional subsistence agriculture and pastoralism as being “inefficient, wasteful and harmful to the environment” (Johnson, 2003, p. 159). A proposal to further expand mechanized agriculture was therefore made, consequently leaving even less land available to pastoralists.

Governmental efforts were made, however, to improve the pastoralist’s condition. This was done through a presidential decree issued in 1994, stipulating the re-opening of former nomadic corridors. The decree had unfortunately little effect as grazing areas were no longer accessible, implying a journey without a destination (Shazali and Ahmed, 2009, p. 16).

Before the Comprehensive Peace Agreement (CPA) was signed in 2005, a unified legal framework of land tenure was still lacking across the Sudan. In the North, legislation was essentially founded on colonial land laws, while the South operated on a system largely based on customary law, especially when regulating access to land and dealing with land-related problems (Pantuliano, 2007, p. 3). This lack of legal framework made it feasible for officials from both areas to issue long-term leases to favored citizens and foreigners without the informed consent of the local customary landowners:

 The commercialisation of land (not expropriation) is gathering pace in both the registered and unregistered sectors. In the registered sector, poor subsistence farmers are being pushed to sell their title without full awareness of the implications of doing so. In the unregistered domain, land grabbing – by officials affiliated to the NCP [National Congress Party] or the SPLM, the military, private investors, land speculators, religious groups and urban residents – is increasing. (Pantuliano, 2007, p. 7)

In addition to this, important property data records have either been lost or are not reliable enough. Additionally, informal and extralegal customary land agreements make it challenging to secure tenure rights according to their appropriate owners. This is especially problematic for those that return to their areas of origin, where they have customary land rights to land, just to find their property occupied or given away to investors (Pantuliano, 2007, p. 9).

The next section will look further into the legal and human challenges regarding property in South Sudan from the signing of the CPA to the present.

* 1. Current Challenges
		1. Legal Challenges *(Charlotte)*

As the previous section clearly has shown, property rights were influential and, at times even a determining factor, in the Sudan’s history. The SPLM/A therefore perceived property rights as being of central importance during the negotiations leading to the CPA. The result of this is unmistakable; the CPA is the first official document in the history of the Sudan to recognize community rights to land. Previously, land had belonged to the government and powers had been centralized in the state in Khartoum. This recognition even resulted in the phrasing “land belongs to the people” in the Interim Constitution (IC), which governed South Sudan until elections in 2011, after which the Transitional Constitution has taken over (McMichael & Massleberg, 2010, p. 10; Rolandsen, 2009, p. 19).

Both the CPA and the IC are characterized by the lack of clarity regarding specification on when the different parties or state levels were to administer a specific piece of land. Moreover, both of these documents call for communities to be consulted throughout any process regarding land leases, but fail to specify the consultation process. Consequently, critics have concluded that the “controversial land use and ownership issues are barely addressed” in these documents (Murray & Maywald, 2006, p. 1221; Jooma, 2005, p. 2; Shanmugaratnam, 2008, p. 2).

In order to address the critique on the lack of clarification on land tenure issues, the CPA “mandated the establishment of the Southern Sudan Land Commission (SSLC) to address the issues of land tenure and property rights in Southern Sudan” (USAID, 2010, p. A-I). The first major step the SSLC took was to develop the 2009 Land Act, which stipulates that all land belongs to the people, as is likewise mentioned in the IC. Moreover, section 10 stipulates that ‘public land’ is held in trust by the ‘appropriate level of government’. The Act, however, fails to provide any concrete definition of ‘public land’ as well as the extent of the ‘appropriate’ level of government. Yet, section 10 (2) allows for public land to be “lawfully held, used, or occupied by any government ministry, department, agency, or local authority” (cited in USAID, 2010, p. B-5) [[1]](#footnote-1). A major current legal challenge is thus the lack of clarification on which state level or agency is to manage publicly held land (McMichael & Massleberg, 2010, p. 11; IS Academie, 2011)

Furthermore, the 2009 Land Act, as did the CPA and the IC, specifically calls for communities to be included in negotiations regarding land lease, and for social and environmental aspects to be thoroughly examined prior to any signing of contracts. However, these requirements are rarely adhered to, as companies prefer to conduct contractual agreements on a bilateral basis directly with government ministries (Deng, 2011, p. 3-5; IS Academie, p. 2; McMichael & Massleberg, 2010, p. 13).

As can be seen above, there is a lack of legal clarification on who owns land, what should be regarded as public land, and which level of government is legally capable of leasing out land to investors. In addition to these legal challenges, there are also ’human’ challenges that need to be considered while discussing property rights formalization in South Sudan. The following section will further present these challenges.

* + 1. Human Challenges *(Charlotte)*

The human challenges are manifold and vary greatly between rural and urban areas. The IC allows the South Sudanese the right to reside in any part of the country, and a large number of returnees make use of this opportunity by choosing to reside in the cities. This makes urbanization boom. The combination of a lack of clear rules on property rights and extremely high prices on rent makes the situation in the cities complex. As a World Bank report notes, “there are various forms of informal settlements with varying degrees of legality and illegality. They include regularized and unregularized squatting, and unauthorized subdivisions on legally owned land with various forms of unofficial arrangements” (cited in USAID, 2010, p. A-8)

The signing of the CPA ended Africa’s longest civil war. The long war meant that a large number of people were either internally displaced or forced to flee the country. At the time of the signing, the Sudan had the highest number of IDPs in the world. Indeed, it was estimated that there were about four million IDPs and approximately three of them were of Southern origin. A further one million sought refuge in other countries (Jooma, 2005, p. 6). The large numbers of IDPs are thus a major human challenge facing South Sudan.

 It is very common in wars that relatively few men survive, and South Sudan is no exception. Women now head nearly fifty percent of all households. This is an unusual situation and poses major challenges regarding property rights as it is traditionally only possible for men to be owners of property. The Norwegian Refugee Council (NRC) conducted a large study which included all of South Sudan’s ten states and concluded that “most of the lands in Southern Sudan were communally owned and customary land tenure practices are predominate in the land management system” (USAID, 2010, p. A-4). Female-headed households pose a new human challenge to the continued functioning of customary law.

Even though the CPA has been signed, there are still reports of fighting taking place in various parts of South Sudan. Often unsettled property rights are the reason for continued quarrels between different communities. As previously mentioned, these disagreements also include pastoral and agriculturist communities that fight for access to grazing and cultivation land areas. Unfortunately, such disagreement leads to lower levels of output for all parties involved (Pantualiano, 2009, p. 159; Shanmugaratnam, 2008, p. 10; IS Academie, 2011, p. 5). Allegations of corruption are manifold and concern all levels of government. These allegations of corruption often happen in relation to land leasing deals as large areas are being leased out to both national and foreign investors. However, as has been described above, the law regarding such deals are unclear. This lack of clarity makes it easier for various actors to sign agreements, and the fact that the signing parties are the sole beneficiaries is a motivating factor for various actors to sign these types of deals. These agreements thus lead to increased corruption, tension and fighting.

The following chapter will analyze de Soto’s thesis in the context of South Sudan, taking into account the country’s historical background and current human and legal challenges. Additionally, the four theories presented in Chapter 3 will be included in the analysis to add greater depth to the discussion.

1. **Analysis**
	1. Social Contract *(Charlotte)*

A central aspect of de Soto’s thesis is his argument that any type of formalization of property rights should be based on what he terms the ‘social contract’. As earlier mentioned, de Soto defines the social contract as collective understandings upheld by a community as a whole (de Soto, 2000, p. 28). He argues that the social contract on property is “firmly rooted in informal consensus dispersed through large areas” (de Soto, pp. 156-157), and that the reason why property laws imposed without regards to the social contract will unquestionably fail because they are not perceived as legitimate by the local population (de Soto, pp. 172-173).

Therefore, in order to fulfill the purpose of this thesis, namely testing de Soto’s thesis on South Sudan, this chapter will analyze the current state of the social contract in South Sudan by questioning de Soto’s assumptions mentioned above; that there is an informal consensus on property rights spread throughout South Sudan, and that formal law needs to be based on social contracts in order to be perceived as legitimate by the South Sudanese population. This analysis will be done by relating de Soto’s arguments and assumptions to both the theoretical framework, to the interviews conducted, and to other relevant literature.

* + 1. Urban and Rural Differences *(Charlotte)*

Based on de Soto’s thesis it can be assumed that different social contracts can be found throughout South Sudan. Interviewees drew attention to the fact that there is great difference between the situation in urban areas and in rural areas (Brylle, personal communication, April 12, 2012, 9:30- 10:25; Pantuliano, personal communication, April 8, 02:10).

The urban areas of South Sudan are rapidly expanding as large numbers of returnees from Khartoum chose to go to the cities, especially Juba, in search of livelihood opportunities. In fact, “Juba has grown from a population of 56,000 in 1973 to 250,000 in 2006” (USAID, n.d., p. 5). Furthermore, during the war many cities changed structure, often several times. Thus, new titles have been provided without any consideration of previous ownership. Consequently, many people returning to reclaim ownership of their house finds that three to four other returnees are claiming ownership to that same residence, all of these with equally valid papers obtained during the wartime period (Rolandsen, 2009, p. 25).

In other cases, due to the long lasting war, residents have been occupying property for many years, sometimes more than 15 years, without any official registration. Returnees find it hard to reclaim such property as the ‘new’ occupant often refuses to move. Moreover, in many cases, current residents have taken in returning relatives, thus; whole families would become homeless if they were forced to vacate the property (Pantualiano, 2009, p. 155-165; McMichael & Massleberg, 2010, p. 13; IS Academie, 2011, p. 5). Furthermore, when IDPs or refugees return, they find their former residence demarcated to provide space for public infrastructure. In many of these cases people find it very hard to successfully claim compensation in court (Rolandsen, 2009, p. 25; Shanmugaratnam, 2008, p. 3).

This is the type of dilemma the government is faced with. The theories of Locke and Hume provide two very different answers to how the government could deal with this problem: According to Locke, the original owner should be formally recognized as the property owner (Locke, 2000, p. 116). Nevertheless, how to decide on original ownership remains a challenge especially since the original residence might no longer exist due to, for example, demarcation. According to Hume, those that have lived on the land over a long period of time and grown attached to it should be granted formal ownership (Hume, 1999, p. 345). It that case it would be necessary to make a decision on a definition of ‘long term ownership’ which might not be easily applicable as many people lack documentation of their period of residence. Both theories thus provide no easy solution to this difficult situation.

Safe to say, however, is that it appears as if the rapid urbanization has contributed to the erosion of the social contract, as there in most cases seem to be no apparent social agreement on property rights ownership. De Soto’s argument on using customary social arrangements as the basis of formalized property rights is therefore not generally applicable for the urban areas in South Sudan.

The situation in the rural areas is of a completely different character. Here the social contract seems to be alive and well, forming the basis of every day life for the majority of people. However, it is important to notice that throughout South Sudan there are “over fifty tribes and countless sub-tribes and clans” (Mennen, 2010, p. 219), and that “each tribe and sub-tribe has its own body of tradition and interpretation of tradition” (Unger, & Wils, 2007, p. 19). This is a complicating factor when discussing the practicalities of formalization, which will be further discussed in section 5.2. Importantly, however, is that the social contract is present in the rural areas and could in principle be the basis of formalized laws as de Soto advocates.

* + 1. Customary Law in South Sudan *(Charlotte)*

Even though the specifics of customary law varies greatly, it can generally be said that “… jurisdiction on all subjects remains squarely in the hands of local chiefs even where the Ministry has established jurisdictional guidelines” (Mennen, 2010, p. 219). Indeed, as one interviewee pointed out, customary law “is so strong that you cannot ignore it because it is working and it is respected” (Bwogo, personal communication, April 2, 2012, VOICE 004/2:12 – 2:44). This means that customary law is having great influence on the daily life of people in the rural areas, also when it comes to property rights. In this regard it is important to notice that customary law does not solely regulate property rights but also many other types of social interactions such as for example marriage, heritage and dissolving disputes.

As previously mentioned, de Soto argues that social contracts should be the base of formal state laws in order for them to be perceived as legitimate. In order to find out if that is the case in the rural areas of South Sudan, it is useful to quote Mennen’s general description of how customary court rulings occur:

Customary courts are held in public places. Large trees and open buildings form the courtroom. Dispute processes are held as a public forum with large numbers of community members present to observe (and comment). Judgments are rendered after lengthy arguments from the participants and between the chiefs – who can comprise a panel of up to seven. Lawyers are prohibited. The chiefs act as advocate and arbiter, the community as public opinion. Chiefs are typically revered as the custodians of the complex oral legal history of tribes and clans. (Mennen, 2010, p. 239)

The fact that these court rulings take place out in the open where the entire community can follow the process has great advantages. It means that there is both understanding of the process itself and that people know who decided and how. As Bwogo argues, customary law functions “because it is understood by the people and there is accountability” (Bwogo, personal communication, April 2, 2012, VOICE 010/1:17 – 1:32). Transparency and accountability are thus two great advantages of customary court ruling. Furthermore, “the current status quo of low corruption in the courts observed (…) is largely due to transparency of internal processes” (Mennen, 2010, p. 249). These facts support de Soto’s argument that the social contract is important along with traditional court mechanisms. However, additional aspects need to be reflected upon before a conclusion regarding the social contract can be drawn.

* + 1. Checks and Balances of Customary Power *(Charlotte)*

As can be deducted from the previous section, chiefs play an important role in South Sudan. Yet, even though this is the case, chiefs cannot acts as dictators in their communities. The reason for this is that “…chiefs who continually advocate for unfair decisions lose credibility among their community and the constituents that pay their allowances. Chiefs without credibility lose prominence on the court panel” (Mennen, 2010, p. 239). In many communities the chiefs are elected, which means that they can also become deselected if they are no longer found fit and worthy of the position (Baker & Scheye, 2009, p. 181). Thus, there are limits and constraints on the chiefs behavior, as Bwogo explains;

The chiefs in the village they don’t decide on their own, there is to some extent a good community base because if the chief does not listen to the people and start dictating, that chief will definitely not survive long. Because they have a system that they put in their bills or their claims and it is discussed in an environment that guarantees actually that it protects your rights and my rights and everybody’s rights. And that is how they coexist and that is how customary law functions. (Bwogo, personal communication, April 2, 2012, VOICE 007/3:33 – 4:15)

Moreover, there are other advantages of using customary courts: “the access to customary justice is also good. Filing fees, when charged at all, are very low … the system operates without lawyers, and transportation is not normally an issue as the customary courts are located in communities they serve” (Pimentel, 2010, p. 15). Thus, the system is easily accessible, transparent, accountable, understood and respected among the population which the rulings concern. However, before a complete assessment of the social contract can be done, the influence of the civil war on the social contract needs to be analyzed.

* + 1. The Effects of the Civil War *(Charlotte)*

As a consequence of the civil war, many have been displaced or forced to seek refuge in other countries. This does not only concern single individual or nuclear families; entire communities have been forced to flee their areas of origin. This is especially the case in areas close to the border or in resource rich areas. This has had a tremendous impact on the integrity of social contract throughout South Sudan. The functioning of the customary law system has similarly been affected by the war as chiefs were displaced, affecting the everyday function and legitimacy of local chiefs (Norton, personal communications, April 2, 2012, 10:39). When chiefs or entire communities went missing, others stepped in to fill the leadership vacuum. As Unger, & Wils (2007) writes:

Parallel leadership established itself with the support of parties to the wider war. An example is the emergence of the armed groups, such as the Jeish Mabor (White Army), whose commanders substituted the traditional leaders, especially in the Upper Nile region of Southern Sudan. Other traditional chiefs were compelled to undergo military training to ensure the execution of orders from the side of the war they belonged to (p. 19)

Additionally, when discussing the topic of credibility of chiefs, it is important to notice that it is not a given that a chief is present as a natural consequence of uninterrupted historical legacy. Instead, as Mamdani describes, many colonial governments appointed local chief positions. These chiefs were granted power over the local population and they were supported in maintaining their position by the colonial government. Thus, the colonials ruled the country through a central government and with the use of locally appointed chiefs. This method of government is what Mamdani terms ‘decentralized despotism’ and it was done in order to create “… a dependent but autonomous state system of rule, one that combined accountability to superiors with a flexible response to the subject population…” (Mamdani, 1996, p. 60). Naturally, this type of historical legacy makes the credibility of local chiefs questionable.

In general, South Sudan has experience a militarization of society, which naturally has affected the social contract and the function of customary law. Militarization of society refers to the fact that arms, especially small arms are easily accessible to anyone interested and that many factions or groups in society are in possession of arms.

As mentioned in chapter 4, South Sudan is experiencing conflicts within its borders. One reason is that militia-groups such as the White Army are still present. Many of these militia-group are a result of the Khartoum- supported small armed forces used to destabilize areas of opposition, or they are a consequence of the instability surrounding areas adjacent to countries such as the Democratic Republic of Congo, Eastern Chad and Northern Uganda. Consequently, “there are an estimated 32 militias in Southern Sudan, ranging in size from a few dozen armed men to as many as a few thousand” (Jooma, 2005, p. 7).

Another reason for the militarization of South Sudanese society has been the conflict between the two main types of communities, namely cattle herders and farmers. It is a fact that “…traditionally, historically that there has been a conflict between those two types of economies, for centuries. The problem today is that both sides are now armed in a way that they never were before” (Brylle, personal communication, April 12, 2012, 11:15-11:30). This militarization of society makes it hard for chiefs to settle conflicts, as they often turn violent to a degree that customary law is not accustomed to deal with.

There are, however, more frequent conflicts between the various communities in regards to land. One important reason for this is that, as a consequence of the public perception and the inclusion of the term ‘land belongs to the people’ in various legal documents, communities have started to take in more land than they previous had, leading to increased quarrels between communities (Bwogo, personal communication, April 2, 2012, VOICE 003/02:22 – 01:40).

In this regard it is interesting to notice that Locke argues that individuals should not take into possession more land than they need for their subsistence. Both Rousseau and Kant share this view in their theories. If this reasoning were adopted, it would most likely help to solve many quarrels between communities. Including the herders in this argumentation would be a challenge however, since they only need land for grazing purposes and because they need to be able to move freely into areas where grass is available.

Likewise, Locke argues that man can acquire new land by putting in his labor and that he should only own as much property as he is able to farm; otherwise it would be spoilt, something Locke regards as unethical as “nothing was made by God for man to spoil or destroy” (Locke, 2000, pp. 117-118). This argument could be used for limiting the excessive land acquisition by farming communities. It is not, however, useful for herding communities that only need land for grazing. Rousseau, on the other hand, argues that property can retain its owner once formal titling has been given. This could assure pastoralist communities that grazing areas will not be taken from them and used for farming. The different possibilities of land titling will be further analyzed in section 5.2 of this chapter. However, it is important to note that one of the reasons why communities try to acquire more land, is that displaced people are returning to their communities, making these expand and necessitate more land. Hence, returnees are seen to exacerbate conflicts in-between communities (Pantuliano, 2007, p. 8).

* + 1. Reintegration of Returnees *(Charlotte)*

Many people coming from the countryside tend to go back to their communities of origin if possible as

…they can fall back on local safety nets, traditional solidarity mechanisms and kinship ties for re-integration into society. Belonging to a group is essential part of the livelihood strategy of rural people in Sudan. Furthermore, most Sudanese societies have health distribution mechanisms in place that may facilitate the recovery of individuals of the armed conflicts. People are well aware of the local coping mechanisms and have a good understanding of local socio-ecologic environment to make a living. (USAID, 2010, p. A-10)

Hence, when the community of origin is still in place and well functioning, it serves as a great mechanism for reintegration of returnees.

It is rather problematic, however, if the community is no longer there or has been displaced. This means that the people who previously owned the land are no longer present to claim their right to the land. Other actors might have taken over, such as another community or a warlord as elaborated on previously. In such cases, the social contract cannot be used to adequately designate the appropriate rights holder to the property.

Another problem affecting returnees is that the customary law is not traditionally endowed with the ability to deal with a situation where there is an “influx of people who are not indigenous to their communities” (USAID, 2010, p. A-10). This means that if some individuals from a displaced community return to reclaim their property, the customary law system is not equipped to deal with this situation. In other words, when “…outsiders are involved the customary system is largely ineffective” (Pantuliano, 2007, p. 7).

When people from another tribe or clan come to live in a community, they are considered ‘outsiders’ and they remain outsiders. They have therefore no right to claim property. A chief can, if he so wishes, allocate land to an outsider on a temporary basis, provided that the outsider follows the rules and customary behavior of the host community. However, “ultimately, outsiders are expected to relocate to their areas of origin or are forced to do so if necessary. Thus, the general expectation is that IDPs and refugees should be reintegrated in their ancestral communities” (USAID, 2010, p. A-10).

Another problematic issue is discrimination. Chiefs are selective when it comes to who they allocate land to and often refuse to grant land rights to certain groups. There have been instances, for example, where chiefs in Central Equatoria refuse to grant land rights to Dinkas (Pantualiano, 2009, p. 160).

* + 1. Marginalized Groups *(Charlotte)*

IDPs and returnees are not the only ones to experience problems in areas where land is governed under customary law. Customary traditions are very hierarchical and patriarchal, and property rights follow the patriarchal line where sons inherit land from fathers. Women gained access to land through their husbands or fathers. Prior to the war, this structure did not pose problems. During and after the war, however, tremendous changes to the structure of society in South Sudan could be observed. As in most other post-conflict societies, many men have lost their lives in the war, leaving women as head of households. In fact, as much as fifty percent of returnee households are headed by females, and traditional customary law is not well equipped to deal with this untraditional situation as previously mentioned in Chapter 4 (USAID, 2010, p. A-14; Pantuliano, 2007, p. 7).

Traditionally, women remained with her father until she got married, then she belonged to the husbands family and gained access to land through him, as did her children. However, things are not as straightforward after the war; “now we are faced with women who, in the movement, they are single, they have never been married, but they have children. This is a big thing that the customary law is struggling with” (Bwogo, personal communication, April 2, 2012, VOICE 006/4:07- 04:28).

Although formal documents specifically grant women the rights to own property, according to customary law a women is bought with dowry from one family to another. This means that, “so to speak, a woman is like a piece of property… you are not talking of a property to own another property” (Bwogo, personal communication, April 2, 2012, VOICE 007/1:26 – 1:35). It is therefore very unnatural for customary law to grant property rights to women.

Customary law is often cherished for its ability to adjust to new situations, and the current situation with high numbers of single women puts pressure on the customary system in favor of change. In some instances, women have succeeded in acquiring property rights for themselves and their children. Often, the women have used references to formal law, which grants property rights to women, and use this to put pressure on chiefs to grant them plots (Bwogo, personal communication, April 2, 2012, VOICE 007/0:56 – 0:01 and VOICE 007/1:38 – 1:47). In this case, legal pluralism can be an advantage to the marginalized as they can draw on the other types of law for their own benefit.

It is not only women who pressure for change within customary law. The earlier mentioned situation with large numbers of IDPs and returnees has had the same effect:

Customary courts in Southern Sudan have shown an amazing degree of cross jurisdictional flexibility. The sheer number of Southern Sudanese IDPs – Sudan has the largest number of IDPs in the world – has necessitated it. Chiefs from different tribes, as seen in Bentiu and Juba, regularly convene in the same customary court to adjudicate cases between members of different tribes. When a defendant appears from a tribe that does not have representation on the panel the case is suspended and a chief from the appropriate tribe summoned to help adjudicate at a latter date. (Mennen, 2010, p. 239)

These are good examples of qualities of customary law that are worth preserving. Nevertheless, the chiefs or the customary system are not as flexible in all instances.

* + 1. Abuse of Power *(Charlotte)*

There are many reports on instances where no one seems to care for the women or for their children. Moreover, allegations of corruption further serve to complicate the situation. Chiefs have been accused of corruption, especially with regards to the leasing of community owned land, for making personal gains instead of making gains for the benefit of the community, and for failing to hold proper consultation with community members (Pantualiano, 2009, p. 163; USAID, 2010, p. B-4-5; Baker, & Scheye, 2009, p. 181). However, it is not always straight forward what is downright corruption and what is simply lack of proper understanding of the situation. Bwogo describes how, when local or foreign investors come to acquire land, that “maybe they pull out one guy, a chief or something, and they say crookedly with very minimum understanding, and a big document is signed” (Bwogo, personal communication, April 2, 2012, VOICE 003/3:46 – 3:57).

All of these issues, most of them relating to the fact that South Sudan has been at war for several decades, affect both of de Soto’s assumptions regarding the social contract; namely that the social contract is dispersed throughout South Sudan, and that social contracts need to be the basis of formal law in order for it to be perceived as legitimate. In the urban areas, the social contract is either non-existent or its actual function is rather limited. It is interesting to relate this situation to Rousseau’s ideal state.

Rousseau argues that ideally, an association of people should not be larger than it would be possible for its members to be present for voting. The current situation in most of South Sudanese urban cities does not allow for this to happen, as they are too large. However, it would maybe be possible to sub-divide them into smaller units. In this case, Rousseau’s argument in his Social Contract could possibly be used to develop a new type of social contract in these cities. Property rights and the division of plots would thereby be a matter to be decided upon via voting.

In the rural areas, the social contract exists and is, in most cases, the legislative system that is principally adhered to. There are, nevertheless, major issues to be addressed, such as the marginalization of women. It is important to realize that such a questions is not just a matter of jurisdiction, it goes much deeper than that. As Bwogo explains;

the only trouble with the customary law; there are parts of them which are part of the traditional culture and norms that people believe in. They are not good, but it is very difficult to change them because they tell them, you know, this is how our ancestors is like. It goes all the way down to their identity. And then we cannot change that one. But that one will be changed by the change that will happen. (Bwogo, personal communication, April 2, 2012, VOICE 008/0:51 – 1:19)

She refers to the flexibility within the customary practices and the ability for the laws to adjust to the changed situation. Interestingly, formal law is used by the women to advocate for the changes they wish to see in customary practices. This fact argues in favor of a modified version of de Soto’s thesis, a version where aspects of both customary and formal law are used together; where a bridge is built between formal and customary law practices. It would arguably be possible to adopt some form of voting which would also enhance legitimacy of customary law in fractions of society, such as the women and young people, as they are simultaneously given a chance to affect these laws.

Nevertheless, when discussing social contract in South Sudan, it is important to keep in mind that customary practices and the right to land were at the heart of the conflict. It is thus the general perception that “the right to practice the cultural heritage enshrined in customary law is an integral aspect of the fruits of that struggle” (Mennen, 2010, p. 239). Customary law is therefore something which the population values highly, and it is therefore interesting to analyze if it is possible to formalize the social contract as de Soto argues. This will be examined in the following section.

* 1. Formalization *(Denise)*

According to de Soto national social contracts need to be concretized by law in order to lift the bell jar in developing countries (de Soto, 2000, p. 158). This process of concretizing, also known as formalizing, the South Sudanese social contract is however an intricate process due to the country’s dual legal systems of customary and statutory law. This section will present some of the challenges and different aspects associated with formalizing the customary land tenure system in South Sudan.

* + 1. Customary and Formal Property Rights *(Denise)*

Despite the introduction of colonial and post-independence legislation in many parts of Africa, customary legislation and authorities continue to play a prominent role in land relations (Toulmin, 2008, p. 13):

All countries have systems of rules or laws establishing property rights, as well as rights over access and use of land. Often, communities have property and land tenure systems of their own that pre-date national systems. These are frequently rooted in their specific culture, existing outside the scope of the national system and varying between different parts of the same country. (OXFAM, 2011, p. 26)

The effectiveness of these customary systems, however, has been eroded by social, cultural, economic and political changes (Toulmin, 2008, p. 14), consequently shifting the customary system’s role and position in many African societies.

As previously mentioned in section 4.1.1, herders and farmers in the Sudan have traditionally had a peaceful relationship based on a customary understanding of who had access to what land during a specific time period. This symbiotic relationship has come under severe strain, however, due to the increased desertification that drives northern herders further south in search of grazing lands (Boudreaux, 2006, p. 79), as well as the growing conflicts relating to the influx and integration of returnees in the local communities (Shanmugaratnam, 2008, p. 10). Although the 2009 Land Act gives special protection to herders (Deng, 2011, p. 10), determining who has rights to use which land becomes a crucial decision as “having the right to farm or herd a particular piece of land may make the difference between starving or surviving” (Boudreaux, 2006, p. 70).

Although rights to property are usually acquired through one’s social relationship (Brylle, personal communication, April 12, 2012, 4:47 – 5:22), defining these social relationships is challenging:

The problem … is many of these relations between people, families, generations is often not precisely defined. It’s often an oral history; it’s something that people know from generations through generations, which is passed on, and it can’t be described as well, of course. It’s not that you can go to a specific piece of land and say that this belongs to him or her. (Brylle, personal communication, April 12, 2012, 6:08 – 6:40)

This ownership ambiguity is what Hume believed can be avoided if property rights are based on rules and law rather than personal connection, which is faulty in nature and corruptible by time (Hume, 1999, p. 345). Rousseau, like Kant, also advocates for the formalization and recognition of property rights by the state, claiming that granting ones plot of land to the state in exchange for a property title that is respected by all members of a community, will lead to more long-term security than if the right of possession was not subordinate to the state (Rousseau, 1976, p. 23-25; Wraight, 2008, p. 46).

In addition to the vagueness surrounding rightful ownership, three different tenure systems can currently be observed in South Sudan. Firstly, there is an inclination towards individual rights to land in the urban areas. Here, land is surveyed, demarcated, titled and registered to individual property owners, and although social contracts can be found in the urban areas, they are eroding due to the rapid urbanization mentioned in section 5.1.1. Secondly, there is the customary system that steers the amorphous larger chunks of land found in rural South Sudan. Thirdly, there is the government owned land which, so far, has not been clearly demarcated either (Mennen, personal communication, April 24, 2012, 5:19 – 6:16). South Sudan therefore operates with different legal systems operating concurrently, where the informal customary non-state laws are found in the rural areas, while the legal system in the urban areas is more statutory based (Deng, personal communication, April 14, 2012, 1:38 – 1:56).

Although this system of dual legality has been present since the Anglo-Egyptian Condomonium, the customary system was, and still is, recognized by the government as a legitimate and valid system. As a matter of fact, the 2009 Land Act reinforced the government’s recognition of customary land tenure in the CPA and the ICSS, stating that land held in common should have equal force and effect in law (Deng, 2011, p. 10):

The South Sudan government is very cognitive of customary law, customary justice systems and how important it is to the culture and the history. It’s part of the reason that civil war was fought, was over; over customs, over culture. So they’re definitely not throwing it aside, but it’s a difficult process, and I think there is a lot of desire sometimes to kind of shorten the process of engaging, consulting the community about the land. … What I think they are trying to do more is secure tenure of land through registration and titling, but also registering and demarcating the customary boundaries of land; so where there is a government piece of land, they’ve clearly demarcated where that ends, and where the customary plot of land [begins]. And the customary plot is controlled as it has been for some time through the chiefs, through the customary system. (Mennen, personal communication, April 24, 2012, 3:54 – 5:01)

According to Brylle, customary law is the legal system that is the most embedded within the South Sudanese society: “it’s what they are used to, it’s what they know” (Brylle, personal communication, April 12, 2012, 36:31 – 37:00). Brylle therefore believes that the introduction of something new or different will not be easily incorporated in South Sudan. Deng, on the other hand, believes that the main challenge with formalizing customary land tenure is managing the overlap where customary meets the formal (Deng, personal communication, April 14, 2012, 2:05 – 2:33). The different issues surrounding the formalization process in South Sudan will be presented further in the following.

* + 1. Pros and Cons of Formalization in South Sudan
			1. Benefits of Formalization *(Denise)*

According to Hume’s’ Treatise, property must be fixed by general rules in order for it to be stable and “Tho’ in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order, which is established in society”(Hume, 1999, p. 339).

The introduction of money economy and the development from subsistence agriculture and pasturage to commercial cropping, led to the adjustment of indigenous systems of land tenure towards a more individualized land tenure system (Ault and Rutman, 1979, p. 171; p. 174). Additionally, rapid changes of pace brought insecurity in formerly stable property rights systems, changing societal structure and consequently affecting authority figures’ role, whether it be the government or customary chiefs (Toulmin, 2008, p.12).

Brylle, like de Soto, believes that codifying the customary legal system in South Sudan should be considered in order for traditional structure to have a meaning in a modern legal system (Brylle, personal communication, April 12, 2012, 6:50 – 7:06). Bwogo, on the other hand, sees the codifying and the formalization of the customary as a way to enhance and improve the current formal laws in South Sudan, which she believes are not adequate (Bwogo, personal communication, April 2, 2012, VOICE 004/ 4:19 – 4:44). Additionally, she feels that there is a need for a unified system that rules over the South Sudanese population equally and systematically: “We need much more formal rule so that nobody get’s away with the exception in the customary law or in misinterpreting it” (Bwogo, personal communication, April 2, 2012, VOICE 013/0:17 – 0:28). This is consistent with both Locke Hume, Rousseau and Kant’s core arguments regarding the necessity of having rules which a whole society abides by (Locke, 2000, p. 164; Hume, 1999, p. 339).

Bwogo is positive to the formalization of the customary law system because it is a system that works (Bwogo, personal communication, April 2,2012, VOICE 015/ 0:11 – 0:19), and she believes that it could benefit South Sudan’s formal legislation. Brylle, on the other hand, believes that formalization of the customary system is necessary due to the policy vacuum that has been noticed in South Sudan, and because formalization of rights is a prerequisite to be able to run a modern economy (Brylle, personal communication, April 12, 2012, 8:22 – 9:27). This prerequisite is akin to what de Soto stresses in his “Mystery of Capital”: that the institution of formalized property rights is essential for the proper functioning of a market economy (Barros, 2010, p. 1).

Joireman is likewise positive to the formalization of customary law, as it can lead to the protection of those living in the rural areas of South Sudan, especially since the nature of tribal judicial systems in light of the changing economic conditions in Africa have led to increased uncertainty due to contradictory tribal court decisions (Ault and Rutman, 1979, p. 177):

 I just agree with you wholeheartedly that if you don’t have formalized rights they can be taken from you more easily. And especially if people can go to customary leaders, and customary leaders say ‘I control this land’. Well it’s true but it’s not true, right. They control it but there are other people living on it, and they’re supposed to be looking out after the interests of those other people so there is a great deal of potential for moral hazard when you don’t have codified rights. (Joireman, personal communication, April 17, 2012, 35: 03 – 35:36).

Conflict is also an aspect that can be attenuated by formalizing the customary legal system. Deng believes that the customary systems have shortcoming when dealing with conflicts (Deng, personal communication, April 14, 2012, 7:36-7:42), as these systems are being forced to deal with issues that they were not designed to deal with, consequently falling short of resolving them (Deng, personal communication, April 14, 2012, 7:22 – 7:32). The conflicts Deng is referring to are the clashes between agriculturists and those running cattle economies (Brylle, personal communication, April 12, 2012, 10:57 – 11:14). Other conflicts include influxes of new people, economic migrants and growing urban areas (Deng, personal communication, 2012, 7:44 – 8:08), as was previously mention in section 5.1.5.

Although Mennen does not believe that codifying customary law is possible, he still sees the potential of formalization in the sense of recognizing the customary system as having its own processes of determining justice, through the documentation of cases that come through the customary court so as to develop a body of law based on actual decisions (Mennen, personal communication, April 24, 2012, 31:26 – 33:37). Mennen believes this form of formalizing the customary legal system, which is less static and leaves room for changes, is more realistic than attempting to codify laws that would take years to agree on due to the different customs in the numerous clans that are present in South Sudan.

So you formalize it by embracing that and giving jurisdiction over many issues, sematic issues, territorial issues to the tribes, to the customary, to the chiefs. But where there are certain issues that cross over into statutory law, you then have a way that the customary system and the formal court date system link up, whether it’s a review, kind of collateral review, or an appeal and remand type systems, so that they are constantly developing linkages between the customary system and the formal system, the court based system, on certain topics of law, or certain territorial jurisdictional issues. (Mennen, personal communication, April 24, 2012, 34:22 – 35:07)

Despite the possibilities and benefits of formalizing the customary and incorporating it into the formal legal system in South Sudan, formalization is not a panacea (Pantuliano, personal communication, April 8, 2012, 18:20 – 19:26); there are still disadvantages that need to be exposed.

* + - 1. Disadvantages Linked to Formalization *(Denise)*

Examples of land tenure reforms have, on a number of occasions, had adverse effects than those de Soto claim in his property theory (Musembi, 2007, p. 1457). One reason for this has been thought to be that policymakers have not paid sufficient attention to local institutions or the complex subtleties that shape the informal property systems (Heltberg, 2002, p. 197). Lack of central government capacity to implement such large-scale national land registration systems have also been a reason for failed formalization attempts (Toulmin, 2008, p. 10). Another reason mentioned by critics has been that the introduction of formalized property systems, especially in rural areas, competes with, and sometimes even destroys, well-established and functioning local systems:

The expansion of influence of state or project law often competes with customary institutions that form the basis for claims of overlapping interests in land. Because land tenure is derived from social relationships and institutions, changes in tenure and property regimes have implications for the entire social and ecological fabric of rural communities, over and above altering the authority on which individuals and groups rely to protect their claims (Meinzen-Dick and Mwangi, 2008, p. 37)

Formalization can therefore lead to situations of opportunism and chaos in both urban and rural areas (Sjaastad and Cousins, 2008, p.3). This is what Rousseau was talking about in his Discourse on the Origin of Inequality; that the human race could have been spared crimes, wars and misery if people saw property as a common rather than an individual good (Rousseau, 1976, pp. 211-212).

The inability to determine the geographical boundaries of the different groups that follow different social contracts has also been a key problem in the attempt to formalize property rights in African contexts (ibid, p. 7). This type of difficulty was mentioned by Hume in his Treatise: “ ‘Tis evident, then, that their first difficulty, in this situation, after the general convention for the establishment of society, and for the constancy of possession, is, how to separate their possessions, and assign to each his particular portion, which he must for the future inalterably enjoy” (Hume. 1999, p. 343).

De Soto, however, disagrees with the focus on mapping, claiming that:

Property creation programs will continue to fail as long as governments think that creating property requires only getting acquainted with physical things – that once they have photographed, surveyed, measured, and computerized the inventories of their physical assets, they have all the information required to issue property title. They do not. (de Soto, 2000, p. 203)

According to de Soto, mapping and locating physical assets’ boundaries do not tell governments how to build the national social contract that will enable them to create widespread legal property (ibid, p. 204). De Soto believes that “until the obstacles to using formal property systems are removed and the extralegal arrangements have been replaced by the law, people have little or no incentive to supply the information necessary to keep maps and databases updated and reliable” (De Soto, 2000, p. 204).

In the case of South Sudan, however, Joireman points out the formalization process of the country’s extralegal property arrangements will nonetheless be under-prioritized by the government, even when the country’s judicial infrastructure will fully be in place. The reason is that the South Sudanese court system will be overwhelmed and clogged with claims and disputes concerning land, property, as well as issues regarding return and citizenship (Joireman, personal communication, April 17, 2012, 7:12 – 7:47). Norton shares Joireman’s concerns when it comes to dealing with land issues in South Sudan:

Nobody really knows what the government wants to do about any of these pretty big issues. There is the Land Act itself, but the land regulations are still not been enacted for some time. What has recently been heard from the Land Commission is that the land itself is likely to be revised when the land policy is finally passed. So there is a policy vacuum and it is unclear what formalization would look like if it ever happened. (Norton, personal communication, April 2, 2012, 7:25 – 7:52)

Brylle, on the other hand, feels that formalization of the customary land tenure system in South Sudan will be a challenging task because it is not a current concern in the predominantly rural areas:

In the urban areas, with the expansion of the urban areas, it’s important. That is where the modern legal frameworks and things must take in to account the relation to the customary laws and the traditions and traditional law, not to create conflicts that cannot be resolved. But if you go outside those areas, into the rural areas, you know, it will take a long time before it becomes something that you should run around selling. (Brylle, personal communication, April 12, 2012, 40:08 – 40:37)

In order for the formalization process to work, titling should only be carried out after a careful demand analysis for such an institutional change has been conveyed (Heltberg, 2002, pp. 206-207). As a matter of fact, “prematurely imposing formal legal changes to customary or informal practiced can also cause positive harm, including the weakening or loss of existing rights” (Bruce et al, 2006, p. 140).

Although Deng is sure that people in South Sudan desire property security, he does not believe that this can be provided through official pieces of paper (Deng, personal communication, 2012, 10:03-10:24). In fact, his instinct is that spelling out everything in law is intrusive, and that thinking problems can be solved simply by writing them down as law is unrealistic (Deng, personal communication, 2012, 22:30 – 23:08), although he does recognize the potential formalization can have on, for example, developing a Customary Land Tenure Act. The reason why Deng is critical to formalizing the South Sudanese customary land tenure system is because, according to him, the customary systems’ flexibility and ability to adapt to changing situations are its strength, and codifying it undermines this asset (Deng, personal communication, 2012, 21:32- 22:21). He believes the customary systems’ resilience works where other bureaucratic systems are unable (Deng, personal communication, 2012, 8:42-8:58). Joireman also expresses how customary leaders in rural areas can essentially take the burden off the state because they are respected and adhered to (Joireman, personal communication, April 17, 2012, 9:18 – 9:50; Krueckeberg, 2004, p. 4).

Growing urban areas, however, makes it necessary to develop and formalize property rights due to increasing land disputes between local populations and those returning from the north:

The whole formalization process here is a bit muddled really because there is no government policy about how to take formalization forward, there is no clarity about how you address property rights, what property rights might look like, the only thing that is happening is that community land is being taken, given to returnees and returnees are given some kind of individual title, but there is not an awful lot. (Norton, personal communication, April 2, 2012, 3:03 – 3:29)

A USAID report on the land tenure issues in South Sudan concerning the repatriation of IDPs and refugees, confirms what both Joireman and Norton express in their interviews: “In rural areas, the presence of customary institutions and traditional mechanisms for dealing with restitutions of land makes the process easier for the reintegration of returnees than is the case in urban areas” (USAID, 2010, p. A-11). Formalization, in the attempt to reintegrate returnees, or returnees reclaiming their land, can therefore lead to social unrest, consequently creating new groups of landless people (Feder and Feeny, 1991, p. 138). However, if the state does not make it possible for these returnees to obtain land on which to build their homes through legal mechanisms, these returnees would have to engage in the extralegal activities that would keep de Soto’s notorious bell jar anchored within the South Sudanese society (Peñalver in Barros, 2010, p. 13).

The issue concerning returnees is also problematic from a theoretical perspective: Those who have had the land first and put their labor into it should be the recognized as owners according to both Locke and Rousseau (Kelly, 2007, p. 61; Tully, 1980, p. 170; Rousseau, 1976, p. 24), while those who currently have the land and developed a personal attachment to it should be granted ownership according to Hume’s Treatise (Hume, 1999, p. 343). The government, which according to Kant should be the neutral arbitrator, is therefore faced with the challenge of deciding who is the formally recognized owner (Kant cited in Hodgson, 2010, p. 62). This entails either worsening the situation of those favored with opportunity, or improving the situation of those less well-favored (Nozick, 1974, p. 235).

Formalization can additionally contribute towards cementing existing social inequalities that are present in the customary legal system (Sjaastad and Cousins, 2008, p. 4; Bruce et al., 2006, p. 198): “While customary practices often meet particular needs, it is also true that in certain cases they do not serve the people well in general …. Therefore, customary practices must be carefully examined to determine the benefits they provide before they are recognized by formal law” (Bruce et al, 2006, p. 140).

The problem with formalizing customary law is that “it is quite difficult to boil these things down to a group of rights that everyone understands and that everyone agrees on” (Norton, personal communication, April 2, 2012, 5:01 – 5:08). Although Norton acknowledges how the examples used by de Soto in his ‘Mystery of Capital’ show how a formalization of property rights could work in an urban context, he fears that an integration of the customary land tenure in South Sudan is far too complicated to actually codify, especially when the land in question is community land with no clear usage agreements (Norton, personal communication, April 2, 2012, 5:32- 6:07).

* + 1. Modifying de Soto
			1. Multiple Legal Systems *(Denise)*

De Soto’s formalization theory has been accused of having a narrow construction of legality, where legal pluralism is equated with informality (Musembi, 2007, p. 1459-1460). This over-valorizes the role of formal state institutions, and social institutions that play a much more central role in day-to-day interactions are disregarded. Contrarily to what de Soto claims in his “Mystery of Capital, critics have additionally argued that property relations are not only dynamic and adaptable, but several types of property-holding arrangements are able to coexist within the same society (Musembi, 2007, p. 1463).

Furthermore, property rights theory suggests that a pluralistic property rights regime “would be efficient in capturing the economic value of different adaptive strategies” (van den Brink et al, 1995, p. 386). Policymakers are therefore encouraged to provide these common property systems with legal recognition and other forms of support, rather than undermining them (Heltberg, 2002, p. 198):

States can legitimize informal laws and customs in a variety of ways. For example, the State may empower customary tribunals to resolve particular types of property disputes, or state tribunals may observe procedures that sanction consideration of customary rules and practices in resolving disputes. (Bruce et al, 2006, p. 181)

When asked if it is possible for a country like South Sudan to function with a multiple legal system, Joireman answered:

From a theoretical perspective, one would think that common law systems might be better able to accommodate customary law, because common law systems are designed to evolve through the articulation of precedence and the use of precedence. So theoretically I would say to you: Yes, it should be possible. But if you want me to give you examples, I don’t have them. That’s the problem, because we don’t see it evolving quite as much as we might hope. So the potential is there, but I can’t point you to anywhere and say look how well it’s working in this case. (Joireman, personal communication, April 17, 2012, 4:24 – 5:09)

Brylle also made an interesting point, saying that property rights should not exclusively be defined as it is understood in the west, that there should also be space for traditional systems. He comprehends, however, how incorporating the traditional into a modern legal system would be a complex procedure (Brylle, personal communication, April 12, 2012, 31:45 – 32:14).

* + - 1. Communities as Rights Holders *(Denise)*

Although the South Sudanese 2009 Land Act made strides towards a system that recognizes community land ownership (Deng, 2011, p. 11), formalization of property rights has, for a long time, meant individualization of property rights, and “even when contemporary arguments for formalisation acknowledge the need to give legal recognition to 'communal' interests in land, they still perceive such recognition as a transitional step toward individualization” (Musembi, 2007, p. 1464). A shift is however being observed as governments, especially from countries that are trying to reestablish peaceful relations between competing groups following a civil war, are now experimenting with ways to register both individual and collective rights to land (Toulmin, 2008, p. 12). Even Rousseau argued for collective land ownership, claiming that men could unite, possess and enjoy territory in common (Rousseau, 1976, p. 26).

When asked whether communities could legally be recognized as rights holders of a piece of property, Deng explained that there were ways of operationalizing it so that they could be. The problem that arises, however, would be how to define a community in South Sudan (Deng, personal communication, 2012, 3:30 – 4:05). He also fears that connecting rights to one’s community membership has the potential to divide the South Sudanese people (Deng, personal communication, 2012, 4:16 -4:44).

Norton recognized how registering a community as a rights holder can benefit South Sudan, as this will hinder land being taken and sold off as individual plots:

A number of activists are fighting for titling for communities to ensure that community land do not become individualized and get sold off by a few unscrupulous chiefs. So a number of people would be in favor for that but not in favor of individualization and formalization of title. (Norton, personal communication, April 2, 2012, 7:07 – 7:21)

Mennen described how a community sharing rights to property could look like, comparing it to a co-op type of situation:

If you are able to delineate a customary controlled piece of land, it’s just like any co-op, an apartment building co-op or something: it’s controlled by a collective of this clan, this family. So once it’s delineated, and say they have collective ownership over this piece of land they could then use that to get funding, as collateral for a loan. As a community, they could use it (Mennen, personal communication, April 24, 2012, 41:27- 42:00)

Mennen believes that this way of constructing property ownership in South Sudan can create the incentive structure that de Soto talks about, consequently, unlocking the property’s assets. The only difference is that these assets would be communally owned and controlled, rather than individually (Mennen, 2012, 42:43 – 42:56).

According to a World Bank publication, group management may be an “especially beneficial alternative to individualization when it is difficult to divide the resources …, where the society has traditionally managed the resources as common property, or where the resource provides a safety net to the poor” (Bruce et al, 2006, p. 184). Additionally, if communities can sue jointly for losses suffered through land grabbing, for example, this could enable them to join efforts and pool their resources (Cotula et al, 2009, p. 95). Pantuliano, however, stresses the necessity of robust institutions in order for this type of legal recognition to work:

Formalization in many ways is the easy bit. Yes, there could be the difficulty of demarcating, and then agreement on which bit, which ethnic group, or which collective has access to which particular piece of land. But once you have reached an agreement on that, that’s fine. The issue is once you have a collective, and say part of that group wants to sell land, and wants to transfer the title to others, or give access rights to others… If you don’t have institution that is able to manage those tensions effectively, how do you get out of that? (Pantuliano, personal communication, April 8, 2012, 20:40 – 21:16)

Whether property is individually or communally owned in South Sudan is of no importance, however, if a property law enforcement regime is not present: “If you have property law but you don’t have enforcement regimes, you may as well not have the property law. It’s completely dependent on enforcement” (Joireman, personal communication, April 17, 2012, 11:29 – 11:38). Indeed, Joireman believes that the problem in many weak states is not the qualities of their laws, but whether or not these laws or able to be enforced by the government (Joireman, personal communication, April 17, 2012, 12:05 – 12:21).

This reflects Locke’s property rights theory, which also claims that the duty of government, “under threat of legitimate revolution”, is to ensure each law-abiding members’ rights (Krueckeberg, 2004, p. 9; Tully, 1980, p. 167): “Whatever the mode of allocation is, for a right to be useful to individuals or groups it needs to have consistent support from the authority that vested that right, especially when it comes under challenge” (Meinzen-Dick and Mwangi, 2008, p. 37). The following section will go further into the theme of government and its role as advocate of property rights formalization in South Sudan.

* 1. Advocacy *(Charlotte)*

If formalization of property rights is to take place as described in the previous section, it necessitates individuals committed to advocate in favor of formalization. The public at large needs to approve of formalization and accept these new formalized laws in order for the laws to have the intended effect. Advocating property rights formalization is a political task according to de Soto as it requires major changes of the current legal situation; “…implementing legal reform will mean tampering with the status quo. That makes it a major *political* task” (de Soto, 2000, p. 188, italics in original). This section analyzes if the most appropriate advocates of legal reform in South Sudan are political actors, or if there are other more suitable advocates for such changes.

* + 1. From Military To Democratic Rule *(Charlotte)*

The SPLM/A was a liberation movement from the beginning and such a movement only functioned when it managed to *unite* people around a common goal. The SPLM/A desires to move towards becoming a democratic government, yet this transition can be a challenging endeavors as “democracy, in contrast, is driven not by the logic of unification, but rather by diversity. Democracy creates divisions between groups; it factionalizes, rather than unifies” (Metelits, 2004, p. 77).

Nevertheless, the SPLM/A began to prepare for this transition already in the mid-1990s as it was aware of the importance of being perceived as more than just a liberation movement; it wanted to become a representative government of Southern Sudan. In 1996 it held the Conference on Civil Society and Civil Authority after which its “…rhetoric of civil society engagement in South Sudan increased significantly” (Jooma, 2005, p. 15). Furthermore, “during the conference, the SPLM outlined the most important task facing the movement as being “the establishment of an effective, democratic, participatory and accountable civil authority, the central purpose of which is the empowerment of civil society to become productive and the driving force of our struggle” (Jooma, 2005, p. 15). This shows that the intentions to be a democratically accountable government were present even before South Sudan became an independent country. However, good intentions alone are not enough.

“Post-conflict states are often referred to as ‘fragile’ or ‘weak’ in which there is limited state capacity …” and South Sudan is no exception (Baker & Scheye, 2009, p. 171). Not only was the South secluded and given few chances to develop during the Anglo-Egyptian Condomonium (Johnson, 2003, p. 12), it was also marginalized by the Sudanese government after independence (Shazali and Ahmed, 2009, p. 9). This marginalization continued even during the civil war, as the Sudanese government replaced the majority of formal judges with judges trained in Sharia jurisprudence and dismissed most of the police force. This was mostly the case in the cities because the severity of the war meant that the rural areas could not be reached and courts could therefore not be replaced. However, the system that was in place in the rural areas was not maintained. Consequently, “the state judiciary and police virtually ceased to function” at all in the rural areas (Baker & Scheye, 2009, p. 175). This means that state structures in rural South Sudan are not only weak; they are basically nonexistent. Hence, “the challenge for state-building in southern Sudan, therefore, is not one of restoring or reconstructing state structures after conflict, but rather of establishing a new state system” (Baker & Scheye, 2009, p. 175; Haslie, & Borchgrevink, 2007, p. 24).

Contrary to many other post-conflict governments, the GoSS is not perceived primarily as illegitimate. As one interviewee stated;

one must remember where they come from, they come from a background of being a liberation movement or a rebel movement in the eyes of the North, and a liberation movement in the eyes of the South. They gained ground militarily. (Brylle, personal communication, April 12, 2012, 18:00 – 18:18)

The fact that the SPLM was seen to fight a legitimate fight is thus important for the perception of the current government, as the experience of fighting repression was binding force for Southern Sudan: it gave the people of the South a feeling of a unified goal; freedom from repression (Jooma, 2005, p. 15). Brylle (personal communication) explains the importance of this fact very well;

they were successful in terms of fighting for freedom for the South, they got a peace agreement which entitled to a referendum, which they won with an overwhelming, you know, votes in favour of separation from the North, which was a very successful thing, seen from their perspective, … it was definitely a victory for them and that somehow kept them together because they had this determination, this objective that was not shared by everybody but by far most people. (April 12, 2012, 21:03 – 21:42).

This fact gave the South a strong sense of unity and gave them great hopes for the future. Nevertheless, it is important also to realize that “the end of the struggle with the North not only deprived Southern leaders of their historic common enemy, but also opened the way for internal divisions to (re)emerge” (Belloni, 2011, 424).

* + 1. Challenges Facing the GoSS *(Charlotte)*

The Dinka tribe were most numerous in the SPLM and “...the conflict between Southern ethnic groups led the SPLA leadership to recognise that decentralisation of the political apparatus was essential if they were to retain support from non-Dinka ethnic groups and were to build national and international legitimacy” (Jooma, 2005, p. 15). Thus, the GoSS embarked upon decentralization policies mentioned earlier which granted a number of powers to the local governments. However, decentralization policies alone are far from enough to secure a legitimate democratic government. The central challenges for the GoSS to transform itself from being a liberation army to a civil, democratic government thus remains (Haslie, & Borchgrevink, 2007, p. 24; Metelits, year, p. 76). Two main challenges are relevant in relation to the ability of the GoSS to advocate property rights formalization in its current state of affairs; corruption and militarization.

* + - 1. Corruption and Militarization *(Charlotte)*

Many African countries are accused of having high levels of corruption and South Sudan is no exception. Kinship, social relations and hierarchy are often determining factors when it comes to resource allocation, as this is the traditional way of dealing with many aspects of life. Nevertheless, this method does not necessarily qualify as corruption as Brylle explains;

But it is also clear that there are also mechanisms in society that whereby allocation of resources is determined by factors that in our eyes are not something that we would regard as normal. And I think one has to make a certain, at least theoretical, distinction between the two things. The fact that you are a successful person for example, having an income, having opportunities, and so on and so forth, will in many African communities be regarded as something that the rest of the community has a right also to share with you. And that is not corruption actually. The problem is of course that the moment the person in question then has become integrated into the modern economy and has for instance access to official resources or you know funds, and begin to manipulate them, because he feels that either he can enrich himself by it and maybe also because he thinks that that is the only way he can satisfy his family in the rural areas for example, then there is a problem, of course, and then we are in the sphere of corruption. (Brylle, personal communication, April 12, 2012, 32:45 – 43:22)

Following the peace agreement, GoSS employed many ex-soldiers in important positions as a reward for their service during the war. This means that they get direct access to public resources and are put in a position where they can enrich themselves and their family or community. Many make use of this opportunity. There are many instances where soldiers have taken over land, either for their own use or selling purposes. Many ex-soldiers argue that they have the rights to take land, as they were they ones who stayed and fought for the land instead of just leaving (Pantuliano, 2007, p. 5).

This also means that a number of foreign companies buy land from ex-soldiers thinking they are the real owners of the land and they receive a piece of document of ownership. The reason these instances can take place is “exactly because they are not a full fledged government system, and transparency and monitoring, and those kinds of things, there is a situation where it easily becomes corrupt. And there is a huge problem of corruption” (Brylle, personal communication, April 12, 2012, 34:34- 34:50).

The main problem in this regard is that the public often does not distinguish between ex-soldiers in general and government representatives as “…the two are one and the same a lot of the time, I mean, a lot of people got positions to be in the government of South Sudan, or government position, or in public services because they were SPLM/A people” (Norton, personal communications, April 2, 2012, 17:20 -17:33). Consequently, ex-soldiers’ misbehavior negatively affect the public’s perception of government (Brylle, personal communication, April 12, 2012, 47:09 – 47:35), thereby making them less likely to be trusted when they advocate for property rights formalization.

It is therefore interesting to notice that government representatives, regardless of their position either as ex-soldier or as government officials at various levels, behave contrarily to what Hume argues they should. According to Hume, the role of the government in relations to property rights is to avoid that the strong take from the weak. The government and government officials are thus supposed to play the role of the neutral arbitrator who secure that everybody retains their property rights (Hume, 2012, II.XII.36). However, when soldiers grab property, as described above, they behave contrary to what is expected according to Hume.

* + 1. Law Enforcement *(Charlotte)*

A problematic issue, which in essence enables corruption, is the lack of law enforcement. This is of major concern as “the application of them [formal laws] is a big question mark because the system is not consequent and it is not systematic” (Bwogo, personal communication, April 2, 2012, VOICE 004/3:05 – 3:12). Bwogo further argues that even in the urban areas “where there is a system in place, you have a lot of undesirable elements. You know big official they would like special treatment, they would want exception, they will by-pass the very law. So when the existing law is not well respected by the custodian of it, then you have very little to hope for” (Bwogo, personal communication, April 2, 2012, VOICE 010/2:09 – 2:45).

The works of Locke, Hume, Rousseau and Kant perceive the government as the most important actor in relation to law enforcement. Locke argues that such enforcement qualities was one of the main reason why men united in the creation of governments at the initial stage; “to avoid these inconveniencies which disorder men’s properties in the state of Nature, men unite into societies that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it by which every one may know what it is.” (Locke, 2000, p. 164).

Kant further argues that if there is no neutral law enforcement mechanism in place, then any type of property right is only temporary; “[an] acquisition is still only provisional as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect” (Kant cited in Hodgson, 2010, p. 62). Heltberg (2002) expresses Kant’s argument nicely by stating that without enforcement, rights are only *de jure*. However, with enforcement, they become *de facto* rights (p. 194). It thus seems as if Locke, Hume, Rousseau and Kant come to the same conclusion when it comes to the importance of government regarding the enforcement of property rights.

* + 1. Perception of Government *(Charlotte)*

In South Sudan, the development from being a liberation army to becoming a democratic government very much concerns the relationship between government and its citizenry. As Haslie, & Borchgrevink (2007) rightly write; “one of the challenges with regard to state-building relates to the relationship between authorities and civil society” (p. 26). This problem does not necessarily steam from the GoSS not having the desire for such a relationship, but rather because they lack the knowledge of being a pluralistic and democratic government, and it is difficult to do something they have no experience doing. In an army, even a liberation army like the SPLM/A, the structure is very hierocratic and top-down, and this “dictatorship is very difficult to get out of the mentality of the people” (Bwogo, personal communication, April 2, 2012, VOICE 014/0:09 – 0:16).

The mindset transformation from being an army to a democratic government “… is very psychological I would say. It is not because they [GoSS] don’t want, it is because this is the exercise they know, I would say. And although they would agree that we will exercise it differently, it doesn’t just come like that, because they don’t know it. They can’t do what they don’t know” (Bwogo, personal communication, April 2, 2012, VOICE 014/2:00 – 2:30).

* + 1. Advocacy Actors *(Charlotte)*

Considering all the above mentioned elements of lack of capacity, issues of corruption and a militarized mentality, it is necessary to question if the politicians of South Sudan are the most suitable and best equipped at advocating property rights formalization as de Soto claims. Nevertheless, contrary to many other post-conflict states, GoSS is generally not disliked or necessarily perceived as entirely illegitimate by the population at large. In fact, when top government officials come to discuss issues with a community, for example, they are often well perceived and the populace is willing to help the government achieve its goals to the best of their abilities (Mennen, personal communication, April 24, 2012, 14:03 – 14:45).

In this regard, it is interesting to relate Hyden’s argumentation relating to the ‘capturing of the peasants’ to the current situation in South Sudan where there is an immense lack of infrastructure such as roads, hospitals and schools, especially in the rural areas. This means that the population does not depend on the government for their survival, they have managed to live without these public facilities during the war and they are still doing so. It does not, however, mean that they would not like to have these facilities. The point is that they do not need them to secure their survival. As long as that remains the case, the ‘peasants’ remains ‘uncaptured’, according to Hyden (Hyden, 1980; Waters, 1992). This means that the contact between the GoSS and the citizens of South Sudan is not very strong and that there is no flow of information going back and forth. In other words, that “the social contract between government and governed is still very slowly getting off the ground” (Norton, personal communications, April 2, 2012, 14:40 – 13:50).

This does not necessarily mean that the laws made by the GoSS are perceived as illegitimate, or that the GoSS is perceived as illegitimate, but “it is just that in many locations people may not have had a lot to do with the government or dealt with it, because they have been through a very long civil war” (Norton, personal communications, April 2, 2012, 15:20 – 15:30). Furthermore, the GoSS’ “control over its territory is imperfect and remains, in places, contested by armed groups. Poor transport and communications networks, not to mention a prolonged wet season that makes many roads impassable, further curtail the GoSS’ ability to project its authority now for the foreseeable future” (Baker & Scheye, 2009, p. 175). In other words, “I think they [GoSS] have very little control actually, to be honest, at the moment (Brylle, personal communication, April 12, 2012, 17:30 – 17:35).

Considering all the above mentioned issues concerning the GoSS it seems reasonable to examine, contrary to de Soto’s argument, if other groups in society would be more adequate advocates of property rights formalization in South Sudan. Relating Hyden’s argument to South Sudan it became clear that the government is not in a position to advocate major legal changes. Norton, however, argues that “for a long, long time the NGOs or others used to provide and build the best services here” (April 2, 2012, 14:40 – 13:50). It thus seems relevant to analyze if what could broadly be termed the ‘international community’ could be adequate advocates of property rights formalization.

* + - 1. The International Community *(Charlotte)*

The international community often works between the government and the citizens of South Sudan. They support the government in reaching their goals, as well as inform citizens about new government policies. They also support communities when, for example, a land deal has been signed without their consent. Bwogo argues that since there are not adequate information flows between the government and the governed, the international community functions as “…a source of information” (Bwogo, personal communication, April 2, 2012, VOICE 012/4:39 – 4:40). Furthermore, the international community has gained a certain level of trust and legitimacy in the eyes of the population as “there has been probably a recognition by the Southern Sudanese that the international community, at the end of the day, assisted them in providing them with the right to decide to separate from the North” (Brylle, personal communication, April 12, 2012, 25:16 – 25:36).

Thus, the international community seems to be playing an informative role in South Sudan, which supports the view that they could also play the role of advocates in favor of property rights formalization. However, the international community is expecting the GoSS to become competent enough to carry through such an endeavor on its own (Brylle, personal communication, April 12, 2012, 26-27:15).

* + - 1. Lawyers *(Charlotte)*

Other interesting actors in relation to property rights formalization are formally trained lawyers. They are daily in contact with law implementation, thus it could be argued that they are the most suitable actors to advocate for one uniform property rights system, and that they would be the most suitable to argue for the benefits it would bring to all parties. However, de Soto rhetorically asks himself the question if lawyers could be formalization advocates, and promptly answers “no” (de Soto, 2000, p. 158). It is the lawyers’ job to apply the law, not to advocate its formalization. Bwogo agrees with de Soto, stating that “it is not their job. If a paragraph does not exist in the constitution, it is not them to put it (Bwogo, personal communication, April 2, 2012, VOICE 014/4:05 – 4:47).

It thus seems as if no one is in a position to advocate property rights formalization at the moment. However, de Soto’s purpose with property rights formalization is to bridge formal and informal law. In this regard it is interesting to notice that a certain dynamism is taking place between these two instances. As was noted in section 5.1, women have used their formal property rights to advocate for this right within their communities. It thus seems that, at the local level, people are the best at creating bridges between formal and informal law in South Sudan (Bwogo, personal communication, April 2, 2012, VOICE 008/0:10 - 0:47).

These individuals are nevertheless not in a position to advocate property rights formalization on a larger scale, let alone secure its enforcement. There are therefore limitations to the ability of single individuals within a society to advocate for major changes to the overall law system in South Sudan, especially without the involvement of a publicly recognized role or figure.

Suitable advocates have yet to be identified. Thus, formalization of customary law into one uniform system is currently not possible in South Sudan. This lack of formalization has an effect on the country’s economic development, which will be analyzed further in the following section.

* 1. Economic Development *(Denise)*

In his “Mystery of Capital”, de Soto argues that the consequences of property rights formalization would be economic growth and increased capital-creating activities (de Soto, 2000, p. 219). He trusts that property rights will allow individuals to use their legally recognized asset to increase their economic potential, thus correlating property rights to economic incentives and behavior. Similarly to de Soto’s theory, research additionally shows that property rights institutions play a crucial role when it comes to investments and financial development (Acemoglu and Johnson, 2005, p. 949; de Soto, 2000, pp. 63-64).

In South Sudan, increasing private investment in land is seen as a way to diversify the country’s oil-dependent economy (Deng, 2011, p. 2). Although this could result to enhanced food security as well to the development of the country’s rural areas, other challenges present themselves. This section’s goal is to present and explain how some of these challenges affect different aspects of the South Sudanese economy.

* + 1. Urban and Rural Differences *(Denise)*

According to Bwogo, one should differentiate between property ownership in the urban and the rural areas in South Sudan:

Accommodation is not the biggest problem with the people in local communities. It is a problem when you come to urban areas, whereby a house is a house that can be rented out, and it becomes an economic resource. But in the village, there is nothing like renting a house. You don’t rent your house, you live in your house. (Bwogo, personal communication, April 2, 2012, VOICE 006/ 1:19 – 1:47)

This customary perception of land is confirmed by Mennen who explained that chiefs and people living on customary land do not necessarily understand the idea of selling a piece of their property to someone else because land, to them, is considered to belong to the community. Even if 90-year leases are given, the community still owns it (Mennen, personal communication, April 24, 2012, 39:49 – 40:10).

Besides being a livelihood asset, land in rural areas in Africa also has a social and cultural value connected to it as it provides a basis for social identity and networks, as well as functions as a status symbol (Musembi, 2007, p. 1468; Cotula et al., 2009, p. 90). Selling land mostly occurs in emergency situations, and even then would only a portion of it be sold (Musembi, 2007, p. 1468).

While discussing the urban areas in South Sudan, Bwogo mentioned increasing internal family disputes where one member would take off and sell land that belongs to the family for personal wealth and gain (Bwogo, personal communication, April 2, 2012, VOICE 006/ 2:08 – 2:39). This is what Hume meant could be avoided if property rights are based on rules and not mutual consent (Hume, 1999, p. 339):

Once a promise is made it is always possible to ask why we should continue to it through time. If, for example, our reason for making promises is self-interest, then it would be permissible and indeed right to break that promise if it were no longer in our self interest to keep it. The institution therefore requires a ground outside of itself if it is to have binding force and preserve society. Otherwise, everyone ‘will be subjected to the force and deceit of all the rest’ and it would be ‘impossible for any man to be happy unless he were both stronger and wiser than the rest’. (Tully, 1980, pp. 49-50)

The presence of binding rules and legislation regarding property and ownership is therefore imperative, because only then can there be a coherent and predictable course of action in between members of a society (Berry and Meadowcroft, 2009, p. 44).

Brylle also mentions predictability as a necessity when it comes to people’s investments actions; as long as there is a possibility that someone might come along and take their property, people will have a short-term perspective on their property investments. This, in turn, negatively affects the development of the country’s economy (Brylle, personal communication, April 12, 2012, 29:54 – 30:37). Indeed, “increased tenure security reduces the likelihood and fear of losing the value of investments made in the land; which means that overall investment in land is stimulated. Such investments increase production yields, economic returns, and household incomes. The value of the land asset increases accordingly” (Bruce et al., 2006, p. 143).

Another issue that could prevent the South Sudanese population from economically benefiting from property titles is armed conflict. Indeed, transferring land rights to individuals or businesses leads to increased land competition with neighboring communities, and with the proliferation of small arms in South Sudan, this competition often turns into violent conflicts (Deng, 2011, p. 2):

The fact that you have a conflictual situation in a very wide range of geographical areas also creates a situation amongst stability and uncertainty. So it is difficult under those circumstances to stand on your rights and to claim your rights, and to insist on your rights in that floating kind of situation where even certain armed warlords have control of an area. You have those kinds of situation where they begin to trade property, which does not belong to themselves, but property that they control a due moment in time to, for instance, foreign investors. And that has happened with chunks of land, you can hardly believe how big they are, in certain areas of South Sudan. (Brylle, personal communication, April 12, 2012, 13:17 – 14:12)

This is also a problem in the town areas; “in town, people find a piece of land which is open and they go and set up there. Another person comes back … and because they have guns people … don’t try to do anything about it” (Deng, personal communication, April 14, 2012, 14:02 - 14:17).

As mentioned in section 5.2, most of the demarcation of land is happening in the urban areas, led by the South Sudanese Land Commission. Teams of surveyors will go into cities and other urban areas to survey and demarcate plots. These registered titles are then given to individuals, or if they are already living on the plot, they are given a certain amount of time to register the plot (Mennen, personal communication, April 24, 2012, 10:58 – 11:28). This option of acquiring land titles is not, however, fully utilized due to the costs associated with registering property:

What’s been happening in urban areas is that the cost, like in Juba, the cost to register your title is too much. So people aren’t able to get title because it costs too much to register with the government in the first place. So that’s actually the major barrier …. I didn’t hear anything about taxes being too onerous or too much to pay; it’s the barrier, just getting the title in the first place. (Mennen, personal communication, April 24, 2012, 17:46 – 18:16)

This reflects de Soto’s point that most people do not resort to the extralegal sector to evade taxes, but because existing laws do not address their needs or aspirations (de Soto, 2000, p. 154). A possible solution could be that the South Sudanese government could better facilitate the purchasing of land entitlements, so that individuals in the urban areas can take advantage of this option of acquiring property titles. Additionally, the South Sudanese government could make sure that the same surveying and demarcation process is conducted in the rural areas. This is difficult, however, as it would seem, according to Mennen, as if the government is still trying to figure out how to tackle the customarily controlled land, as they feel the country’s economic growth is impeded unless the customary is under government ownership (personal communication, April 24, 2012, 11:44 – 12:10).

The lack of customary land control is not, however, what is currently impeding economic development in South Sudan: Unless titling and registration are accompanied by measures that ensure adequate access to credit markets and annex services, titleholders would possibly have to sell or abandon their lands, often to the advantage of better-situated landholders (Bruce et al, 2006, pp. 169 – 170). Indeed, Mennen mentioned during his interview that people in urban areas were taking advantage of surveying processes to get their hands on as mush land as possible at the expense of the poor people living on the land (Mennen, personal communication, April 24, 2012, 24:32 – 24:52). This confirms Hume’s argument that a government is necessary in order to prevent the strong from taking advantage of the weak: “In like manner, may it be said, that men could not live at all in society, at least in a civilized society, without laws and magistrates and judges, to prevent the encroachments of the strong upon the weak, of the violent upon the just and equitable” (Hume, 2012, II.XII.36).

* + 1. Auxiliary Services *(Denise)*

In order for de Soto’s theory to be applicable, certain key institutions need to be in place. In fact, “the major objection to speaking of everyone’s having a right *to* various things (…) and enforcing this right, is that these “rights” require a substructure of things and materials and actions” (Nozick, 1974, p. 238). In South Sudan’s case, some of these required systems are unfortunately either not yet present or currently not fully functioning. The country does not, for example, have a full banking system (Brylle, personal communication, April 12, 2012, 35:55 – 36:08). This means that even if people have titles to land, they do not have any access to credits, which is necessary in order for them to improve their productivity, according to de Soto’s theory; “without auxiliary services and infrastructures, title alone has little meaning” (Krueckeberg, 2004, p. 3).

Mennen, however, believes that the financial sector in South Sudan will naturally develop once property rights are established:

Once you have secure title, and you have people who have a piece of paper in their hand that says that they own something, that creates the foundation for a bank to be able to… that’s collateral that a bank then needs to issue a loan. So I feel like the more you have a market of people looking for loans with secure collateral, the more the banks will open up that financing option. That’s a very broad brush look at that, I think there’s probably a lot more nuances in relation to the banking sector in South Sudan. (Mennen, personal communication, April 24, 2012, 25:45 – 26:22)

Although what Mennen says confirms de Soto’s thesis on rights and ownership leading to the growth of a country’s capital market, some critics point out that the formalization of property rights, or the lack thereof, is not what is holding back the poor masses; the lack of education, infrastructure, health care and job opportunities, on the other hand, do (Sjaastad and Cousins, 2008, p. 8). Instead of declaring informal property as the main underlying cause of poverty, informal property could be included as one of several causes of poverty (ibid, p. 8).

 Joireman also disagreed with de Soto, explaining how title possession is not enough to bring about economic growth; banks, for example, will not be willing to give mortgages if they doubt their ability to expropriate the land that is being put up as collateral (Joireman, personal communication, April 17, 2012, 16:40 – 16:51). The absence of an established land market makes it additionally difficult to determine the value of the land that is put up as collateral (Norton, personal communication, April 2, 2012, 29:11 – 29:19)

 Poor countries governments’ capacities to rapidly establish procedures and bureaucracies, as well as bringing vast informal economies into a formal, taxable system have also been questioned (ibid, p. 4). In South Sudan’s case, Norton pointed out that there are currently more pressing needs that need to be addressed first, especially now with the country’s austerity measures due to the oil crisis (Norton, personal communication, April 2, 2012, 24:46 – 25:03).

Nonetheless, research has shown that countries with less secure property rights have a lower level of financial development (Claessens and Laeven, 2003, p. 2403; Knack and Keefer, 1995, p. 223). In fact, “few would dispute that the security of property and contractual rights and the efficiency with which government manage the provision of public goods and the creation of government policies are significant determinants of the speed with which countries grow” (Knack and Keefer, 1995, p. 207).

South Sudan desires to modernize and get into the 21st century economy. The first step towards achieving this, according to Mennen, is through securing people’s rights to property. Once this is done, titles can be used for trading, selling and buying. He also believes tilting and ownership can increase productivity and lead to efficient land use as title owners would want to invest in the land they own (Mennen, personal communication, April 24, 2012, 15:39 – 16:21). This is consistent with de Soto’s argument in his “Mystery of Capital”: That property rights will provide people with the incentive to take advantage of their assets to increase their economic potential (de Soto, 2000, p. 218).

* + 1. Collateral *(Denise)*

Secure formal land rights can provide a secure source of collateral, which in turn increases the availability of investment and purchasing funds (Bruce et al, 2006, p. 144). In fact, when there is little or no likelihood of losing ones property, the fear of losing investment value is similarly decreased and overall investments stimulated (ibid, p. 152).

Although utilizing property titles as collateral is consistent with de Soto’s argument of how titling can be used to create capital, this approach has been criticized due to the vulnerable position it puts title owners in. While giving loans against collateral is the preferred and established manner in which credit institutions operate (Heltberg, 2002, p. 205; Feder and Feeny, 1991, p. 141), it can lead to landlessness as mortgage loans can, for example, result in foreclosures (Bruce et al, 2006, p. 155 and p. 169):

Titles – and the privileges of ownership – also carry responsibilities, such as the payment of property taxes and fees for municipal services. When a poor resident receives legal title to land but cannot find work to secure the income to support that property, one of three results tends to follow: (1) No taxes and fees are paid, leaving the “owner” with an encumbered title; (2) the services are discontinued, which is tantamount to eviction; or (3) the tile is sold, and the “owner” is no longer an owner. In all these scenarios, the program for tenure security fails to produce collateral at the bank. (Krueckeberg, 2004, p. 2)

There thus seems to be a contradiction between de Soto’s objectives of providing tenure security through actually putting that property at risk; “titling a home and treating it as an asset … is not the same as providing security of occupancy”(Marcuse, 2004, p. 41).

Although moratoriums could be imposed in order to protect new landowners in South Sudan, this would require the enhancement of the current legislative system. Deng, however, pointed out that not much is done in South Sudan in this regard. According to him, it would seem as if the South Sudanese government is instead trying to redefine the Land Act, changing the content of the laws relating to land and property in ways that favors and justifies government land acquisitions (Deng, personal communication, April 14, 2012, 15:38 – 16:10). This government conduct is questionable, and will be discussed further in the next section.

* + 1. The Role of Government *(Denise)*

According to Kant’s theory, governments should function as neutral arbitrators to ensure that property rights agreements are adhered to. Additionally, according to Rousseau, they should also act in the interest of its societal members. In South Sudan, however, government officials are currently attempting to redefine the Land Act in order to have greater control over community land (Deng, 2011, p. 15), or make land deals with their own interests in mind (Deng, personal communication, April 14, 2012, 16:22 – 16:28):

Now it’s mainly done through public statements. You hear a lot of the government and those people saying that ‘the citing that land belongs to the community has been misinterpreted’ (…) and it even goes as far to say that the government owns all the land in South Sudan. (Deng, personal communication, April 14, 2012, 15:12 – 15:29)

This trait of the South Sudanese government is not consistent with neither Kant’s nor Rousseau’s definition of the role of government, and it is likely to face opposition from groups at the local levels in the long run, given the importance of land to local livelihoods (Deng, 2011, p. 15).

Bwogo, on the other hand, is concerned about the amount of land that is being sold or leased to investors without communities being informed (Bwogo, personal communication, April 2, 2012, VOICE 003/ 2:26 – 3:10). Indeed, she feels there is a growing competition for land between land sold or leased for investment and land used by rural communities:

The other crisis, or the other trouble, is that actually there is a competition now between the land that is proscribed for agriculture, for food security, the rural agriculture. Because the people still are depending on, you know, on themselves to grow the food so that they can survive, sustain their living. There is a competition between that and the investment land. (Bwogo, personal communication, April 2, 2012, VOICE 003/ 4:29 -5:00)

Apparently, the South Sudanese government, using the pretext of creating jobs in the villages is making agreements for the sake of increased economic development, instead of enforcing the rights and laws concerning the people’s right to the land that is constitutionally theirs (Bwogo, personal communication, April 2, 2012, VOICE 004/0:05 – 00:40). It would therefore seem as if the South Sudanese government is acting contrarily to what Kant made clear in his property argumentation on what the role of government should be; a neutral arbitrator.

It is important, however, to understand why the South Sudanese government is operating this way. According to Norton, “the government has [had to] put some structures in place to encourage foreign investment, because the problem with the economy in South Sudan is that it produces virtually nothing here. Almost everything comes in from outside” (Norton, personal communication, April 2, 2012, 25:31 – 25:40). Additionally, there is the oil aspect that needs to be taken into consideration: Most of the public budget in South Sudan comes from oil revenues, so “if those revenues don’t come, the money part doesn’t come” (Brylle, personal communication, April 12, 2012, 43:04 – 43:29). This puts the South Sudanese economy in a very vulnerable position, especially now with the austerity measures and the current conflict with the oil pipelines in the North, combined with the country’s reliance on imports:

South Sudan desperately needs private investment. If done in a responsible manner, agricultural investments can help to jumpstart the economy, provide food and services for struggling populations, and develop building and road infrastructure in rural areas. By adopting business models that maximize employment opportunities, investments can create jobs for rural communities and provide young people with an alternative to recruitment into armed groups. (Deng, 2011, p. 42)

In his interview, Mennen mentioned how the South Sudanese government is currently frustrated over not having access to enough land. They also feel that going through consultation processes with affected communities when it comes to land acquisitions and expropriations is too onerous and time consuming (Mennen, personal communication, April 24, 2012, 7:22 – 8:02). These governmental challenges will only grow with the formalization of property rights.

The term *Tragedy of the Anticommons* refers to a paradoxical situation where too much ownership, instead of increasing wealth, wrecks markets and stops innovation (Heller, 2008, pp. 2 and 19), because the cost of finding and bargaining with all the owners are prohibitive: “Each holds one jigsaw puzzle piece. Unless you can buy all the pieces, no one gets to see the whole picture” (ibid, p. 6). This anticommon situation therefore creates a gridlock where ownership rights and regulatory controls are too fragmented, which in turns impedes investment and development:

Rather than waste time and money trying to assemble fragmented ownership rights that might profit them and benefit us all, many of the world’s most powerful businesses simply abandon corporate assets. They redirect investment toward less challenging areas, and innovation quietly slips away. (Heller, 2008, p. 2)

This gridlock is not yet an issue in South Sudan because there is so much undemarcated land that the government’s ease when it comes to land grabbing is alarming (Mennen, personal communication, April 24, 2012, 6:18-7:22). Had the Tragedy of the Anticommons been a problem in South Sudan, the government could still use its right of eminent domain in order to assemble land for economic development (Heller, 2008, p. 115). More on South Sudanese government’s right of eminent domain will be explained in the following section.

* + 1. Right of Eminent Domain *(Denise)*

According to Rousseau, because members of a state grant their plot of land to the state (Rousseau, 1976, p. 23-25; Wraight, 2008, p. 46), the state can decide how to make use of these pieces of property on behalf, and for the benefit, of the community. A World Bank publication claims that the ability of governments to acquire private land for public purposes, even though it infringes on private land rights, is a necessary state of power (Bruce et al, 2006, p. 116), but this power should be carefully defined and limited. In fact, the publication explicitly mentions processes and principles that governments should follow before terminating private land rights, and this includes notifying and compensating those whose land is involved (ibid, p. 117). This is in accordance to Rousseau’s emphasis on the importance of members of a society partaking in decision-making processes as part of the *body politic* (Rousseau, 1976, pp. 18-19).

In South Sudan, although the 2009 Land Act requires that the government consult local communities and take their opinions into consideration (Deng, 2011, p. 10), communities are often neither informed or offered compensated:

What I have seen for example, you will see that there is a surge in land, land in terms of investments. In the middle of nowhere, you will be seeing that this piece of land has been sold or leased to an investor that the communities themselves they do not know. They are there, even sometimes a land with community on it is sold already or is leased… What I see as a problem in that, because as resources are being discovered and communities less concerted, there is already a crisis. (Bwogo, personal communication, April 2, 2012, VOICE 003/2:26 – 3:10)

Especially when it comes to oil companies, contracts with the South Sudanese government are dubiously signed and huge areas are cleared, consequently breaching entire communities’ human rights (Bwogo, personal communication, April 2, 2012, VOICE 003/ 3:15 – 3:58). Fortunately, there have been cases where communities, after voicing opposition, managed to make the government cancel contracts (Deng, personal communication, April 14, 2012, 17:41 – 18:41). Although this shows how the people of South Sudan have a voice and the capacity to lobby (ibid, 20:15-20:52), this capacity is very dependent on how well connected and well informed the petitioning community is (ibid, 19:32 – 20:12).

Economic gain is not the only government incentive to grab land however. In order to adhere to international legislation concerning the reintegration of returnees, the South Sudanese government, which does not own a lot of land, takes it from the communities without consulting them (Norton, personal communication, April 2, 2012, 2:25 – 3:02). Although providing land to returnees is a genuine motive to expropriate land, the process of consulting and compensating communities is still not followed. Most of the time however, these local communities will not oppose the South Sudanese government’s land grabs:

If the government wants the land for something, they will give the government the land. They’ll ask for some compensation, normally in the form of services such as ‘give us a school, can we have a road here’, things like that, not even full market price. And they’re very much open … to the government taking land if it’s in the interest of the economy and business. But the government still has a responsibility to make sure that there is compensation, otherwise they are going to… you are not going to distribute the wealth of South Sudan’s major asset which is land. (Mennen, personal communication, April 24, 2012, 14:03 – 14:45)

Mennen believes that although the South Sudanese government has the right of eminent domain in the Transitional Constitution, expropriation of land should only be in the public’s interest, which is also Kant’s and Rousseau’s argument. However, when the government is leasing large areas to companies that have large rice growing schemes for example, and that rice is sold abroad, the public interest is attenuated and the land should therefore never have been expropriated in the first place, especially if the land in question had previously been customarily in use (Mennen, personal communication, April 24, 2012, 8:38- 10:04). The South Sudanese government, however, is not the only actor involved with suspicious activities relating to the country’s current property situation.

* + 1. Foreign Investments *(Denise)*

According to the South Sudanese Investment Promotion Act of 2009, the government’s objective is to encourage and promote domestic and foreign investments in order to strengthen and diversify the economy, promote economic growth, as well as generate and regulate employment through multiplier effect (IPA, 2009, CHAPTER II §7.1). However, with the current dual legislative system, foreign investors are coming in and making deals in both the formal and extralegal sector, taking advantage of the opaque rules, and the overlapping systems and procedures in South Sudan (Pantuliano, personal communication, April 8, 2012, 14:53 – 14:59):

South Sudan experienced a large influx of investment after the signing of the CPA in 2005. Companies used the ambiguity of the prevailing law to secure favorable deals for themselves through agreements with local powerbrokers. There was very little resistance to these investments, in part due to the underdeveloped civil society in South Sudan and the fact that many investments have not yet become operational. (Deng, 2011, p. 42)

One of the things you should recall when you do deal with the Sudan, South Sudan in particular, but not only, is that large chunks of land are sold these days to foreigners, to foreign investors. It’s very questionable and it’s even, I am convinced, wrong that these transactions take place because those people who actually make them, pretending that they had a claim to that piece of land, do not own the land. And there are some very disturbing articles about foreigners buying these huge tracks of land on which they get some kind of piece of paper, what they believe is a legal instrument, and whereby, in a transaction where those who have given them the rights to the land, who have signed the contract on behalf of the Southern Sudanese society if you want, do not have the right to do so. (Brylle, personal communication, April 12, 2012, 7:13 – 8:18)

Brylle is therefore concerned that this, in the time ahead, could contribute to the creation of conflict situations in South Sudan (Brylle, personal communication, April 12, 2012, 28:46 – 29:08). This concern is shared with Deng, who also believes that the continuing allocation of large land areas to foreign companies, “in direct contravention to communities’ ownership rights, … will begin to undermine peace building efforts” (Deng, 2011, p. 42). Ironically, conflict can also provide a fertile environment for investments as “opportunistic companies can take advantage of weak institutions and unclear laws to secure favorable deals for themselves” (Deng, 2011, p. 42). Indeed, conflicts would make it harder for the South Sudanese government to monitor which deals are actually being made, as well as make it harder to enforce any eventual regulatory requirements (ibid, p. 42).

* + 1. The Silver Lining *(Denise)*

So far, this section has attempted to describe different economic aspects connected to the land issue in South Sudan. Regardless of the many unavoidable challenges, a formalized property rights still has the potential to positively affect South Sudan’s economy. According to Brylle, a property system that gives people the possibility to go to court and claim their rights, as well as provide predictability, will provide an important condition for investments (Brylle, personal communication, April 12, 2012, 31:03-31:44). Norton also mentions the importance of a reliable property rights regime in South Sudan to the country’s investment climate (Norton, personal communication, April 2, 2012, 27:30 – 28:04). According to Deng, investors would definitely be attracted to South Sudan if the formalized property system can provide tenure security (Deng, personal communication, April 14, 2012, 23:37- 23:43).

Bwogo, however, fears that a formalized individualistic property rights system, where each and every inch of land and property is owned by someone, could end up being a dangerous thing. Her fear is that people would not sell or lease their property, consequently impeding the construction of necessary infrastructure in South Sudan (Bwogo, personal communication, April 2, 2012, VOICE 011/4:10 – 5:00). Between Locke’s argument of individuals being free to do what they want with their possessions (Locke, 2000, p. 116), and Kant’s concept of ‘permissive’ law which permits individuals to exclude others from making use of an object or a piece of land once taking into possession (Hodgson, 2010, p. 63-71; Byrd & Hruschka, 2006, p. 220; Tierney, 2001, p. 382), it would seem as if individual rights, as Bwogo fears, could go against what is best for a country’s development as a whole, creating a gridlock situation. Luckily, right of eminent domain still gives the South Sudanese government the authority to expropriate land as long as it is for the benefit of the people. The following chapter will summarize the finding made in this thesis’ analysis.

1. **Conclusion** *(Charlotte and Denise)*

This thesis set out to analyze whether de Soto’s thesis is applicable to the current situation in South Sudan. To add depth to the analysis, a theoretical framework consisting of the theories of Locke, Hume, Rousseau and Kant were applied. These four theorists each have a perspective on the relation between government, property law and citizens which are valuable when analyzing these issues in the context of South Sudan.

As described in Chapter 4, the Sudan has a long history of operating with multiple legal systems, where both customary and statutory law functioned simultaneously. Although the Sudan gained independence from the Anglo-Egyptian Condomonium and experienced civil war lasting over two decades, these legal systems never ceased to exist. After long peace negotiations, South Sudan gained independence in 2011 making it the newest country in the world. However, there is a lack of clarity regarding the country’s legal framework in relation to property. This situation made South Sudan an interesting case for applying de Soto’s thesis.

De Soto argues that the social contract should be the basis of property rights formalization. In South Sudan there is remarkable difference between the situation in the urban and the rural areas. In the urban areas the social contract is not the basis of property rights agreements making the application of de Soto’s thesis irrelevant. The situation in the rural areas is of a different nature, as customary law still steers property rights agreements. Thus, de Soto’s thesis seems feasible.

However, multiple challenges to the functioning of the social contract can be observed. As a consequence of the war, several million people have been displaced and half of the heads of households are now women. Additionally, militarization of society challenges customary leaders’ ability to settle issues adequately. Issues of corruption are evident as well. All of these issues make it questionable whether social contracts are a suitable basis for property rights formalization. Interestingly, bridges between customary and statutory law have been observed. Women have, for example, in some cases used their rights to own property granted in statutory law to push customary chiefs into granting them the same rights.

According to de Soto, the formalization of property rights would be beneficial for all sections of a society. In South Sudan, this would entail security provision for community land from land grabs and illegal sales, as well as a legal uniformity under which everyone would be equally held accountable. However, determining property ownership of land that has been passed on for generations and that has customarily been shared between agriculturists and pastoralists, makes formalization a difficult endeavor. Additionally, it is doubtful that the South Sudanese government is adequately equipped to embark on a national property formalization process.

Nevertheless, de Soto argues that it is in fact the duty of government to advocate a formalization process. The South Sudanese government is in a transitional process moving from being an army to being a democratic government. Even though it is not yet a fully democratic institution, it has a high level of legitimacy among the population of South Sudan. However, kinship and hierarchy still determine resource management, including property allocations. Due to this situation, allegations of corruption increasingly occur. This makes government enforcement of formalized property rights questionable as to whether their intentions are for the benefit of the population or their own. Looking for alternative advocates therefore seem reasonable. In this regard, the international community, lawyers and the people of South Sudan were all possible candidates, but they were all ill equipped in different ways to tackle this task.

Even though most of the land rights in South Sudan have not been formalized into one unitary system, the government is still leasing out property to investors in the name of economic development. However, according to de Soto’s thesis, this economic development will happen as a consequence of property rights formalization. Once property ownership is established, people can use this title as collateral. Unfortunately, South Sudan lacks the necessary auxiliary services to deal with property titles in this manner. On the other hand, a formalized property rights system can lead to a Tragedy of the Anticommons, which could consequently force the GoSS to increasingly make use of its right of eminent domain. Luckily, formalization of property rights can also result in property and rights security that encourages investments, subsequently positively stimulating South Sudan’s economy.

*Figure 2: Important issues when dealing with property rights in South Sudan.*

The above figure shows how the theories applied to this thesis could assist the government in dealing with property rights issues. In the urban areas, where there are major disagreements due to the fact that ownership has changed hands multiple times during the war and that the city structures have been altered, Hume argues that the status quo should be honored. On the other hand, since the customary legislation still has an important position in rural societies, they should be handled with care when assessing formal ownership, in accordance to Locke’s emphasis on the social contract’s prominence. Importantly, Kant argues that it is crucial for the government to function as a neutral arbitrator, whose role is to protect the weak from being taken advantage of. Moreover, even though Rousseau is critical to the concept of property ownership, he nevertheless argues that, ideally, every citizen should partake in law-making decisions, which the government should secure the enforcement of.

To answer this thesis’ problem formulation; there are several elements that complicate the direct application of de Soto’s thesis to the current situation in South Sudan. Many of these challenges relate to the fact that South Sudan is a post-conflict country that has several hurdles to overcome before formalization of property rights can be prioritized. Although aspects of de Soto’s thesis are not possible to implement in South Sudan, a modified version of his theory, such as recognizing communities as rights holders, could possibly assist in lifting the bell jar in South Sudan, empowering the South Sudanese population as well as benefiting the country’s economic state.

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**APPENDIX 1**

Dear Mr. Torben Brylle

We are two master students at Aalborg University in Copenhagen studying Global Refugee Studies. We are currently writing our master thesis on property rights in South Sudan. After your contribution to the conference at the Danish Institute for International Studies on December 1st, 2011 we would very much like to ask permission to interview you for our master thesis.

In the documents attached we have given a short description of our master thesis and the questions we would like to ask our interviewees. Considering your extensive work in the political field, we would like to kindly ask you to focus on the third question (legitimacy). Nevertheless, if you any thought on any of the other questions we would be grateful to hear that as well.

If you have time to set aside one hour for a telephone interview, we would be very grateful. We look forward to your reply.

Best regards,

Charlotte B. Thingholm and Denise M. Habimana

**APPENDIX 2**

Our Thesis

The problem formulation we have chosen to research on regards property rights and its importance in relation to economic development. Our aim is to test whether Hernando de Soto’s thesis is applicable to the property situation in South Sudan.

Hernando de Soto is the author of the book “Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else”. He argues that private property rights need to be formalized and thus secured in order to ensure long-run economic development. He specifically focuses on the poor and the many extralegal arrangements that can be found in many developing countries. His central argument is that in order for long-term economic development to occur, these extralegal arrangements need to be included into one all encompassing formalized property right system.

The following questions are based on de Soto’s thesis, put in the context of South Sudan.

1. Social Contract

According to de Soto social contracts need to be included in order for property rights formalization to be successful. De Soto defines social contracts as “collective understandings of how things are owned and how owners relate to each other”. In South Sudan, customary law regarding property has played a huge role in society.

1. We would like to ask you if you find it realistic to incorporate the customary social contract into one formal uniform property rights legislation in South Sudan?
2. Is there still enough of a social contract considering the historical developments (colonialism, civil wars, ecological factors)?
3. Has urbanization eroded the social contracts regarding property rights?
4. Do returnees and IDPs contribute to this erosion?
5. Formalization

De Soto argues for the many advantages that both the state and the people who function in the extralegal sectors on a daily basis gain from property right formalization. In South Sudan however, the notion of individual property rights was introduced during the British Condominium. We therefore find it interesting to ask if a uniform formalization of property rights is indispensable for a country to function, or is it possible to have multiple legal systems within one nation.

1. Is it possible to have a well-functioning country with multiple legal systems?
2. Can a European concept such as individual property rights be applicable in a system were communities and not individuals traditionally owned land?
3. Does international legislation regarding returnee and IDP rights to property further impose European concepts in a non-European setting?
4. Legitimacy

De Soto argues that securing legitimacy of formalized property rights is the job of government. This is important as there needs to be a consensus on the benefits of formalizing property rights in order for people to adhere to new property rights legislation. Our question is if South Sudanese politicians are the most legitimate actors to advocate property right formalization, or should other actors such as local chiefs or the international community be the main advocates? In essence, the question is;

1. Who are the most legitimate actors to advocate property rights formalization?

Furthermore, considering the diversity of South Sudanese society;

1. Is there a common perception on this matter?
2. Economic Development

According to de Soto, formalizing private property rights is necessary in order to secure long-term economic development. On the other hand, the government of South Sudan is claiming to do the same by leasing large land areas to investors. Our question is what is really the best method to achieve this goal?

1. Should the government of South Sudan prioritize land leasing or formalizing individual property rights?
1. We were unfortunately unable to access or locate the 2009 Land Act as it is currently unavailable on the GoSS’ website. [↑](#footnote-ref-1)