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Article Title: Legal Pluralism in Practice: Critical Reflections on the Formalisation of Artisanal and Small-Scale Mining and Customary Land Tenure in Ghana

Abstract

Since formalisation was officially introduced into the Ghanaian artisanal and small-scale mining landscape in the early 1980s, its law and policy framework has largely been driven by a state-run, institutionalised hegemony. This is against the background that ASM in Ghana, like many other countries of the Global South, operates on the peripheries of state law and from local communities where non-state, informal and customary laws are the main determinants of land rights and mineral resource governance. This paper draws on legal pluralism to highlight the reality and implications of these multi-level legal systems on ASM formalisation in Ghana. It presents a theoretical and conceptual overview of how formalisation's state-centric mining titling systems intersect with customary land tenure arrangements in the local mining communities. In so doing, this paper challenges two prevailing propositions under the current Ghanaian ASM formalisation regime: first, the universalisation of state-exclusivism in mineral and land rights allocation, and the rigid conflation of informal, non-state ASM operations with illegality. It argues that a decolonising socio-legal lens is best suited for transforming perceptions about concepts of ASM legality, legitimacy and access to property rights in legally plural contexts like Ghana. It concludes with a call for rethinking the methodological enquiries used in researching customary law in indigenous, formerly colonised contexts and suggests the use of more Afro-oriented methodologies for researching land and mining rights in Africa.

Keywords: Legal pluralism, formalisation, artisanal and small-scale mining, customary land tenure systems, informal laws

1.0 Introduction

Across the rich mineral countries of the so-called developing world[1], formalisation of artisanal and small-scale mining (ASM)- the low tech, predominantly manual labour form of mineral extraction and processing (Hilson, 2011)- appears to have reached an axiomatic position. In the search for innovative strategies for improved regulation of the ASM sector, states and their foreign donor agencies have become resolutely fixated on formalisation, through which it is believed that ASM can be effectively monitored and supported upon incorporation into the formal legal domain (Siegel and Veiga, 2009; Maconachie and Hilson, 2011; Hilson et al, 2017). This position is reinforced by the ever-increasing body of ASM scholarship, which centres the state and its westernised, neoliberal economic policies and rule of law orthodoxy as the normative framework for reforming ASM (Davidson,1993; ILO,1999; Hentschel et al,2003; Maconachie and Hilson,2011).

[1] In this paper, the author uses the terms 'developing world' and 'Global South' advisedly. This paper acknowledges the contentions surrounding the use of such terminologies, as political constructs used in 'othering' and homogenising non-Western societies. Its use here is mostly to enable readers understand not the economic but references to political geographical positions of the countries being referred to.

At the heart of this formalisation discourse is land. In many mineral producing countries, particularly on the African continent, the universalist adoption of formalisation has created unprecedented opportunities for states to consolidate their sovereignty and hegemonic power over all mineral-bearing lands within their territories, backed by formal laws rooted in colonially inherited legal conceptions of mining and property rights (Fold et al., 2013; McQuilken and Hilson, 2016). For the state, governance of mineral-rich lands has often taken the form of setting out the rights, responsibilities and decision-making through its legal and institutional machinery at the national level. Article 257(6) of the 1992 Constitution of Ghana vests all surface and subsurface minerals to the President for and on behalf of the people. This is applicable to both high value minerals such as gold, diamonds, bauxite and magnesium, etc, and low-value development minerals such as clay, sand, kaolin, limestone, salt, feldspar and silicite, etc, although governments have tended to prioritise the exploitation of the former for their high revenue in international markets(Afeku and Debrah,2020).This state hegemony over mineral resources is not unique to Ghana as it pertains to a colonially inherited property rights construct that features prominently in the constitutions of many other African countries. By institutionalising control over mineral resources, states aim to assert sole regulatory oversight over access to, control and use of mining titles under a formalised, unitary property rights regime.

However, a striking feature about property rights in many of these countries is that they are fundamentally shaped by a plural legal system where rights derive from both customary land tenure and statutory laws, with overlapping interests that intersect at various points in space and time. This is of particular relevance to ASM, which as recent research have confirmed, thrives on a complex interplay of multiple state and non-state legal frameworks. Key ethnographical findings from the Philippines, Liberia and Congo (Verbrugge et al,2015), Senegal (Persaud et al, 2017) and La Côte d'Ivoire (De Jong and Sauerwein,2021) all indicate that ASM mainly operates from outside the peripheries of the state's rather weak and fragmented regulatory oversight, while at the same time maintaining some level of interactions. These findings provide relevant methodological insight into the complex legal pluralities surrounding ASM operations and confirm that the conventional unitary and fixed conception of property rights in relation to natural resources is conceptually flawed because it does not reflect the reality of the multiple and overlapping property rights that exist in most social settings (Meinzen-Dick and Prahan,2001).

While scholars generally agree that there cannot be any transformative development in ASM without regards to the actual lived realities of artisanal miners, the strategy to inject these local realities into mainstream law and policy appears to be stuck and lacking in theoretical vision (Hilson and Okoh, 2013; O'Faircheallaigh and Corbett,2016). In Ghana, Nyame and Blocher (2010) provided one of the first real attempts at exploring the reality of customary land tenure's influence on ASM formalisation. Prior to this, the intersection of ASM and the complex legally plural terrain within which it operates had largely remained muted in the literature. Even where it was mentioned, it was mostly treated as a footnote to what was deemed as a more pressing issue facing ASM, i.e., the negative environmental and socio-cultural expressions of ASM

operations. From this optic, increased coercive state intervention was deemed as imperative for flushing out the 'menace' of ASM and their harmful environmental footprints. The design, enforcement and evaluation of ASM laws and policies were then made to revolve around the state and its formalised bodies such as legislators, state departments, the police, judges, business enterprises and corporations as the main legal actors (Asamoah and Kojo,2016). The solutions rendered by this state-centric rule of law orthodoxy were not only exclusionary of the voices of local artisanal miners as significant stakeholders (Tschakert,2009), but they also denied the historical and socio-cultural trajectory of the multiple legal entanglements in ASM governance.

This paper builds on the published empirical material on customary land tenure integration in ASM formalisation by presenting a theoretical and conceptual overview of legal pluralism in Ghana's ASM formalisation. In so doing, this paper contributes to the emergent view that no transformation of ASM can take place without due recognition of the parallel suite of customary land tenure and informally negotiated outcomes that operationalises ASM in the local mining communities. This paper is divided into four sections. The first section discusses Ghana's ASM formalisation and more particularly how ASM legalisation has failed to consider customary land tenure arrangements in the local mining communities. This section serves as a legal inquiry into the disjuncture between the ASM law in the books and the socio-legal realities on the ground. The second section provides a more detailed overview of customary land tenure as it pertains to ASM in Ghana, drawing on a historical trajectory of land and mining reforms respectively. In the third section, this paper introduces legal pluralism and explains how it can help ease the tensions between the seemingly irreconcilable trajectories of formal and informal ASM. In the fourth section, this paper explains how the infusion of customary laws into ASM formalisation can be operationalised in Ghana. It also examines the shortcomings of the methodologies used in sourcing customary laws and suggests more appropriate methodologies for unearthing the customary laws of local mining communities in Africa.

2.0 Formalisation, Illegality and Persistent Informality in Ghana's ASM

The concept of formalisation as propounded by the Peruvian economist Hernando de Soto has, for many extractive societies of the developing world, been sold as the inevitable and sure pathway to transforming and harnessing the full economic potential of their ASM sector (International Labour Office,1999; De Soto,2000; Hentschel et al,2003). According to de Soto, the assets of the poor are tied up in 'dead capital,' as a result of which they are unable to obtain credit, insurance, make profitable contracts or even enjoy the fruits of their labour. His solution to this was for these assets to be integrated under a singular formal property system that would shift the legitimacy of rights from the context of local communities to the impersonal context of a formal state legal system. Since the 1980s, the World Bank has been very instrumental in promoting ASM formalisation measures and reforming mining sector in the developing world. The expectation is that with formalisation, artisanal miners would have access to secured land titles by which they would more likely gain access to credit for operational improvements,

support from government agencies and the needed monitoring for environmentally responsible operations (Hinton,2005).

In Ghana, the commitment to this policy reform kickstarted with the passage of the Small-Scale Gold Mining Law,1989 (PNDCL 218), which legalised ASM after over half a century of it being banned under colonial rule. The government further established a multi-level Small-Scale Mining Project to ensure that registered miners had access to support from the relevant state agencies including the Minerals Commission, Ghana Geological Surveys Department and the Precious Minerals and Mining Company (Hilson and Potter,2003). On paper, ASM formalisation appears to be a simple process. The vision of the erstwhile Small-Scale Gold Mining Law,1989 (PNDCL 218) now replicated under the Minerals and Mining Act,2006 (Act 703), was to bring all ASM operations into the formal legal sector through registration. Under the Small-Scale Gold Mining Law, the state explicitly set out the parameters of what constituted a lawful small-scale gold mining operation. It defined small-scale gold mining as "the means of mining gold by a method not involving substantial expenditure by an individual or group of persons not exceeding nine in number or by a co-operative society made up of ten or more persons." What constituted "substantial expenditure" though was not explicitly clarified under the law. The law, however, institutionalised an ASM formalisation system by which the state took charge of all things pertaining to licensing, allocation of land and mining rights, facilitation of payment of compensation to previous landowners and the enforcement of environmental standards through the concerted oversight of its institutions such as the Minerals Commission, the Ghana Geological Survey Department, the Environmental Protection Agency, the Forestry Commission, the Lands Commission and the Water Resources Commission, the police and the courts.

The Small-Scale Mining Law therefore effectively established a clear distinction between legal and illegal ASM operations by setting out the particularities of a formally recognised ASM. This legacy is retained under the Minerals and Mining Act which also provides that only duly registered and licensed individuals or group of persons can lawfully undertake ASM in the country. The Minerals and Mining Act explicitly sets out the procedure for registration and licensing, which begins with prospective miners submitting applications with the prescribed documents at a District Small-Scale Mining Centre within the jurisdiction of the proposed mining operation. The District Small-Scale Mining Centres fall under the Minerals Commission, which is the government agency established and mandated under the Minerals Commission Act,1993(Act 450) to regulate and manage the utilisation of all mineral resources in the country. The Minerals Commission is headquartered in Accra and the District Small-Scale Offices serve as more decentralised outlets of the Commission. Currently, there are nine of these District Small-Scale Mining Offices set up in selected mining communities in the country, working to democratise ASM governance and to facilitate ASM formalisation (McQuilken and Hilson,2016). Detailed provisions on how formalised artisanal miners can obtain land through the formal legal system is evidently limited in the various Acts of Parliament. The Minerals and Mining Act however does make mention of designated areas for ASM, the allocated sizes of which are to be determined by the relevant state authority.

Upon receipt of the application, the District Small-Scale Mining Centre liaises with the relevant local government authority to publish notices of the proposed ASM operation for 21 days. Within the 21 days, any objections relating to the mining operation, including the land on which the mining is proposed to take place will be considered by the local authorities. In the absence of any such objection, the District Small-Scale Mining Centre across the country forward all received applications to the Minerals Commission head office in Accra for approval and final licensing (McQuilken and Hilson,2016). The state eventually purchases the gold from the miners through its Precious Minerals Marketing Company which was established under the Precious Minerals Marketing Corporation Law,1989(PNDCL 218) to among other things, buy and sell precious minerals.

After nearly four decades however, the legalisation of ASM is yet to translate into any significantly positive transformation of the sector. The criminalisation and land dispossession of ASM which were set in motion during the colonial government's ban of indigenous small-scale gold mining under the 1932 Mercury Ordinance persists till today (Yankson and Gough,2019). In Ghana, 60% of the mining labour force are in ASM and nearly 80-90% of these miners operate informally (Centre for Development Studies, 2004; Hilson and Potter,2003). The factors accounting for the limited success of formalisation has been widely expounded in the literature and includes the weak institutional capacity, the prohibitively expensive and cumbersome bureaucratic processes and delays which render the entire formalisation process unappealing and alienating for many prospective artisanal miners (Hilson,2001; Hilson and Potter,2005; Tschakert and Singha,2007; Banchirigah, 2008; Maconachie and Hilson,2011; Geenen,2012). It is not the aim of this paper to rehash these factors but rather to focus on how Ghana's formalisation has failed to integrate the customary practices of local artisanal miners into its formalisation scheme, and its implications for these miners who predominantly rely on customary land tenures and other informal management practices in their work.

One often taken-for-granted feature of Ghana's ASM formalisation that accounts for the government's unpreparedness to adopt and integrate the customary practices of artisanal miners is its distinctive state-centralism. ASM formalisation is largely carried on the shoulders of a state-centralism that assumes that only state-centric laws and institutions can legitimise and deliver any meaningful transformation in the sector. A closer look at the views of the main schools of thought in ASM formalisation- the structuralists, dualists and the legalists- reveal that despite their fundamental differences in the conceptualisations of formalisation, they all hold a consensus on state-exclusivism as the secured pathway for access to secured mineral tenure. The structuralist school of thought may deplore the legalists' fixation on legalisation and find them deficient in suggesting a clear direction towards actual transformation of ASM. The dualists focus on the persistence of traditional forms of production in semi-industrialised economies that arose from economic imbalances (Chen, 2005). These different conceptual approaches notwithstanding, all schools of thought take for granted what constitutes 'law' and assume that law here refers to 'state' law. ASM formalisation therefore embodies a minerals reform policy and regulatory apparatus that places ASM within a standardised legal framework registered in and governed by a central state system (Geenen,2012). De Soto himself was so

convinced about the centrality of a state-centric property system that to him, any conceivable alternative was nothing more than a state of 'legal anarchy' in which the poor would be locked up in a 'legal apartheid' where they would not have access to the tools to create wealth (de Soto,2000).

This state-centric legal framework however loses sight of a major feature of property rights, i.e., that rights are socially constructed and that any property laws imposed without reference to the existing social contracts would fail for lack of legitimacy. Property rights involve claims to the use or control of resources and are only as strong as the institutions that stand behind them (Wiber,1993). Institutions are not only about the state, as they can also refer to the relationship between people and can be socially constructed, with normative, cognitive and regulative dimensions (Jentoft et al.,1998). This means that property arrangements work best when people have formed a consensus about the ownership of assets and the rules that govern their use and exchange. De Soto himself held the position that property is not about the assets themselves but a consensus between people as to how these assets should be held, used and exchanged.

State-centric formalisation also overlooks the limitations of its own institutional capacity. State regulatory machinery stretches very thin and is therefore unable to effectively administer their respective mandates, particularly in the remote and rural mining communities (Verbrugge et al,2015). For instance, the Ghana Geological Survey Department which was tasked with prospecting and demarcating suitable areas for ASM operations has been unable to do its job for a long time. Lands demarcated and allocated for ASM are often unaccompanied by geological mapping and mineral inventory, and complaints about their marginal productivity and commercial viability abound (Hilson et al, 2017; Hilson et al,2020). Formalisation's promise of securing access to mineral tenure rights is therefore yet to materialise even for many formalised artisanal miners. This, as the literature has found is fuelled by a large-scale mining bias where the state prioritises large-scale mining through the grant of sizeable mining concessions and other attractive fiscal and regulatory concessions while simultaneously subordinating ASM to the bottom tier of its mining policy reforms (Akabzaa and Darimani,2001; Hilson and Potter,2005; Hilson,2019). In what is often referred to as a 'legislative afterthought', scholars argue that legalisation has done little to augment access to land for ASM operations since ASM legalisation occurred three years late after mining sector reforms had already yielded substantial concessions to large-scale mining companies, sometimes causing expulsion of artisanal miners from their operating sites in the process. (Tschakert and Singha,2007; Maconachie and Hilson 2011; Hilson, 2013; Teschner,2013). A study undertaken by Patel et al (2016) using Landsat imagery revealed significant overlaps between ASM sites and large-scale mining concessions, with more than half of the studied ASM operations occurring within concessions granted to large-scale mines. These spatial overlaps often arise from the expropriation and re-zoning of ASM sites to large-scale mining corporations and contextualises the intense resource competition between ASM and large-scale mining operations in the country. This is even more pertinent in areas with substantial proven mineral deposits, longstanding history of mining and high concentration of artisanal miners. In such communities, it is not uncommon for local artisanal miners to encroach on large-scale

mining concessions often at great risks of brutal human rights violations, violent confrontations and in some cases death (Hilson, 2002; Aubynn,2009; Ellimah,2017).

Efforts to diffuse these extraction-related conflicts have often involved negotiated working partnerships where large-scale mining corporations permit artisanal miners to operate on their concessions. Specific examples of such arrangements in Ghana include the agreement between Ghana Consolidated Diamonds Limited and local artisanal miners for the latter to work on the company's Akwatia diamond mine (Hilson,2001; Hilson 2002; Yelpaala and Ali,2005), the agreement between GoldFields Limited to allow nearly 740 local artisanal miners work at its Damang site (Aubynn,2009), the allocation of approximately 5% of Bogoso Gold Limited's concession to local artisanal miners(Hilson, 2002) and the agreement between Newmont Gold Mining and local artisanal miners at its Akyem mine in the Eastern Region of the country(Patel et al,2017).

These arrangements notwithstanding, mining communities continue to remain hotspots for violent clashes between artisanal miners and large-scale mining corporations over mineral-rich lands (Hilson and Yakovleva,2007; Okoh,2014). Hilson et al (2020) critiqued these ASM-large-scale mining working partnerships which they term 'cohabitation,' for being short-sighted, far-fetched and unsustainable as a development strategy. They argue that large-scale mining corporations are hardly ever altruistic and such arrangements never fully relinquish the apportioned concessions to the artisanal miners. These working partnerships are mostly temporal and subject to many uncertainties such as fluctuating gold prices and periodic changes in ownership and management of large-scale mining corporations. Hilson et al (2020) traced the negotiation of a significant number of these agreements to periods of low gold prices where the mining certain marginal deposits was not particularly profitable to the large-scale mining corporations. They found however that as soon as gold prices began to rise and such deposits become attractive, large-scale mining corporations immediately began evicting artisanal miners from the allocated sites. New managements may not be keen on continuing with such negotiated arrangements and the influx of new artisanal miners on the allocated sites further complicate the competition for land. Amidst such tensioned land conflicts and difficulties in obtaining lands for operations, many artisanal miners find the state unhelpful and its institutional capacity weak and fragmented. These artisanal miners therefore turn to customary institutions as a complement or an outright alternative to the state-institutionalised formalisation process (Lund,2006; Fisher,2008). In the local mining communities, the state is confronted with an informal and shadow governance system made up of chiefs, elders, ASM sponsors and other local leaders who operate on the authority of customary laws, indigenous spiritualities and informally negotiated arrangements (Rosen Coyle,2020). Artisanal miners on their part have also endogenously formulated customs and practices by which they navigate the complex legal plurality of land rights in their operating communities. However, state-centric formalisation as it stands now effectively works to delegitimise any reliance on customary land tenures that are not sanctioned by the state. Artisanal miners are heterogeneous, just as their claims to mineralised lands are constrained by multiple, often competing claims and power relations. It is the disregard for this reality of legally plural, multiple, overlapping claims that I argue, forms the fundamental stumbling block to a more sustainable and

transformative ASM formalisation in Ghana. In the next section, I turn to customary land tenures and how they intersect with Ghana's ASM formalisation.

3.0 Customary land tenures and the ASM formalisation framework

Land in Ghana is either customarily owned, vested lands or state owned (Da Rocha and Lodoh,1999; Amanoor,2010). Customary lands constitute nearly 80% of all lands in the country and it is therefore not uncommon for mining titles held by both large-scale mining corporations and ASM to superimpose or overlap with customary land rights (Nyame and Blocher,2010; Ghebru and Lambrecht,2017). The relations of production on such lands therefore holds significant implications for agriculture and the extractive industry (Chimhowu,2019). As a start, it is worth mentioning that customary land tenure is not a monolith, and this paper does not purport to give an exhaustive account of all customary land tenures in the country. Customary law, as defined under article 11(3) of the 1992 Constitution refers to laws that pertain to different communities. Customary laws and their land tenure systems therefore vary and are distinct from one community to the other. For instance, customary land tenure systems in the northern parts of the country differ from those of the southern forested areas of the country, in terms of their socially constituted arrangements and colonial history (Kunbour,2009; Biitir and Nara,2016).

Despite their unique characteristics, customary land tenures across various African societies converge on such points as constitutional group duties and rights perceived as inseparable oneness, that 'land belongs to no one' and on African spiritualities (Ghebru and Lambrecht,2017; Ruffin, 2019). In Ghana, chiefs, priests and priestesses, regents, family and clan heads hold the allodial title of lands for and on behalf of the community. In the southern parts of Ghana, these lands are referred to as stool lands, a reference to the stool being the symbol of traditional authority and office of the particular chief in the local communities.[2] Local chiefs are deemed to hold their position as overlords of the land in a spiritual capacity with a responsibility to the people, the unborn generation, the ancestors, deities and the Supreme Being. Amongst the Akans in Ghana, we refer to this Supreme God by several names, one of which is *Onyankopon*. This Supreme God is approached through a hierarchy of ancestral spirits and whose territoriality are concerned with the care and management of the earth and community well-being. Lauren Coyle Rosen recalled from her ethnographic study in the prominent Ghanaian mining town of Obuasi moments where some aggrieved community members would remark, 'they have sold our future', when speaking of an alienation of lands which ostensibly did not involve community participation or benefit. Such dictum, she found, reflects a worldview where land rights are underpinned by communality of ownership and where the present generation is held to be in trusteeship for future generations (Rosen 2020). In addition to this communal ownership, families and individuals are also able to exercise rights to land which they can freely use and pass to their descendants free from interference from the larger community. There is also the institution of *guaha* whereby customary lands interests

[2] In the northern parts of the country these are referred to as skin lands (Kunbour,2019). Materially, the stool is an intricately designed wood-carved seat engraved with certain insignia that are associated with particular polities and rituals. The stool physically rests with the royal family and spiritually connects the deceased and living communities (Ruffin,2019;Kyerematen,1969).

could be granted to strangers, after extensive rituals and agreements for a reversion to the stool. Customary land tenures therefore consist of overlapping notions of individual and communal rights which may be accessed by different users at different times (Ollenu,1962; Woodman,1996).

The colonial legacy of eminent domain by which successive post-colonial governments have retained control over mineral resources has reinforced a dual tenurial arrangement where the state recognises the rights of customary landowners, while maintaining sole rights to any minerals found on, in and under the land. This dichotomy between surface land rights and mineral rights is emblematic of the divide between customary and statutory legal systems and makes the disconnect between formal and informal tenurial regimes even more pronounced in local mining communities (De Jong and Sauerwein, 2021). In practice, this statutory recognition of customary land tenures means that all prospective mining operators- formal ASM and large-scale mining firms alike- are required to pursue the prior informed consent of the customary landowners and to pay appropriate compensation for the acquisition of the land for mineral exploitation.

The distinction occurs when for informal ASM, operations commence by engaging directly with chiefs and customary landowners without any oversight or assistance from the state. These informal artisanal miners carry out their business on customarily held lands where the tenure is recognised simply by occupation of the land and the payment of rents and fees directly to the local chiefs or other customary landlords (Nyame and Blocher,2010; Banchirigah,2008). In addition to the widely held view that ASM is a poverty-driven venture made up of mainly transient, uneducated miners operating out of necessity (Verbrugge,2016; Hilson et al,2017),there is also confirmation that ASM has seen an increased interest from mining entrepreneurs made up of wealthy, well-connected businessmen, gold buyers and mercury dealers, often backed by influential politicians who have gained significant stronghold in the ASM sector through their social capital and financial investments (Tschakert,2009; Hilson,2010; Verbrugge,2016). The past decade has come with significant transformations in the Ghanaian ASM landscape, with many mining sites upgrading from the use of rudimentary tools such as pans, buckets, pickaxes and shovels to much more sophisticated mechanisation involving the use of excavators, bulldozers, gold washing plants and Changfa pumps to increase productivity. ASM is thus constituted by an ever-evolving assemblage of heterogenous technologies and players ranging from casual hired labourers at the bottom of the production chain to the well-resourced investors (Ferring et al,2016). These businessmen, locally referred to as sponsors, finance the acquisition of lands, equipment, payment of wages for hired labour and broker deals for the sale of the mined produce (Nyame and Grant,2014). Their work also involves negotiating revenue or benefit sharing agreements with local chiefs and customary landowners by which these landowners and chiefs typically receive percentage of mined produce, royalties, fees, rent or other negotiated payments. This arrangement is usually not by outright sale of the land, as the chiefs and other customary landowners retain the reversionary interest in the land. There are also arrangements where ASM sponsors are expected to provide certain basic infrastructure as part of the conditions for operating within the local communities. Verbrugge et al (2015) found from the Philippines, Congo and Liberia that under customarily negotiated agreements between artisanal miners and the local

communities, 'benefit-sharing often (but not always) becomes institutionalised in the form of royalty arrangements whereby landowners are entitled to a fixed percentage share of the mining produce. However, the extent and form of these royalties is subject to a degree of variation."

Speaking on a similar dynamic in the Ivorian small-scale diamond mining sector, De Jong and Sauerwein (2021) noted that:

"It is very uncommon for miners lacking statutory or customary land rights to not negotiate access rights (and compensation) with landowners, unless mining takes place in a virgin area. Whether land is owned under customary or statutory land tenure arrangements, in order to be able to mine peacefully in close proximity to a rural community, it is necessary to obtain the permission of the landowner, or at least one influential community member…'

In the Ivoirian artisanal diamond mining sector, the legitimacy of customary institutions was recognised, and a collaborative arrangement reached between the parastatal mining company, Société pour le development Minier en Côte D'Ivoire (SODEMI) and local chiefs of villages organised as cooperatives. This agreement provided a level of shared control and benefit sharing where SODEMI determined the location of the mining while communities received 12% of all proceeds. Mining licences were granted to villages and not individual mine sites. The villages then allocate parcels of mining sites with the approval of SODEMI. This collaboration helped to cut the registration process from 1 year to 1-2 weeks and saw a record increase in recorded mineral production (De Jong and Sauerwein,2021).

In Ghana, the agreements are often reached verbally and hardly involve the use of lawyers or any legal technical paperwork. The customary laws of the relevant mining community provide the regulatory framework, with the presentation of 'customary drinks' in the presence of witness to seal the transaction(Nyame and Blocher,2010).[3] Disputes arising from such transactions are also resolved under customary law, where local chiefs and elders in council act as mediators and arbitrator. ASM groups such as the locally formed associations and cooperatives also operate through their leaderships and taskforces in negotiating for land, resolving disputes and brokering deals for and on behalf of their members. This confirms the findings of Verbrugge et al (2015) that relationships between local communities and ASM is not always antagonistic, unstable or even unpredictable but rather transactional and more often mutually economically beneficial.

This practice of relying on customary land tenures and acquiring mineral rights directly from chiefs and customary landowners without statutory licensing is in direct contravention of the Constitution and the Minerals and Mining Act. Amongst state bureaucrats and within certain corridors of the Ghanaian media and public space, this is greatly frowned upon and chiefs who directly grant lands and essentially provide a safe haven for ASM operations often face actual or threats of destoolment. These calls for stringent measures against these chiefs are based on

[3] Customary drinks are mainly socio-cultural political acts presented to chiefs to appease the stool and the ancestors when demarcated land is leased or alienated. Nowadays, they amount to chiefs receiving market value for lands sales to ready buyers.

the position that their actions are contributing to the environmental 'menace' that informal ASM wreaks on the local communities.[4] This notwithstanding, direct access to mineral-rich lands from chiefs and other customary landowners has proven to be a robust system which in most local mining communities has even superseded the state's prescribed formalisation processes. For chiefs and customary landowners, ASM offers a range of lucrative benefits which incentivises their continued support for ASM in their communities. When the Ghanaian government consults with local chiefs, it is often accompanied with calls to help flush out the 'menace' of artisanal miners from their communities. The empirical material from the literature mentioned above however reveal that formalising ASM through the integration of customary practices need to go beyond achieving a state agenda which does not offer a mutual benefit to the local communities. In communities where there are already feelings of resentment against the state about its misuse of revenue from large-scale mining (Nyame and Blocher,2010), it is not enough to ask chiefs and local communities to help get rid of informal artisanal miners, especially when the collaboration between ASM and the communities offers certain socio-economic benefits to the community.

Further, the above-reviewed empirical materials also confirm that a well-incentivised, collaborative governance between the state and customary landowners can be an effective tool for ASM formalisation. As Africa's foremost gold producer, Ghana has a unique opportunity to be a global leader in this emerging discourse by taking key learning points from the success stories of these other African countries who have effectively integrated customary law into their ASM formalisation. Ghanaian artisanal miners number over 1 million and operate within communities with very vibrant and dynamic customary land tenure systems (McQuilken and Hilson,2016). At the moment however, instead of studying, mapping and incorporating the customary practices of ASM, the prevailing formalisation regime relies on a rigid state-centric legality that criminalises informal ASM. The state's approach has been to view ASM not as a socio-legal space with existing customary practices it can adopt, but as a legal vacuum within which it can impose its state-centric formalisation.

The government's response to ASM's reliance on customary land tenures and informally negotiated arrangements has not been favourable. These have included bans, the enactment of more stringent legislation, increase criminalisation, vicious militarised evictions, confiscation and burning of equipment used by informal artisanal miners (Hilson,2017). ASM continues to be a major source of environmental degradation and the negative press on its increasingly harmful impacts on the forests and water bodies across the country further catalyses the state's adoption of even more repressive laws and policies (Bansah et al,2018; Affum et al,2016). Mercury pollution, destruction of farmlands, diversion of watercourses and deaths in open pits

[4] The act of de-stooling refers to being removed from the stool, which represents the office and authority of the chief of the particular traditional area. General News,'Destool chiefs in 'galamsey' affected communities- Prof Akosa' Thursday 22 September 2016 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Destool-chiefs-in-galamsey-affected-communities-Prof-Akosa-471520; General News. 'Go after politicians and chiefs engaging in galamsey-Minister tells Police' Sunday 9,April 2017 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Go-after-Politicians-and-chiefs-engaging-in-galamsey-Minister-tells-Police-527133; Kojo Agyeman, 'Stiffer punishment needed for chiefs, politicians engaged in galamsey-Jinapor' CitifFM April 15,2021 https://citinewsroom.com/2021/04/stiffer-punishment-needed-for-chiefs-politicians-engaged-in-galamsey-jinapor/

left by artisanal miners have all been attributed to what is said to be a culture of environmental irresponsibility amongst artisanal miners. Globally, ASM remains the highest source of anthropogenic mercury emissions, with widespread harmful impacts on human and environmental health (UNEP,2013). In Ghana, a study conducted by Clifford (2017) in three ASM sites across the country revealed widespread mercury pollution, with soil and water samples containing significant levels of mercury concentration considerably higher than the guideline limits acceptable for drinking water, aquatic life and any use of land. A global response to tackling the mercury pollution was the negotiation of the 2013 Minamata Convention. Among other action plans, the Minamata Convention highlights ASM's position as a significant contributor to mercury pollution and endorses formalisation[5] as a relevant national plan to stimulate a reduction of mercury use (Spiegel et al,2015). As a signatory to the Minamata Convention since 2014, the Ghanaian government has adopted several strategies for achieving a controlled use of mercury in ASM, including a statutory regulation of the purchase and quantity of mercury use under section 99 of the Minerals and Mining Act, as well as provision of technical education and cleaner technologies (Basu et al,2015; Rajee et al,2015). These measures have however not been entirely successful due in part to the state's limited capacity, the technicalities of the alternative technologies as well as the general skepticism of local artisanal miners. The historical use of mercury-controlling legislation, such as the colonial Mercury Ordinance 1923, to ban indigenous gold mining while simultaneously promoting a conducive environment for large-scale mining operations free from competition and interference from ASM (Aryee et al,2003; Yankson and Gough,2019), gives some insight into the general skepticism about the government's well-intentioned mercury-control regulatory measures. In 2017, a nationwide public outcry over the spate of ASM's negative environmental externalities sparked a media crusade under the banner of #StopGalamseyNow. This campaign was spearheaded by the Accra-based media firm Citi FM and spiralled protests that eventually led to the sitting Minister of Lands and Natural Resources issuing an initial three-month ban on all ASM operations across the country.[6] This ban was a precursor to the militarrised evictions dubbed "Operation Vanguard" which was launched in 2017and the more recent "Operation Halt II" which deployed nearly 400 military men to evict artisanal miners operating on certain river bodies across the country.[7]

Again in 2017, the government established specialised 'Galamsey Courts' tasked with the specific mandate of trying mining-related offences, particularly the operation of informal ASM.[8] This was followed by a 2019 amendment to the Minerals and Mining Act which increased the penalties for informal ASM to a minimum of fifteen (15) years imprisonment

[5] Article 7 and Annex C of the 2013 Minamata Convention on Mercury

[6] DelaliAdogla-Bessa,'Citi FM launches #StopGalamseyNow campaign' April 3,2017 https://citifmonline.com/2017/04/citifm-launches-stopgalamseynow-campaign/;Marian Ansah,'Small scale mining ban extended again' March 9,2018 https://citifmonline.com/2018/03/small-scale-mining-ban-extended/

[7] Mamavi Owusu-Aboagye, "Military fight illegal miners in 'Operation Halt'" 11 May 2021 https://www.myjoyonline.com/military-fight-illegal-miners-in-operation-halt/accessed June 9,2021

[8] Isaac Yeboah, "Chief Justice designates 14 'Galamsey Courts' to fight mining offences" General News-Graphic Online, Accra 2017. https://www.graphic.com.gh/news/general-news/chief-justice-designates-14-galamsey-courts-to-fight-mining-offences.html(accessed February 19,2021). Also note that galamsey is the local reference for informal artisanal miners.

and/or a prescribed fine.[9] These high-handed measures have over the years proven counterproductive, short-lived and unsustainable, with further allegations of some of the security personnel extorting huge sums of money from artisanal miners or directly engaging in ASM themselves(Hilson et al,2014; Carlson et al 2015; Crawford and Botchway,2016). The 'catch and release' pattern of these militarised interventions (Eduful et al,2020), has also meant that prosecutions under the Minerals and Mining Act are only targeted at those artisanal miners who are unable to bribe their way through, or who have no elite or political connections. A recent comment made by an opposition member of Parliament raised questions about how the disproportionate number of the ASM arrests and prosecutions have mostly involved the poor, casual and hired labourers at the bottom of the value chain, while a significant number of the well-connected local big shots, politicians and elites widely rumoured to be involved in financing and facilitating ASM remain unaccounted for.[10] This demonstrates how discriminatory the state-centric responses to informal ASM have been and how formal laws continue to be wielded as instruments to victimise the vulnerable and marginalised while simultaneously shielding the classed and privileged members of society.

The sporadic growth of informal ASM despite these coercive state laws and policies goes to show that there is clearly a disconnect between the law in the books and the realities on the ground. One thing de Soto and legal pluralist theories agree on is that creating a sustainable legal system is not merely about drafting elegant or even more stringent legislation, but rather about designing systems that are rooted in people's beliefs and are compatible with their realities. Instead of viewing ASM as an empty legal space, a more proven, sustainable approach would be for the state to explore and acknowledge the already existing customary practices, and as Kirsten Anker puts it, submit itself to 'the potentially disruptive process of asking, "What place is there for me in your universe?" (Anker,2014).

4.0 Legal Pluralism in ASM

From the empirical analysis in the literature examined above, it is evident that in many countries, ASM occurs within a legally plural context where artisanal miners navigate a parallel system of state laws and customary land tenures. The challenge however remains how to harmonise the relationship between these state-centric and customary legal systems and ensure that conflicts arising from their intersection are resolved. Unresolved tensions at the intersection between statutory and customary legal mechanisms develop what Charles Benjamin refers to as 'sterile dualism,' which undermine both the state's formalist resource governance mechanism as well as the livelihood security of local resource users (Benjamin,2008). A fundamental proposition of this paper is that legal pluralism can provide

[9] The Minerals and Mining (Amendment) Act,2019 (Act 703)

[10] Rebecca Addo Tetteh, ","Galamsey: Real perpetrators are not those 'small boys'; arrest barons-Ablakwa says burning excavators is a futile exercise" May 24 2021 https://www.peacefmonline.com/pages/politics/politics/202105/445182.php?storyid=100& General New, "22 galamseyers remanded into prison custody" Sunday 4 July 2021 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/22-galamseyers-remanded-into-prison-custody-1301116; MyNewsGH,"163 galamsey operators arrested,2000 seized changfan machines burnt" October 23,2020 https://www.mynewsgh.com/163-galamsey-operators-arrested-2000-seized-changfan-machines-burnt/

the conceptual framework and methodological approach suitable for addressing these rough boundaries.

What then is the theory of legal pluralism and how relevant is it to the discourse on mining property rights in ASM? Legal pluralism emerged from legal studies and the social sciences as a resistance to the 19th century legal positivist notion of law which privileged the nation state as the sole progenitor of law (Sousa Santos,2002). The concept of law in this era was reduced to state law, i.e., the codified, institutionalised and legitimised expression of state sovereignty and monopoly of power. Legal theorists such as Eugen Ehrlich, who is often credited as one of the founding fathers of legal pluralism however propounded that societies were not ordered by a single legal system and that any claim to the contrary was not only scientifically untenable, but it was also historically inaccurate (Ehrlich,1936). Legal pluralism therefore went beyond the scope of the "lawyer's law" and embraced a range of other normative orders where law was no longer claimed as the exclusive product of a top-down centre towards periphery movement. Accordingly, the state was not viewed as the sole producer of law but as one of many other legitimating institutions (Roberts,1998). In some context, it was understood that the state was not even as relevant as the village, ethnic community or local user groups.

Legal anthropologist Sally Falk Moore conceived non-state spaces as the semi-autonomous social field, which she defined as a social locale capable of generating its own laws internally, but which is also a part of and vulnerable to decisions and forces beyond it (Moore,2000). Socio-legal fields are autonomous to the extent that they possess their own 'jurisgenesis', i.e., the capacity to generate internal rules and regulations, but "semi" due to their permeability to official state regulations. Legal pluralism underscores the point that law dwells in other socio-legal fields besides the bosom of the state and that it takes more than engaging with the law books and state agencies to uncover these laws. Legal pluralism therefore suggests the use of socio-legal empiricism in unearthing what constitutes the law on the ground. In many respects this bears significant similarities to the ideas of de Soto who proposed that to achieve formalisation, the customary practices of extralegals, i.e., those who lived and worked outside statutory legal obligations must be studied and integrated into the formal legal domain. De Soto confirmed the relevance of legal empiricism when he adopted a non-positivist path in studying the socio-legal processes of establishing a business in his home country of Peru.

From their analysis of the hybrid statutory-customary governance in three different ASM countries, Verbrugge et al (2015) concluded that there needs to be a more open-minded and empirical approach to what constitutes 'formality' and 'legality' in a fragmented and multi-layered institutional arena. They also contested the rigid, dominant binary approach towards formality and informality, observing that there is a blurred space that is subject to negotiations and contestations. A more open-minded, empirically situated, polyphonic conception of legality cannot be found within the corridors of legal positivism where only state laws are considered the sole normative legitimising order (Davies,2017). The answer can only be found within a legal pluralist framework of law. Legal pluralism, as the socio-legal conceptual framework acknowledges the existence of other legitimising domains besides the state and

proposes the use of socio-legal enquiries in unearthing the social interactions, practices and customs that constitute law within these non-state legal systems.

The application of legal pluralism to natural resource management discourses however has not been without its oppositions (Benda-Beckmann,2001). One major objection dwell on the argument that the state's legal system provides a degree of certainty and predictability which will be threatened by the application of multiple legal frameworks to particular property rights. This argument has been prominent amongst international development practitioners who hold the view that that the recognition of multiple normative orders creates compliance problems and is therefore a hindrance to the implementation of development-oriented projects (Woodman,2012). In ASM formalisation for instance, it has been suggested that recognising multiple legal frameworks would lead to a complex, heterogenous and bureaucratic mining land tenure system.[11] My view however is that these arguments emerge from a very Eurocentric ontological and epistemological framing of law which projects the idea of a homogenised legal positivism, constitutionalism and governance onto the very distinctive African worldview. This appears to be the trap of legal imperialism that de Soto's raised concerns about. In arriving at his theory of property formalisation, De Soto took a non-positivist, decolonial stance by which he recognised the colonialist and Western imperialist antecedents of property rights in many parts of the developing world. In a true socio-legal fashion, De Soto understood that law grew upwards from the structures and customs of the society as they also did from the state. He cautioned lawyers and legal scholars from emerging economies against being preoccupied with Western legal ideologies and the tendency to view local laws as not being 'genuine' enough. De Soto admonished lawyers to critique the Western legal traditions they have been taught and to 'step out of their law libraries' in order to understand the 'people's' law.

Understandably, the 'people's law', which in this context refers to the living, customary laws of ASM, may not always conform to Western homogenous characterisations of law. Nevertheless, it is this seemingly complex, heterogenous legal system that has sustained their operations for centuries, even before the first European encounter with mining on the continent. Verbrugge and Besmanos (2016), Hilson(2010) and Fisher (2007) have argued extensively that homogenised assumptions about the ASM sector are erroneous and only lead to impractical policymaking. As already mentioned, ASM is an ever evolving, heterogenous landscape with increasing variability in the assemblage of miners, their complex organisation and the technologies they employ in their work. This constant reconfiguration takes place within the context of a spatio-temporal domain influenced by a complex history, cultural mining practices, emergent socio-technical innovations and other particularities of mining in the rural landscapes (Ferring et al, 2016). This domain is also a socio-legal terrain made of up a living, dynamic, flexible and informal customary legal system. Thus legal, policy and regulatory frameworks that essentialise artisanal miners in disregard to this critical characteristic mask the complex actual realities on the ground and fail to provide the needed interventions in the ASM reform process. In her ethnographic work with the Sans people of Namibia, Vermeylen identified that rigid assimilationist policies that disregard or seek to strip indigenous peoples of their

[11] Here, the author references the comments of an anonymous reviewer.

customary laws or their unique characteristics end up totalising their communities and creating a dichotomisation that further subjugates their lived experiences (Vermeylen,2010). This goes to show that a formalisation scheme that attempts to impose homogenous conceptions of law on such a heterogenous group of people who work within a fluid, legal and culturally heterogenous context such as ASM is bound to fail for its disconnect with the actual lived realities of the target community

Again, when it comes to natural resources, instead of looking to and privileging a single coherent legal system, Meinzen-Dick and Prahan (2001) suggest that it is more viable to embrace the reality of the ambiguity of rules and the multiplicity of legal systems. They add that legal pluralism is not about getting the right law or right institutions to allocate or manage resources. Instead, it is an acknowledgement that rights can be allocated through messy, dynamic processes which also provides the scope to respond to the uncertainties that resource users face. Recognising diverse sources of property rights is more equitable since it affords more people some basis for a claim. Consolidating all property rights under a unitary, state-centric legal system on the other hand, sacrifices adaptability to changing circumstances (Meinzen-Dick and Prahan,2001). Even de Soto himself agreed that rights do not necessarily have to be defined by the formal state law (and by what the formal law considers to be normal or orderly) to be legitimate and that social consensus at the local level was also valid for legitimating claims to property rights (De Soto,2000).

Another objection to legal pluralism is that it often works to suppress indigenous knowledge systems of land governance, constitutionalism and customary laws. (Schmid,2001; Ruffin,2019). This stems from emergence of classical legal pluralism from the imposition of colonial laws (Merry,1988) which for formerly colonised countries saw to the reconstitution of existing indigenous legal systems. Even after attaining political independence, the hierarchy of laws that placed colonial state laws above customary laws persists till today. Accepting customary law as being of an equal status and footing as statutory laws remains a tensioned legal and political issue. Legal pluralist scholars who employ decolonising frameworks therefore emphasise the need for legal pluralism to hold a much more emancipatory role for indigenous legal systems beyond mere recognition by the state. Historically, the recognition of customary laws and land tenures has not stopped the state from imposing an overarching control mechanism by which indigenous claims could be made. In the Ghanaian ASM context, it is seen that despite the state's formal recognition of customary land tenures and the authority of chiefs, the state still maintains its colonially inherited positionality as the chief arbiter of mining rights. It has refused to give more scope for the application of customary laws and land tenure systems to ASM and any such integration without its sanction is criminalised. What exists then is a multilateral but very unequal legal pluralism in which state-centralism continues to be privileged over customary arrangements, even when local artisanal miners are clearly less enthusiastic about the former.

These conceptual challenges aside, legal pluralism still hold significant promise for customary laws and indigenous knowledge systems. Legal pluralism does not only highlight the existence of customary, informal and non-state laws, it also provides a theoretical framework to centre these laws to contest colonialist practices that subjugate customary laws and constitutionalism.

By reconsidering the one-way, top-down ideology of law, legal pluralism rediscovers the subversive power of suppressed and muted discourses and provides the means to acknowledge the peculiar characteristics of non-state laws as fully-fledged law (Teubner,1997). By embracing a legal pluralist approach to ASM formalisation, governments, donor agencies and researchers can acknowledge that informal artisanal miners who operate predominantly under customary land tenures do not constitute an illegality, but rather a socio-legal field where customary laws, informally negotiated arrangements, customs and spiritualities provide legitimate sources of normative regulation. In so doing, they can retire their perception of informal ASM as an illegality and begin to have the discussion on how best these customary practices can be mapped for a more effective integration into ASM formalisation.

5.0 Integrating a Living Customary Law in ASM Formalisation: Resolving internal conflicts and methodological shortcomings

According to Chimhowu (2019), neoliberalisation and increased land commodification over the past three decades have birthed a 'new' African land tenure with significant impact for agriculture and the extractive industry. According to him this emerging land tenure is 'a product of an interplay between spontaneous adaptations to changing local and global opportunities on the one hand and state directed neo-liberal reforms designed to craft a more market friendly 'customary tenure' that is as secure as it is efficient and democratic on the other'(Chimhowu,2019). In the mining context, the increased land commodification and demand for mineral-rich lands have fostered an environment ripe for rentier politics where local elites wield their traditional authority to alienate lands for their own personal benefit. Given the heterogenous and hierarchical nature of local communities, negotiation can often mean that powerful local elites can establish stronger rights at the expense of women and other vulnerable members of the community. Crawford et al (2017) documented an account in the northern part of Ghana where traditional authorities and political elites had forged alliances to alienate lands to wealthy businessmen and Chinese ASM firms at the expense of local artisanal miners, farmers and other members of the community. In the Ivoirian customary ASM model discussed above, it is observed that the cooperatives are controlled by customary leadership as there is no artisanal miners' representation on the leadership (De Jong and Sauerwein,2021). This reinforces elite capture and is not reflective of the inclusivity that a customary management is envisaged to achieve.

While the impact of neoliberalisation on African land tenures over the past decades has been radically significant, reconfigurations of customary land tenures date back to pre-colonial times. Throughout history, customary laws have been subject to periodic reconstitutions and manipulations which have mostly benefitted local elites while engendering tenure insecurity for other customary land users. During the colonial era for instance, mineral-rich lands were particularly targeted for their economic potential to benefit the colonial government's capitalist expansion and became the subject of many strategic colonial interferences. In Ghana, colonial laws such as the 1894 Crown Lands Bill Ordinance, the 1897 Public Lands Ordinance, 1903 Concessions Ordinance and the 1927 Land and Native Rights Ordinance became tools of colonial land dispossession and the reconfiguration of existing land tenures. The plural legal

system that was established recognised customary laws and the authority of local chiefs over their lands, subject to the repugnancy test (Bentsi-Enchill,1969). This test required existing local laws to be applicable to the extent that they did not offend colonial notions of equity, natural justice and good conscience. Under this system of indirect rule which Mamdani described as a 'decentralised despotism,' (Mamdani,1996), the institution of chieftaincy was reduced to a lackey of the colonial government to pave the way for sanctioned interferences in the established legal order. Chiefs and chiefdoms were invented as part of a hierarchical structure of chiefs and sub-chiefs with allodial titles (Busia, 1951). Central to this reconstitution of customary land tenures was when the colonial government attributed chiefs with the sole authority to transact stool lands. In so doing, negotiations for concession were carried out solely between the state and/or the foreign mining corporations and the relevant chief in exchange for the payment of compensation. This system essentially homogenised customary land tenures, excluded the rights of other customary landowners, and downplayed the authority of existing accountability measures in the form of the council of elders, priests and priestesses. This practice prevailed because it suited the capitalist interests of the colonial government and enabled local chiefs who were aligned with it to exploit the system for their own material and socio-political gain (Amanoor, 2010; Ruffin, 2019).

The elite capture and asymmetries of power within customary land tenure persists today and have drawn critiques to the call for the integration of customary law in ASM formalisation. Scholars who have examined customary land tenures in ASM formalisation have often reflected on this and raised questions about how to ensure a more democratic decision-making, control the exploitation of land pricing and ensuring that the appropriation of revenue benefits of the entire mining community (Maconachie,2010; Hirons,2014; De Jong and Sauerwein,2021). Amanoor (2010) holds the view that the contemporary framework which presents customary relations as undifferentiated and representative of subaltern rural interests or civil society interests in opposition to a corrupt state is over-simplistic. From her study of customary land tenures in Ghana, Ubink (2007) made similar observations about the breakdown of traditional accountability measures in the form of the Council of Elders and cautioned against the idealisation of customary land tenures as a preferred alternative to formalisation. To administer checks and balances on the powers of local chiefs, Ubink further made recommendations for increased state interventions in customary land administration.

State intervention in customary land administration have often revolved around formalisation. Drawing from a National Land Policy and a World Bank sponsored Land Administration Project (LAP), the Ghanaian government recently passed the Land Act,2020 (Act 1036) to create an enhanced collaboration with traditional rulers towards a customary land tenure reform. The 2020 Land Act provides statutory backing to the existing Customary Land Secretariats (CLS), which were established to review, harmonise and streamline customary practices, facilitate the land administration skills of traditional authorities and family landowners in order to create a system of proper record keeping (Ministry of Lands and Natural Resources,2011). This is in line with De Soto's formalisation theory, where customary land tenures are equated with unsecured titles holding poor people back from prosperity and

formalisation is seen as the key to liberalising markets and transferring land to more productive users and uses.

However, not all scholars are enthusiastic about these land reforms. There is the view that these customary land tenure reforms are nothing more than attempts by the state to expand its influence into the traditional arena (Chimhowu,2019). In addition to the fact that land title registration in Ghana is fraught with delayed procedures and other overwhelming bureaucracies, Amanoor (2010) holds the view that registering and documenting existing rights does nothing more than reaffirm the status quo and its injustices. Additionally, research has found that customary land tenure formalisation does not necessarily translate into tenure security particularly for the poor in society. Often, it is those with the financial wherewithal who are able to take advantage of formalisation to secure and acquire more rights thereby widening the inequality gap and reinforcing existing social differentiations (Ubink and Quan,2008; Fisher 2017; Ubink,2018; Chimhowu,2019)

The complex nature of customary land tenures means that there cannot be one simple answer to how customary laws can be operationalised in ASM formalisation. When answering questions about the current state of African customary laws and land tenures, decolonial legal pluralist scholars have often referred to a living African law, which they sharply distinguish from the colonial/official customary law. They conceptualise the living customary law as the fluid, dynamic sets of laws indicative of the socio-cultural contexts in which they are embedded. Living customary laws seek restorative justice, relationship building and searches for communal-oriented decision-making to holistically promote community interests, taking into account indigenous spiritualities (Ruffin,2019; Tamale,2020). This can be linked to Ehrlich's living law, which he identified as the law which dominates life itself even though it has not been posited in legal propositions (Ehrlich,1936). The colonial customary law on the other hand refers to the product of significant alterations to the living customary law shaped by colonial governments in collusion with local elites, frozen into obdurate set of ossified norms through interpretation and codification by formal institutions. What decolonial legal pluralism suggest therefore is for researchers, policy makers and states to recognise that customary law is living, rooted in socio-cultural contexts and amenable to change.

An opportunity for Ghana to map and integrate such living, customary laws and land tenures into its ASM formalisation has arisen in the form of the Community Mining Programmes (CMP) launched in 2019. At the moment, there appears to be no singular official policy documentation on the CMP and detailed information about the project remains scanty. However, the information available suggests that the CMP is envisaged to be a collaborative, community-driven project aimed at formalising ASM in mining communities across the country. [12] Under this joint collaboration, the state together with the communities(led by their chiefs) provide land for mining, with large-scale mining corporations providing technical and

[12] Communications Bureau, The Presidency- Republic of Ghana, 'President Akufo-Addo Launches Community Mining Programme' 25 July,2019 https://presidency.gov.gh/index.php/briefing-room/news-style-2/1266-president-akufo-addo-launches-community-mining-programme accessed June 9,2021

safety support. [13] There are also proposals to review the existing Minerals and Mining Act to provide for a more predictable and transparent process for acquiring mining concessions which would entail the state blocking out areas specially for CMP, providing relevant geo-data, equipment support services and training of artisanal miners.[14] Artisanal miners who have received the requisite training and insurance cover would then be considered for the program. Additionally, three strategies to achieve successful implementation of the CMP have been outlined, i.e., a Community Mining Oversight Committee, adoption of Small-Scale Miners Code of Practice and support services to community members.[15]

Although the government touts the CMP as a novel mining model, a closer look shows significant overlaps between the CMP and the existing formalisation scheme. Licensing is still very much not decentralised, and some local chiefs remain unconvinced about the state's commitment to involve them in the management process. Other stakeholders are also concerned about the possibility of the CMP being hijacked by local and political elites who would only allocate mining titles to their cronies.[16] Again, it remains unclear what the proposed Code of Practice and support services under the CMP would entail, or how different the Community Mining Oversight Committee would be from the District Small-Scale Mining Committees already established under the prevailing Mining and Minerals Act. If the CMP is to effectively transform ASM and not function as a mere rebranding of the existing failed formalisation scheme, there needs to be a stronger political commitment on the part of the state in coordinating geological work and demonstrate transparency in its inclusivity of local chiefs and artisanal miners as co-producers of the process. As Seigal and Veiga (2009) noted, a policy of ASM formalisation is as effective as its implementation methodology. Beyond the fanfare of the nationwide inaugurations, the state needs to instil trust and confidence in its commitment to implementing the proposed community-driven CMP if this initiative is to function as more than a reactionary political campaign to win election votes.

Part of fulfilling this commitment would be for the state to proactively prioritise geological assessments and blocking out productive lands for ASM so that they do not fall within large-scale mining concessions in the first place. This, Hilson et al (2020) suggest, will promote a more sustainable autonomous co-existence instead of the unreliable and unpredictable working partnerships where large-scale mining corporations are positioned as saviours to source parts of their concessions for ASM. It would also require the state to loosen its hegemonic stranglehold on ASM governance and embrace a more decentralised regulatory structure.

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[13] Ministry of Science, Environment, Science and Technology, 'Government Starts Community Mining Programme in Ashanti Region' January 28,2020 https://mesti.gov.gh/government-starts-community-mining-programme-ashanti-region/ accessed June 9,2021

[14] Charles Nixon Yeboah, "Review of Mining Act 703 in offing, as 2021 West Africa Mining Conference underway" 3rd June 2021 https://www.myjoyonline.com/review-of-mining-act-703-in-offing-as-2021-west-africa-mining-conference-underway/

[15]Ghana News Agency, 'Community Mining Scheme to create 1600 jobs nationwide-Minister' 5 June,2020 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Community-Mining-Scheme-to-create-16-000-jobs-nationwide-Minister-972130?channel=D2 accessed June 9,2021

[16] Neil Nii Kanarku, "Government's community mining program a disguised galamsey -Okyehene" April 5,2021 https://citinewsroom.com/2021/04/governments-community-mining-program-a-disguised-galamsey-okyenhene/

Eduful et al (2020) recommend that such decentralisation can take the form of establishing district level branches of the Minerals Commission and authorising them to issue licences. Taking it a step further, this decentralisation can become even more participatory and inclusive of local traditional authorities, indigenous knowledge systems, customary land tenures and living, informal management structures of local artisanal miners. Drawing key lessons from the reviewed examples from Senegal, La Cote d'Ivoire, Congo, Liberia and the Philippines, the Ghanaian government can maintain the CMP as a true community-driven and hybrid governance project between customary leadership, state agencies and local artisanal miners. As a hybrid governance model, the CMP would see the state supporting ASM with its technical and financial support, provision of relevant geo-data, facilitation of financing and market access, capacity development and research and development while actively providing space for the functioning of living, customary laws, management systems and land tenures. As the evidence from the literature suggests, traditional authorities and local artisanal miners are more well-versed with knowledge of the local terrain, land acquisition, the day-to-day ASM operations and therefore have a lot to offer in terms of relevant localised knowledge for transforming reforming the sector. As custodians of the communal land, traditional authorities are better positioned to ensure a more sustainable and environmentally responsible mining operation. Traditional systems of democratic governance and accountability need to be strengthened to liaise with the state in holding both political and traditional elites accountable in the fiscal and environmental management of ASM operations. A good starting point to this would reframing the engagement of local chiefs from the positionality of 'combating the menace of ASM' towards a collaborative customary and statutory ASM governance geared towards an environmentally responsible and economically viable venture profitable for rural development. Adopting a legal pluralist lens would mean a departure from this conventional framework where the multiple sites of normative authority are seen as problems to 'fight' towards a framework that views this complexity as interactions capable of providing a sustainable pathway of emancipatory practices from which a new praxis of safeguarding ASM formalisation in local communities can emerge.

This by extension also places a huge responsibility on ASM researchers. ASM is already a field that is heavily dependent on fieldwork methodology as the major source of data collection and scholars may undoubtedly be well-versed in the requisite tenets of local community engagement and empirical research. However, the colonial history of customary land tenure disruptions and the ongoing colonialities[17] of neoliberal economic policies and western legal imperialism (Mignolo,2011) means that as more and more scholars begin to engage with this emerging discourse of integrating customary laws and land tenures in ASM formalisation, there is the further need for critical reflection on the ethics and epistemologies underlying our conceptual frameworks and research methodologies. This is where decolonial scholarship rooted in indigenous onto-epistemologies become helpful. One of the admonitions of decolonial scholarship is for researchers, particularly those based in the Global North to ensure

[17] This is in reference to Grosfuguel's "coloniality of power" which refers to the legacies of colonialism and the long-standing patterns of power that continue to dominate and define culture, labour, intersubjective relations and knowledge production in formerly colonised societies (Grosfuguel,2007)

that not only is their research geographically situated in the local communities of the Global South but also epistemically situated in the indigenous knowledge systems of these communities (Mkabela,2005; Ruffin,2019; Tamale,2020). Research that seeks to elicit the customary land tenures of poor mining communities in formerly colonised countries need to consciously undergirded by an ethics and epistemology that does not re-enact subjugating systems of knowledge production or approaches that undermine indigenous legal systems. For example, when Ubink (2007) suggests for more state intervention in customary land administration as a solution to the breakdown of traditional accountability measures, Ruffin (2019) objects, stating that such recommendations proceed from westernised epistemologies that are used to suppress indigenous knowledge systems. It seems to suggest that a solution rooted in indigenous epistemologies would be to devise means of rebuilding or reimagining the broken traditional systems to suit the changing times. The Senegalese model of customary management in ASM formalisation for instance shows the use of traditional accountability measures underlaid by principles of equity, security, participatory decision-making and balances to control abuses by chiefs under the decentralised and local administrative *Tombolouma* system. Although chiefs are the ultimate traditional authority in rural Senegal, ASM power is shared between the *Diourakountiqui* (mine site chiefs) and the *Tomboulouma* (persons responsible for ASM site and village security) when it comes to ASM management. This serves as a more practical, locally sourced pathway for accountability in land allocation, local support services for technical assistance, conflict resolution, maintenance of order and control and even direct taxation (Persaud et al,2017).

Although it is beyond the scope of this article, it would also be interesting to see linkages between this emerging framework and regional and sub-regional mining policies, as well as the global value chain on ASM governance. However this convergence manifests, it is undeniable that the nation-state remains central in this modern capitalist world and is bound to retain this position for the foreseeable future, albeit in contestation with other non-state forms of governance (Sousa Santos,2002). Governments can take advantage of this legal pluralism by forging hybrid governance models which as the reviewed literature has proven holds optimal potential for transforming ASM. ASM scholars have an equally important task to ensure that as we place customary land tenures under the microscopic gaze of our research, it will not be through the lens of Western legal traditions or epistemologies but through locally generated epistemologies and indigenous knowledge systems. If not, we risk producing research that will merely reproduce the very unjust dynamics in ASM that we seek to disrupt, and our claim to expertise on African customary land tenures will only re-enact colonialist legal ideologies and westernised impositions on customary law.

6.0 Conclusion

Law plays a significant role in the privileging of property systems. While the state's intervention in legalising ASM, after years of colonial ban is a welcome development, its exclusivist formalisation policies remain incoherent with the actual realities of local artisanal miners. This is because they are embedded in Western ideologies of mineral rights and legal institutional frameworks that continue to function as a barrier to artisanal miners' access to

mineralised lands. Local artisanal miners are more endeared to the less technocratic and flexible customary land tenure arrangements, which have sustained ASM operations in local communities for centuries.

This paper drew on empirical analysis from the literature on customary land tenures in ASM formalisation to demonstrate how such hybrid governance models presents a more sustainable pathway to ASM formalisation in legally plural contexts like Ghana. In presenting a theoretical and conceptual overview of legal pluralism in the Ghanaian ASM landscape, this paper challenged the conventional conflation of informality with illegality, stressing that informal ASM is itself a socio-legal field constituted by its own customary laws which serve as a valid, legitimising legal framework.

It drew attention to a decolonial, living customary land tenure and stressed that in order not to re-enact foreign notions of customary law, researchers need to reflect on the ethics and epistemologies of their work and ensure that it is epistemically situated within the indigenous knowledge systems of the local communities.

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