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## The constitutionality of South Sudan's land tenure system: Making a case for reform

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### Abstract

*South Sudan's land tenure system is complex, given that statutory, customary, and communal practices remain a contentious and evolving legal framework. The critical point in question concerns the constitutionality of the current land tenure arrangements, bearing in mind the inconsistencies between the Land Act, customary land governance, and the Constitution. The underlying problem is tested in this chapter by analysing constitutional provisions, judicial interpretations, and comparative Sudanese historical legal models in order to make a compelling case for reform and advocate for a harmonised, inclusive and rights-based land tenure system that aligns with constitutional principles and promotes sustainable development, social justice, and national cohesion. Thus, the chapter examines land as a key question in constitution-making in South Sudan. In so doing, it critiques the constitutionality of certain laws, practices and*

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*jurisprudence that are used to adjudicate land disputes. The chapter calls for urgent land reforms to be adopted in the constitution-making under way in South Sudan.*

**Key words:** *land tenure; constitution-making; customary rights; constitutionality*

## 1 Introduction

The term 'land tenure system' refers to the way in which ownership of land and rights to land are organised through a system determined by statute, agreed precedent, or customary practice.<sup>1</sup> It refers, in short, to the timeframe under which an individual may hold land. Since a land tenure system involves a bundle of rights and responsibilities under which land is held and utilised, the nature of the system varies according to the prescripts of statutory or common law, customary land tenure, and the land tenure practices in a particular historical context.

Land is owned and disposed of in accordance with customs, norms and practices of a specific community; it is applicable to a specific area of land and a specific class of people; it is governed by rules and practices generally accepted as binding and authoritative by the class of people to which it applies; and it provides for communal ownership and use of land.

In South Sudan, land tenure arrangements vary significantly between urban and rural areas, given that in rural areas land is used for agriculture and, in urban areas, for residential and business use.

Although land is a natural and national source of wealth in South Sudan, it has been difficult to identify the nature of the country's land tenure system.<sup>2</sup> The reasons for this stem from a conflict between laws within a complex legal framework made up of statutory and customary laws that have evolved over time without having been consolidated with each other, as a result of which enforcing laws becomes an exercise in uncertainty. As such, contradictions between written laws and customs make it hard to identify how land tenure works in South Sudan.

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1 Land Act 14 of 2009, sec 14.

2 SA Mohamed *Introduction to land law in Sudan* (1979) 1.

At present, the Transitional Constitution of the Republic of South Sudan, 2011, as amended, together with the Land Act of 2009 and the Local Government Act of 2009, is arguably the most important legislation governing land tenure, even though other, unwritten laws also apply.<sup>3</sup> The evolution of the current system of land law has created obstacles to proper land administration due to a remarkable multiplicity of pieces of legislation, which are found largely in previous Sudanese land laws and are now supplemented by the Land Act and Local government. As matters stand, article 170 of the Transitional Constitution vests ownership of land in the people of South Sudan, with such land being regulated by the government.

The Constitution envisages three categories of land tenure, namely the arrangements applicable, respectively, to public, community, and private land. As regards the first category, public land means land owned collectively by all the people of South Sudan and held in trust by the appropriate level of government, or land lawfully held, used or occupied by any government ministry, department, agency or local authority, except where such land is occupied under a private lease.<sup>4</sup> This classification includes land owned by *bomas*, counties, states and the national government, as well as all land which is not otherwise designated as community or private: there is no such thing as 'no-man's land' in South Sudan, given that land unclaimed by an individual or community belongs to the government by default.<sup>5</sup>

Community land, the second category, includes all lands traditionally and historically held or used by local communities or their members. This category would include communal grazing lands for animals, hunting grounds, or locations of traditional sacrifices and worship. Private land, the third category, includes registered land held by any person under leasehold tenure, investment land acquired under lease from the government, and any other land designated as private land in accordance with the law.

<sup>3</sup> JT Mugambwa *Source book of Uganda's land law* (2002) 1.

<sup>4</sup> Transitional Constitution of South Sudan, 2011, art 170(1).

<sup>5</sup> N Ajo 'Land ownership and conflict of laws in South Sudan' Land Portal News, <https://landportal.org//node/13043> (accessed 4 March 2023).

The assumption in this three-fold framework is that all land for businesses is acquired from the government through leasehold tenure<sup>6</sup> while private land is acquired by way of the freehold system. However, the practice in place entails that all land is acquired by lease. This raises the question: From whom do people get the lease title while they own the land? Despite the constitutional provision on land classification, private land ownership is regulated by a leasehold system.

Prior to the 2011 Transitional Constitution, the government of Southern Sudan had by then already enacted the Land Act of 2009 pursuant to article 85(1) of the Interim Constitution of Southern Sudan, 2005. The Land Act reiterates the constitutional provision that the people own all land in South Sudan. However, the *de facto* tenure system is quite different from that of the Constitution, in which the categories are customary, freehold and leasehold tenure. All citizens hold freehold titles to their lands, while non-citizens may acquire leasehold for specific periods of not more than 99 years, as stipulated in section 14 of the Land Act.

Although the Land Act contradicts the Constitution, it does sound clearer than it. In contrast to other jurisdictions, for example Uganda, which has clear land laws stating that land belongs to the people, citizens hold a freehold title in perpetuity that would be transferable through bequest from one generation to the next. In these circumstances, individual owners could grant leaseholds to foreign investors and, in some instances, nationals with a strategic interest in the land. This arrangement could facilitate economic growth, as citizens would be in a position to transact in land and use it as collateral to secure loans in order to buy land rather than lease it.

Surprisingly, then, the practice and policy on land tenure in South Sudan conforms with neither the Constitution nor the Land Act. How is this possible? The answers will be explored in this chapter, which examines the evolution of land law that resulted in the current inconsistencies. For example, in the case of land acquisition, the Constitution and the Act both say different things. Such inconsistencies

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<sup>6</sup> IGAD 'Sudan: Land governance profile' IGAD, <https://land.igad.int/index.php/countries/41-countries/sudan> (accessed 4 March 2023).

affect not only acquisition or ownership but all other derivative rights, such as in easements, usufructs, mortgages, leases and tenancy.<sup>7</sup>

The back-and-forth shifts in South Sudan's land tenure system originate in a variety of laws and legal arrangements. These include the land tenure system that prevailed under the Sultanate (1504-1820); the Land Resettlement and Registration Act, 1925; the Land Acquisition Act, 1930; the Unregistered Land Act, 1970; the Civil Transaction Act, 1984, and its amendment in 1990; the Urban Planning and Land Disposal Act, 1994; the Local Government Act, 1998; the Comprehensive Peace Agreement (CPA), 2005; and the Interim Constitution of Southern Sudan, 2005. All of these have played a role in South Sudan's current land tenure arrangements. The country's jurisprudence reflects the fact that land ownership is vested in the government (such that the mode of acquisition is via lease from the government), whereas in earlier periods it was vested in God (such that acquisition was via lease from God through the government).<sup>8</sup>

The situation is compounded by the fact of land's scarcity and high value. As the American comedian Will Rogers once said, 'Buy land now because no more of it is being made.'<sup>9</sup> Land is a critical asset for economic growth, social development, and poverty alleviation, and as such holds strong potential to be a source of dispute. Indeed, the literature shows that most cases before the judiciary in South Sudan have been associated with land use. The first volume of South Sudanese law reports reveals the first-ever case in South Sudan dealt with land.

Against this backdrop, the chapter proposes possible land reforms that could be considered in the ongoing process of making a permanent constitution, the key argument being that the land tenure system should consist of an amalgam of the freehold, leasehold and customary systems. The chapter is structured as follows: after this introduction, it examines the history of land tenure from pre-independence to the present, after which it looks at the current legal regime on land, offers a critique of it, and concludes with various recommendations.

<sup>7</sup> See Transitional Constitution of South Sudan, 2011, art 171(6)(a) and (b).

<sup>8</sup> SMA el Mahdi 'The limitation on the ownership of land in the Sudan' (1977) 58 *Sudan Notes and Records* 152.

<sup>9</sup> D Chappelle *Land law* (Pearson Education 2007) 3.

## 2 A brief history of land tenure in South Sudan

The legal framework of land tenure in South Sudan is rooted in Sudanese land tenure. Despite the fact that the legal regimes of Sudan and South Sudan originate in different legal systems, namely *Sharia'a* and common law, they contain some similarities with regard to ownership, registration and conveyancing. Ever since early history, customary law, legislation and Islamic law have remained applicable in practice. To trace this evolution, the section covers land tenure during the Black Sultanate (1504-1820); the Land Resettlement and Registration Act, 1925; the Land Acquisition Act, 1930; the Unregistered Land Act, 1970; the Civil Transaction Act, 1984, and its amendment in 1990; the Urban Planning and Land Disposal Act, 1994; the Local Government Act, 1998; the CPA, 2005; and the Interim Constitution of Southern Sudan, 2005.

### 2.1 Land tenure during the Black Sultanate

Under the Black Sultanate (1504-1820), the main uses of land were cultivation, woodcutting, hunting, grazing and settlement. Ownership was vested in sultans, who could allot it to individuals in the following ways:

- through absolute individual ownership, which was exercised mostly in regard to rivers, other bodies of water, and areas of cultivation;<sup>10</sup>
- through private landlordism, which was a system used to allot land for cultivation to either the ruling class or tribal heads or religious sheikhs in order to collect tributes;<sup>11</sup> and
- through communal ownership of grazing lands, hunting grounds, and cultivation areas was held by the tribe, represented by a headman known as the overlord. However, individual members generally exercised ownership rights. This arrangement marked the transition from informal regulation to formal statutory control through an Act of Parliament.

### 2.2 The Land Resettlement and Registration Act, 1925

Before Sudan was divided up, the Land Resettlement and Registration Act was the main point of reference in regard to land registration. The Act in

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10 Mohamed (n 2).

11 A Linklater *Owning the earth: The transforming history of land ownership* (2013) 26.

its section 6 consolidated government ownership of land by establishing that all unoccupied land was presumed to be state land. It contained rules and procedures for the gazetting of land (mainly for urban settlement and resettlement), the surveying of plots and demarcation, land (lease) registration, transfer of leasehold land, issuance of land certificates (including provisions for the destruction and loss of documentation), fraud, and erroneous registration.

### 2.3 The Land Acquisition Ordinance, 1930

The Land Acquisition Ordinance was promulgated to provide procedures for the acquisition of land for public purposes, especially for urban settlement, expropriation and compensation. The Land Resettlement Act was silent about the compulsory acquisition of land, making it difficult for the government to acquire land for public use. Hence, to ensure that land was used in accordance with government policy (which was opposed to the customary system), it became necessary to pass this ordinance.

### 2.4 The Unregistered Land Act, 1970

The Unregistered Land Act served to effect the *de facto* nationalisation of all unregistered land in the country, given that customary land rights had no formal legitimacy. The Act provided that all land that had not been registered at the time of its enactment was state land. Land ownership was thus vested in the state, and citizens or entities could acquire it by a leasehold system.<sup>12</sup> The Act was implemented especially forcefully in areas where people had no access to registration. The southern, eastern and western regions were the ones most affected by the Act, with most areas became government land. According to Atem, the Act 'designated all unregistered land as state land [stating that] there were two main types of tenure within the statutory land tenure system in Sudan: registered freehold and registered leasehold'.<sup>13</sup>

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12 United Nations Human Settlements Programme *Darfur land administration assessment: Analysis and recommendations* (2020).

13 PG Atem 'Land policy in South Sudan' (2025) 1 *International Journal of Developing Country Studies* 2958.

## **2.5 The Civil Transaction Ordinance Act, 1984 and its amendment, 1990**

The Civil Transaction Ordinance Act repealed the 1970 Unregistered Land Act and identified different forms of land and property rights, such as land held in undivided shares and family ownership; the possession of unclaimed property; usufruct rights over land; easement rights; and the acquisition of ownership by accession (acquisition in good faith and bad faith).<sup>14</sup> The Act also provided for the registration of usufructs rights, and confirmed that registered usufructs were equal to registered ownership. This meant that, after granting usufruct rights, the owner of the property ceased to have overriding rights over a registered usufruct. The Act's 1990 amendment was a benchmark for the regulation of inheritance of property and compensation for land appropriated by state.<sup>15</sup> With this amendment, the state's ownership and management of land was legally confirmed.

## **2.6 The Urban Planning and Land Disposal Act, 1994**

The Urban Planning and Land Disposal Act was enacted to lay out procedures and institutional responsibilities for urban planning, including the delimitation of town and rural boundaries and the process of gazettlement.<sup>16</sup> It provided details on land appropriation in the public interest, and in this regard specified modalities for expropriating land for settlements, disposing of government land through leasehold, and acquiring land through leasehold.<sup>17</sup>

## **2.7 The Local Government Act, 1998**

The Local Government Act Act aimed to address the land-management vacuum that had been created at the local level with the abolition of the native administration system in 1971. De Wit notes as follows:

[T]he Act confers important responsibilities to the States and localities and calls for identification of territories of jurisdiction that reflect rural reality with

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14 See Civil Transaction Ordinance Act, 1984, sec 608.

15 See the amended Civil Transaction Ordinance Act, 1990, sec 37.

16 See Urban Planning and Land Disposal Act, 1994, sec 6.

17 See Urban Planning and Land Disposal Act, 1994, sec 19.

the possibility of identifying territories of local governance that coincide with customary land management territories ... [Land management committees] exist in every locality (for example, in Darfur) and are functional. The committees are made up of participants from various sectoral departments and contribute to decision-making on validation of land claims to allow registration. A similar overarching committee exists at state level, usually linked to the Ministry of Agriculture, which performs a similar function ... [The Act also allows for the] development of local bylaws for [the] regulation of land management, including grazing lands and transhumance routes. For example, there are committees at state and locality level whose function it is to determine bylaws on grazing land and transhumance routes, as dictated by the state acts which regulate grazing and farming.<sup>18</sup>

## 2.8 The Comprehensive Peace Agreement, 2005

The CPA was signed in 2005 by, *inter alia*, the Sudan People's Liberation Movement (SPLM) and the Government of Sudan. Its purpose was to end the civil war and institute democratic governance in the country. Article 2(6) provides for the establishment of a National Land Commission to arbitrate between willing contending parties on claims over land and resolve these claims. This Commission was expected to be representative and independent. The CPA does not address issues regarding the ownership of land and natural resources, but, in article 2(6), does call for the recognition of customary land rights.

## 2.9 The Interim National Constitution of The Sudan, 2005

The Interim National Constitution of The Sudan, 2005 was promulgated following the signing of the CPA in 2005. Article 43 recognises the right to own property. It states that every citizen shall have the right to acquire or own property as regulated by law and no private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation; in addition, no private property shall be confiscated save by an order of a court of law.<sup>19</sup> Under article 186, the regulation of land tenure and usage and the exercise of rights thereon shall be a concurrent competence, one exercised at the appropriate

<sup>18</sup> P de Wit 'Land policy development in post-conflict Sudan: Dealing with delicate balances in a fluid environment' (2008) 8.

<sup>19</sup> See Interim National Constitution of Sudan, 2005, art 43.

level of government; rights in land owned by the Government of the Sudan shall be exercised through the appropriate or designated level of government.<sup>20</sup> The Constitution further requires all levels of government to institute a process to progressively develop and amend the relevant laws to incorporate customary laws, practices, local heritage, and international trends and practices. Articles 187 and 188 establish a National Land Commission and a Southern Sudan Land Commission, respectively.

### **3 The legal regime on land tenure in South Sudan**

The legal regime on land tenure is currently based on the Transitional Constitution of South Sudan, 2011, as amended. All other relevant laws shall conform with its provisions. The section below analyses a selection of such laws.

#### **3.1 The Transitional Constitution of South Sudan, 2011**

The Transitional Constitution of South Sudan, 2011 is the supreme law of the land and all other laws must conform with its provisions. Under article 170, 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 the Constitution and the law.<sup>21</sup> This means that other laws, including the Land Act, 2009, and the Local Government Act, 2009, shall not apply in isolation from the Constitution.

Although all land is owned by the people, the government, at all levels, may expropriate land in the public interest, as shall be prescribed by law.<sup>22</sup> As mentioned, the Constitution, in article 170(4), provides for the land tenure system to consist of public land, communal land, and private land. Public land includes land owned, held or otherwise acquired by any level of government.<sup>23</sup> It is a land which is classified as neither community nor private land; as such, the provision may be interpreted to mean that any unclaimed land belongs to the government by default. Community land includes lands traditionally or historically held or used

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20 See Interim National Constitution of The Sudan, 2005, art 186 (1).

21 See Interim National Constitution of The Sudan, 2005, art 186(2).

22 See Transitional Constitution of South Sudan, 2011, art 28.

23 See Transitional Constitution of South Sudan, 2011, art 170(4).

by local communities or their members. Examples are communal grazing lands, hunting grounds, or the locations of places of traditional sacrifice and worship.<sup>24</sup>

As for private land, it is land registered and held by any person under leasehold tenure.<sup>25</sup> This contradicts the forgoing provision, which vests the ownership of the land in the people of South Sudan. The reason is that it raises the question: From whom do people lease the land? When shall they have freehold? Sub-article 170(6)(b) includes investment land acquired under lease from the government or community as private land. Moreover, the legal framework lacks clarity regarding the vertical extent of land ownership, both above and below the surface. In *Bocardo SA v Star Energy UK Onshore Ltd* (2010), the UK Supreme Court clarified that while a surface owner's rights to the airspace above are limited, their rights to the subsurface are more extensive. The ruling affirmed that, subject to certain exceptions, ownership of subterranean strata may extend to depths of up to 1,000 metres. This precedent underscores the need for South Sudanese land law to define the spatial boundaries of land rights more precisely.<sup>26</sup>

### 3.2 The South Sudan Land Act, 2009

The Land Act of 2009 was enacted in accordance with the article 59(2) (b) read together with article 85(1) of the Interim Constitution of Southern Sudan, 2005, which at the time gave the Southern Sudan.<sup>27</sup> Legislative Assembly the power to enact laws in the region. The Act recapitulates the constitutional provision that land is owned by the people of Southern Sudan. However, the tenure system is quite different from that of the Constitution, which in section 9 classifies land into public, community or private land.<sup>28</sup> The term used here is 'classification', whereas the constitutional phraseology refers to a 'tenure system'.

<sup>24</sup> See Transitional Constitution of South Sudan, 2011, art 170(3).

<sup>25</sup> See Transitional Constitution of South Sudan, 2011, art 170(3).

<sup>26</sup> *Bocardo SA v Star Energy UK Onshore Ltd* (2010).

<sup>27</sup> The word 'Southern' is used here to refer the previous semi-autonomous region which has since become the Republic of South Sudan.

<sup>28</sup> See Interim Constitution of Southern Sudan, 2005, sec 9.

### 3.3 Classification of land

Section 10 of the Land Act provides that land is classified as follows. Public land is land owned collectively by all the people of Southern Sudan and held in trust by the appropriate level of government. This includes land lawfully held, used or occupied by any government ministry, department or agency or local authority, except where such land is occupied under a private lease; land transferred to the Government of Southern Sudan, the state government or local government by way of reversion or surrender; land in respect of which no private ownership, including customary ownership, may be established by any legal process; land in respect of which no heir may be identified by any legal process; all roads, railways airports, and thoroughfare as specified by law; all rivers, lakes, canals, wetlands and other areas of water for which no customary or other ownership may be established that has been voluntarily surrendered for public benefit as land which has been compulsorily acquired for special protection, benefit or use of the community; land for investment; or land as agreed by any international treaty. This is self-explanatory that in South Sudan any land unclaimed or land where no customary ownership is established is by default public land.

Under section 11, community land is a land identified on the basis of ethnicity, residence or interest. It includes land lawfully registered in the name of group representatives; land lawfully held, managed or used by a specific community as community forests, cultivation areas, grazing areas, shrines and any other purposes recognised by law; land lawfully transferred to a specific community by any process of law; and any other land declared to be community land by law. The interpretation here is that community land may or may not be registered.

Private land, according to section 12 of the Land Act, 2009, includes land registered and held by any person under a freehold tenure; land held by any person under leasehold tenure; or any other land that may be declared private land by law. The provision emphasises that private land may be held under freehold, leasehold, or any other tenure system recognised by law, with an underlying presumption that customary tenure is included among these recognised systems.

## 4 Acquisition of land

Section 7(2) of the Land Act of 2009 states that land may be acquired, held and transacted through the tenure systems described below.

### 4.1 Customary system

In principle, the customary system of land acquisition is grounded in traditional norms and cultural practices of clans, families, and communities. Under this system, land is collectively owned by indigenous communities and governed according to their customary laws and practices. Section 100(4)(f) of the Local Government Act, 2009, confers jurisdiction over customary land disputes to local government authorities, thereby recognizing the legitimacy of customary tenure within the statutory framework.

In spite of the statutory recognition of customary ownership, a Supreme Court judgment in the case of *Jacob Maker Macheck v Pagarau Macot Campiu*, SC, CV-APP NO.2/2011, held that unregistered land cannot be owned: the occupier is a squatter until his or her name is registered in the registry book and none of the disputants could claim the land. This judgment is contrary to the fact that customary land ownership exists if one can prove occupation since time immemorial regardless of registration. It may be argued that the judgment also offends the long-standing legal principles of equity and *bona fide* effective occupancy. These are expressly recognised in the Land Act under section 89, which states that, ‘a person may not be considered an unlawful occupant if that person in good faith occupied or infringed the rights of others, unless such an act is due to a mistake that no reasonable person would have made’.

### 4.2 Freehold

The concept of freehold refers to a system in which land is owned individually rather than by the government. This means that property can be transferred freely without any restrictions or conditions attached to it. However, the Land Act of 2009 does not provide an explanation of what freehold entails.

In practice, South Sudan does not currently recognise freehold title: all land is acquired under the leasehold tenure system. However, the

freehold system is significant because it offers individuals the highest level of protection for property rights. With perpetual ownership, landholders are less vulnerable to government claims or reallocation than those under leasehold arrangements. Moreover, freehold tenure allows unrestricted transfer of title, enabling owners to freely convey property to others without legal limitations

#### **4.3 Leasehold**

A leasehold is a lawful property tenure wherein the landowner (lessor) offers temporary ownership rights to the leaseholder (lessee) for a fixed term. It fulfils both short- and long-term residential requirements without ownership costs. Moreover, the lease duration is a maximum of 99 years, as stipulated in section 18 of the Land Act, 2009. The provision in this law applies to all leases, including those governed by customary law and any other law. Leases, according to section 18(1), are classified as either short-term or long-term. A long-term lease is a lease for more than one year; such a lease shall be in written form and not exceed 99 years – any lease for more than 99 years shall be considered a lease for 99 years within the meaning of this section (section 18(1)). A short-term lease, by contrast, is a lease for one year or less, and, as per section 18(2), includes a tenancy for a year renewable every year. Such a lease may be oral or written.

#### **4.4 Registration of titles**

The purpose of registration systems is to make it as straightforward as possible for purchasers of land to discover, before buying the property, what rights they will take subject to<sup>29</sup> and, in the case of registration of title, to assure them that the sellers actually own the land they are purporting to transfer. Section 57 of the Land Act provides for registration of titles such that the registration of any person or community as an owner with title over land shall vest in that person or community the ownership of that land or piece of land, together with all rights and privileges belonging to or appurtenant thereto, free from any other interests and claims but subject to leases, charges and other encumbrances, and to the conditions

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<sup>29</sup> AY Tumwebaze *Land transactions law, practice and jurisprudence* (2007) 12.

and restrictions, if any, shown in the register, as well as to such liabilities, rights and interests as affected by the same and declared by easements under section 28 of the Act, unless the contrary is expressed in the register – provided that nothing in this section shall be taken to relieve any owner from any duty or obligation to which he or she is subject to as a trustee.<sup>30</sup> In this provision, there is no registration concerning freehold, and thus it is contrary to article 170 of the Transitional Constitution, which refers to land belonging to the people of South Sudan.

## 5 Critique of the land tenure system

The Constitution of South Sudan provides limited guidance on land acquisition, primarily referencing leasehold as a form of private ownership. This narrow framing stands in contrast to the Land Act, which outlines three distinct methods of acquiring land, each of which has been discussed in detail above. The divergence between constitutional and statutory provisions raises important questions about the legal coherence and legitimacy of land tenure systems. The following analysis examines the constitutionality of these tenure arrangements and their implications for land rights in South Sudan.

- The constitutional provision that vests ownership of land in the people of South Sudan is just verbiage without meaning. The reason is that the mode of acquisition of land by citizens should have been via a freehold system enabling land to be owned in perpetuity. However, article 171 of the Constitution contradicts the forgoing provision in regard to acquisition by referring the ownership to leasehold system only.
- The Land Act provides for registration of leasehold and customary tenure excluding the freehold system. This is an indication that, practically speaking, land is owned by the government. How could one lease one's own property? Who are the citizens paying the lease amount? When do they become owners forever? All of these questions are the product of the country's previous land history in Sudan. The Transitional Constitution was presumably drafted in such a way as to avoid contradicting the previous land tenure regime in Sudan. In ideal legal system, such as Uganda's, citizens acquire land ownership freely. Lease is a contract which parties enter freely if they so wish: it should not have been a conditional prerequisite for acquiring land. This suggests that the Constitution gives ownership with the one hand but takes it away with the other.

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30 Land Act, 2009, sec 60.

- The Land Act was enacted before the Constitution, and therefore the inconsistency is the result of the historical legal regime.
- The Land Act does not include airspace. This is a critical legal gap in the tenure system. Defining ownership of airspace is important for avoiding future disputes, as was highlighted in *Bernstein v Skyviews* (1978) QB 479. This was a case where the owner of a large estate brought an action of trespass against a company for flying over his land and taking photographs of it. The case turned on whether the airspace formed part of the claimant's land.<sup>31</sup> Lord Griffiths J held that the rights of the owner of land in the airspace above it extend 'to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it'. Above that height, the landowner has no more rights than the general public.<sup>32</sup>

## 6 Conclusion

South Sudan's land tenure system is currently regulated by laws in place and laws that were repealed. This regulation is unconstitutional because the statutory and policy framework contradicts the Constitution itself. For the same reason, constitutional provisions say different things to the relevant statutes and practice in relation to land ownership and acquisition. The country's history of land regulation – dating from the Black Sultanate and extending through a variety of laws until the present day – has contributed to unconstitutional land management. The literature on acquisition makes it clear that all lands in South Sudan can be acquired by the leasehold system. As mentioned, the Supreme Court has ruled that customary ownership cannot be exercised over a piece of land that is not registered, which means that the constitutional recognition of customary ownership is redundant in the light of this judgment – it is the first time that the author has come across a case where both the plaintiff and the defendant lost. Therefore, the land tenure system in South Sudan is regulated by unconsolidated laws that result in a conflict of laws. As such, there is a need to consolidate these fragmented laws on land management in the form of an amendment to include a system of freehold tenure.

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31 *Bernstein v Skyviews* (1978) QB 479.

32 S Clarke & S Greer *Land law directions* (2022) 8.

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