

The Protection of Land Rights: A Comparative Overview

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THE PROTECTION OF LAND RIGHTS: A COMPARATIVE OVERVIEW

By Christine Venter*

*Care for the land, therefore, implies seeing it not simply in material terms as geographical space, but in moral and theological terms as an opportunity for sharing and caring for the poor, the dispossessed, the stranger, the sojourner, the widow and orphan; in other words, those who have no status in the community, since being without land means to be without power and dignity. This same spirit of sharing was at the heart of the early Christian community in the Acts of the Apostles (2:44-45; 4:32-37) where all things were shared in common. Members sold property and goods, dividing everything on the basis of each one's need.***

EXECUTIVE SUMMARY

Access to and ownership of land will likely be a difficult issue in South Sudan for a number of reasons: the State will have to balance the competing interests of Internally Displaced Peoples (IDPs), returning combatants, communities who were removed from their land, individuals seeking land for agriculture and/or grazing rights, corporations, and the state itself seeking access to resources and land to develop for investment, and women, who are now officially entitled to own land. This will all take place in the context of redefined boundaries, and disputes over citizenship and tribal membership. What South Sudan has in its favor is that, unlike some other African countries, it does not have to deal to any large extent with redistributing land appropriated by a colonial power.

This paper will discuss:

1. The relevant constitutional provisions of the Transitional Constitution (TC) that pertain to land, including Article 169(1) which provides that the land belongs to all of the people of South Sudan; Article 28 which affords everyone in South Sudan the right to own property; Article 171 which further recognizes different forms of ownership of land, namely public land, community land and private land; Article 28(2) and Article 170(2) which provide for eminent domain; and Article 172 which creates a Land Commission but leaves its structure and functions undefined.
2. Land use in South Sudan is regulated by the Land Act of 2009, a statute designed to resolve land disputes, recognize customary law practices with regard to land ownership, and establish a system of administering land. Other important purposes of the statute include creating a land regime that is favorable to investment, facilitating the reintegration of IDPs, and promoting a system that will preserve the environment. These competing interests will all have to be balanced and reconciled. It should be noted that all of the references to the Constitution in the 2009 Land Act are to the 2005 Interim Constitution, and this paper

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**Southern African Catholic Bishops' Conference, "Vision for Land Reform in South Africa," p. 3.

suggests that these references might be updated once the Permanent Constitution (PC) has been adopted.

3. The potential need for clarification in some of the wording in the TC and Land Act in order to provide clarity and consistency about land ownership, housing and which local government entity has authority to allocate land.
4. The potential problems with customary law and land allocation.

BACKGROUND

The land issue is crucial as it could provide a real threat to peace and food security. The paper canvasses access to and ownership of land, the competing competencies of state and local government and traditional authorities, and the application of customary law. Gender equality with regard to the distribution of land is also discussed, as is expropriation of land. Relevant provisions from the South African, Kenyan, and Zimbabwean Constitutions are canvassed. These countries have been selected because they have the most recent and salient experience with addressing land issues in constitutions. The paper offers potential approaches with regard to addressing the land issue in South Sudan's PC.

DISCUSSION

Several of the provisions of both the TC with regard to land and the Land Act are somewhat ambiguous and could be clarified. Both legal instruments are broadly consistent with each other, with the Land Act fleshing out some of the provisions in the TC and the earlier 2005 Interim Constitution. They also have to be considered in light of the land policy recently approved by the Council of Ministers, and currently awaiting approval by the Legislature.¹ The first issue that will be discussed concerns wording in both the TC and the Land Act about land ownership.

1. Access to Land and Land Ownership in the Transitional Constitution (TC) and the Land Act

Article 28(1) of the TC provides that: "Every person shall have the right to acquire or own property as regulated by law." The right to own land is regulated by Part 12 Chapter II (Articles 169-171) of the TC. Article 169(1) of the TC provides that "all land in South Sudan is owned by the people of South Sudan and its usage shall be regulated by the government in accordance with the provisions of this Constitution and the law."

Article 169(1) may be expected to raise challenges as it calls into question whether land may be privately owned by individuals in South Sudan, implying that the land is already owned by the "people." This may impact development of land and investment in the country.² Article 169(1) is also potentially contradicted by Article 170(6) (a) and (c) which defines private land as including: "(a) registered land held by any person under leasehold tenure in accordance with the law;" and "(c) any other land designated as private land by law." (This article thus confirms that land may be privately owned, rendering Article 169(1) potentially confusing.)

Article 170 goes on to provide for different forms of land tenure and defines different categories of land holding. Article 170 provides as follows:

- (1) The regulation of land tenure, usage and exercise of rights thereon shall be governed by this Constitution and the law.
- (2) Without prejudice to sub-Article (3) below, the land tenure system in South Sudan shall consist of:
 - (a) public land,
 - (b) community land; and
 - (c) private land.
- (3) Public land shall include, but not be limited to:
 - (a) all land owned, held or otherwise acquired by any level of government as defined by law; and
 - (b) all land which are not otherwise classified as community or private.
- (4) Regardless of the classification of the land in question, rights over all subterranean and other natural resources throughout South Sudan, including petroleum and gas resources and solid minerals, shall belong to the National Government and shall be regulated by law.
- (5) Community land shall include all lands traditionally and historically held or used by local communities or their members. They shall be defined, held, managed and protected by law.
- (6) Private land shall include:
 - (a) registered land held by any person under leasehold tenure in accordance with the law;
 - (b) investment land acquired under lease from the Government or community for purposes of social and economic development in accordance with the law; and
 - (c) any other land designated as private land by law.

2. An Assessment of Land Ownership and Tenure in the Land Act of 2009

The Land Act purports to delineate more specifically the broad outlines regarding land ownership that were sketched out in the TC and 2005 Interim Constitution. The Land Act raises potential concerns in that: 1) it repeats the TC's clause about "the people" owning the land; 2) it also potentially creates a conflict with some of the wording in the TC regarding housing; 3) it does not provide sufficient specificity regarding which government or authority has the power to apportion land; and 4) it potentially creates tension between customary law allocation of land and the gender equality principles articulated in the TC.

The Land Act echoes the TC in that it provides that all land in South Sudan "is owned by the people" (Section 7). This may be problematic as it could create confusion regarding ownership if the text is taken literally. Section 7 also provides that land shall be classified as public, private or community land – definitions of each of these terms are set out in the statute in sections 10, 11 and 12. These correspond with the Constitutional definitions.

Section 7(2) goes on to provide for the different forms of land ownership, specifically:

Land may be acquired, held and transacted through the following tenure systems –

- (a) customary;
- (b) freehold; and
- (c) leasehold.

3. Governmental Responsibility to Provide Housing and Land

Subsection 2 of section 13 of the Land Act further guarantees every person access to land for housing, cultivation, pasture, grazing or fishing, as well as for investment purposes. This language does not have the “progressive realization” caveat that Article 34(2) of the TC contains in respect to housing. Article 34 of the TC guarantees every citizen the “right to have access to decent housing” but 34(2) provides that “[t]he State shall formulate policies and take reasonable legislative measures within its available resources to achieve the *progressive realization* of these rights” (emphasis added). Per the jurisprudence of the South African Constitution Court in the *Grootboom* case,³ this may be interpreted to mean that the state does not have an absolute immediate obligation to provide housing, but has to take reasonable steps to provide it, depending on resources. The progressive realization language, if included in the Land Act or other legal instruments, would help avoid unreasonable expectations among the people for immediate housing.

4. Competing Competencies among Different Authorities regarding Access to and Administration of Land

The relationship between central and local governments with regard to the administration and distribution of land is unclear as it has not been stated with certainty how disputes between the government and traditional authority over land will be resolved. Articles 170(7) – (11) of the TC broadly sketch out the relationship between the central and local governments and traditional authorities:

- (7) Rights in land and resources owned, held or otherwise acquired by the Government shall be exercised through the appropriate or designated level of government which shall recognize customary land rights under customary land law.
- (8) All levels of government shall institute a process to progressively develop and amend the relevant laws to incorporate customary rights and practices, and local heritage.
- (9) Customary seasonal access rights to land shall be respected, provided that these access rights shall be regulated by the respective states taking into account the need to protect the environment, agricultural production, community peace and harmony, and without unduly interfering with or degrading the primary ownership interest in the land, in accordance with customary law.
- (10) Communities and persons enjoying rights in land shall be consulted in decisions that may affect their rights in lands and resources.
- (11) Communities and persons enjoying rights in land shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest.

The language is ambiguous, with phrases used like “institute a process to progressively develop ... laws” (Article 170(8)) and “shall be consulted in decisions that may affect their rights in lands and resources” (Article 170(10)). The vagueness of this language runs the risk of negatively affecting the security of land tenure held by communities and so would require more precision if incorporated in the PC.

The Land Act lays out general principles, but this could be done more clearly. Currently it reads:

Section 6. General Principles

- (1) The regulation of land tenure, usage and exercise of rights thereon shall be a concurrent competence, exercised at the appropriate level of government in Southern Sudan.
- (2) Rights in the land owned by the Government of Southern Sudan shall be exercised through the appropriate or designated level of government in Southern Sudan, which shall recognize customary land rights under customary land law
- (3) All levels of government in Southern Sudan shall institute a process to progressively develop and amend the relevant laws to incorporate customary laws, practices, local heritage and international trends and practices.
- (4) All lands traditionally and historically held or used by local communities or their members shall be defined, held, managed and protected by law in Southern Sudan.
- (5) Customary seasonal access rights to land shall be respected, provided that these access rights shall be regulated by respective states taking into account the need to protect agricultural production, community peace and harmony, and without unduly interfering with or degrading the primary ownership interest in the land, in accordance with customary law.
- (6) Without prejudice to the provisions of Article 180(7) of the ICSS and the provisions of this Act, subterranean natural resources shall be owned, regulated and managed by the Government of Southern Sudan.
- (7) Communities and persons enjoying rights in land shall be consulted and their views duly taken into account in decisions to develop subterranean natural resources in the area in which they have rights; they shall share in the benefits of that development.

The term “concurrent competence” used in Section 6(1) gives concurrent jurisdiction to allocate land to multiple government entities, and this could lead to conflicts. The term “appropriate level of government” which is used in both the TC and Land Act could lead to different government entities seeking to allocate the same land.

Moreover, Section 6(3) requires local governments to incorporate customary laws. If this is done, women will be excluded from land ownership as women cannot own land under customary law. This creates a potential conflict between the TC (Article 16(5)) and also with Section 13(4) of the Land Act, which specifically provide women with the right to own land.

It is advisable to ensure that the law (such as The Land Act) specifically designate which authority is responsible for allocating land. The phrasing regarding concurrent competence should be clarified or amended. It is recommended that Section 6(3) of the Land Act be amended to include a caveat that guarantees that no customary law practices may be implemented that deny women the right to own land.

5. The Role of the Traditional Authority

Problems may also arise with regard to the allocation of land among members of the community by traditional authorities. Section 15 of the Land Act gives the Traditional Authority the power to allocate land for residential, agricultural, forestry, or grazing purposes. African constitutional models provide for the equitable distribution of land. Equitable distribution of land will be an issue for former combatants, internally displaced persons and women. The case of the 2010 Kenyan Constitution provides a model that may be relevant to the South Sudan case.

Article 60 of the Kenyan Constitution provides:

- (1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—
 - (a) equitable access to land;
 - (b) security of land rights;
 - (c) sustainable and productive management of land resources;
 - (d) transparent and cost effective administration of land;
 - (e) sound conservation and protection of ecologically sensitive areas;
 - (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
 - (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.
- (2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.

The South African Constitution also specifically recognizes the principle of access to land on an equitable basis. Article 25(5) provides that: “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

Pursuant to Section 27 of the South Sudan Land Act, traditional authorities also have the power to lease community land to individuals or companies. Registration of land ownership is essential to avoid conflicts and encourage investment. Section 54 through 60 of the Land Act provide for land registration. Given customary law practices, which have traditionally been less formal, there is little tradition of registration, and it will be a new concept for some of the traditional authorities. Pursuant to Section 58(2) (b), community land may be registered in the name of a clan or family in accordance with customary law. This provision may prove to be problematic as under customary law only males may be the leaders of clans or families, and so may operate to prevent women from having community land registered in their names.

Another issue may be access to land for grazing purposes, especially given the importance of cattle and grazing rights to the people of South Sudan. This is currently regulated under Section 67 of the Land Act. Conflicts may arise when land has been acquired for investment purposes but people want to exercise their grazing rights on that land. Section 67 provides that no one may obstruct the approaches to water points in communal grazing lands unless this is done pursuant to Section 61, meaning unless the land is being used for investment purposes. It is

noteworthy that there are required environmental, social and economic impact reports of land used for investment purposes under Section 70.

Some valuable lessons may be learned from Tanzania with regard to the division of community lands. There, Village Councils are charged with dividing up the land for agricultural purposes among families and individuals. They work with experts to delineate the boundaries of village lands and apportion rights of occupancy on an equitable basis to interested families and individuals. These occupancy rights are then recorded with villagers receiving certificates to show that their ownership of the land has been registered. A 2013 World Bank study of the Tanzanian approach shows that it has been working effectively and gives confidence both to villagers, the community and investors (banks).⁴

6. Expropriation of Land by the Government

Art 28(2) of the TC provides that:

No private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation. No private property shall be confiscated save by an order of a court of law.

Article 169(2) of the TC further gives the government the power to expropriate land “in the public interest.”

Article 25 of South Africa’s Constitution is designed to provide specific guidelines for when expropriation may take place. These guidelines, reprinted below, may prove useful to South Sudan:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application
 - a. for a public purpose or in the public interest; and
 - b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
 - a. the current use of the property;
 - b. the history of the acquisition and use of the property;
 - c. the market value of the property;
 - d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - e. the purpose of the expropriation.
4. For the purposes of this section
 - a. the public interest includes the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources; and
 - b. property is not limited to land.

5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

...

South Sudan would be wise to avoid the path taken in Zimbabwe's new Constitution which provides for expropriation without compensation. Specific expropriation provisions along the lines of the South African Constitution may be able to guide the drafters as to what could be incorporated in the PC.

7. Land Ownership by Women

Article 16(5) of the TC guarantees that women have the right to own and inherit land. The Land Act confirms this. At the same time, both Section 170 of the TC and the Land Act are replete with references to the powers of the Traditional Authority to divide and apportion land. No mention is made of the fact that this should be done in a gender equitable manner, save for Section 13 of the Land Act which provides the general principles that:

- (1) Right to land shall not be denied by the Government of Southern Sudan, State Government or community on the basis of sex, ethnicity or religion
- (2) Every person shall have access to land for housing, cultivation, pasture, grazing, or fishing as shared resources as shall be regulated by this Act, rules and regulations
- (3) ...
- (4) Women shall have the right to own and inherit land together with any surviving legal heir or heirs of the deceased as stipulated in Article 20(5) of the Constitution.

It is noteworthy that women are now guaranteed access to and ownership of land; this stands in contrast to customary law, which traditionally prohibits women from owning land.⁵

Section 5 of the Land Act lays out the objectives of the Act, including: "(b) Ensuring equal rights to acquire or own land for the people of Southern Sudan, legal entities, communities, State Governments and Government of Southern Sudan as regulated by law." While "equal rights" are mentioned in this section, it is not clear that these rights pertain to gender equality or to more equal rights among communities, the government, individuals, etc.

The Kenyan Constitution makes a clear statement in its provisions that land distribution shall not take into account any customary laws and practices that discriminate against women. It provides for equitable access to land in Article 60:

- (1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—
 - (a) equitable access to land;
 - (b) security of land rights;
 - (c) sustainable and productive management of land resources;
 - (d) transparent and cost effective administration of land;

- (e) sound conservation and protection of ecologically sensitive areas;
 - (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
 - (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.
- (2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.

CONCLUSION

Article 169(1) of the TC referring to land belonging to all the people of South Sudan raises concerns and should be clarified in the PC or legislation. It is worthwhile considering adding “progressive realization” language to the Land Act provisions, so as not to create unreasonable expectations among the people for immediate housing.

Amending the Land Act to specifically designate which authority is responsible for allocating land would provide greater clarity; phrasing regarding concurrent competence should be avoided or improved by clarification of authorities. Section 6(3) of the Land Act could contain a caveat that guarantees that no customary law practices may be implemented that deny women the right to own land. Along these lines, it is advisable that the PC include a gender equality clause with regard to the acquisition and ownership of land.

The Kenyan model regarding equitable land distribution could inform the PC. Through legislative or constitutional provisions, Traditional Authorities may be held accountable for the way in which land is distributed and land registration records may be mandated. Specific expropriation provisions along the lines of the South African Constitution may be considered for incorporation as well.

¹Government of South Sudan, Southern Sudan, “Draft Land Policy”, February 2011. Accessed at: <http://www.scribd.com/doc/49322360/Draft-Land-Policy>

²IRIN News, “Analysis: Land Deals ‘threaten South Sudan’s development’”, December 12, 2011. Accessed at: <http://www.irinnews.org/report/94453/analysis-land-deals-threaten-south-sudan-s-development>.

³*The Government of South Africa, the Premier of the Western Cape, Cape Metropolitan Council, Oostenberg Municipality v Irene Grootboom and Others*, October 4, 2000. Accessed at: <http://www.saflii.org/za/cases/ZACC/2000/19.html>. In this case the court considered whether socio economic rights like the right to housing were justiciable (legally enforceable in court). The court found that such rights are enforceable to some extent, but their enforceability is contingent on the availability of government resources to provide housing. The Court ultimately found that the South African government’s housing program in the Cape area was inadequate given the resources available to it.

⁴http://www.openaccesslibrary.net/publication/securing-africas-land-shared-prosperity-program-scale-reforms-and-investments#.Uj7_VYashcY

⁵N. Shanmugaratnam, “Post-War and the Land Question in South Sudan”, (Norwegian University of Life Sciences: 23 – 24 February 2008), 1. Accessed at: http://www.umb.no/statisk/noragric/publications/shan_lectures/shan_southsudan_landquestion.pdf.