

Does the land belong to the communities?

Critical land tenure issues in the post-conflict constitution-making process in South Sudan

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Abstract

Land is a natural resource central to deepening the economic foundation of society. Its ownership and usage have been at the heart of conflicts in South Sudan among indigenous communities and foreign powers. In the South Sudanese legal framework, land is constitutionally recognised as belonging to the people, but its usage must be regulated by the government according to relevant laws. Despite this constitutional provision, there has been fierce contention over land ownership, with one side – primarily communities – arguing that it should belong to them, while the other side – mainly the government – arguing that it

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should be owned by the government on behalf of the people. There has been little analysis of the question of whether land should belong to communities or the government. This chapter addresses that question, as well as the further question of what the implications are of absolute ownership by either side. It analyses contestation over land ownership and other critical land tenure issues, and develops recommendations for consideration in the constitution-making process in South Sudan.

Key words: *land tenure; land ownership; land belonging to the people; land belonging to the community*

1 Introduction

Land is a natural resource that satisfies a variety of human needs. It thus holds a special place not only in the economic marketplace but also 'deep in the human soul'.¹ In South Sudan's Transitional Constitution, as amended (the Constitution), the ownership of land vests in the people of the country while its regulation belongs to the government.² In October 2023, the Council of Ministers, chaired by President Salva Kiir Mayardit, passed the country's first land policy, affirming – as stipulated in the Constitution – that 'the land shall belong to the people and shall be regulated by the government'. This is contrary to the widespread view that the land belongs to the communities on the basis of their historical and communal rights to land, and has stirred up heated debate throughout the country.³

The Constitution and the new land policy thus agree that the land belongs to the people, but the public view is different. This difference is not due to lack of clarity: the law and the policy are crystal clear. Rather, there has never been consensus on whether the land should belong to 'the people' or to 'the communities'. If this disagreement is not resolved, development may continue to be held hostage to widespread land-tenure insecurity, bringing with it severe socio-economic and environmental consequences.⁴ The argument in this chapter is that, to resolve these

¹ T Tietenberg & L Lewis *Environmental & natural resource economics* (2012).

² The Transitional Constitution of South Sudan, 2011, as amended.

³ N Tiitmamer and others 'Land tenure in South Sudan: Does it promote climate change resilience?' (2017) The Sudd Institute.

⁴ Tiitmamer and others (n 3).

debates and remedy the lack of consensus, the government should reserve the land ownership issue for the new constitution-making process, where consensus can be reached through either a constitutional referendum or popular consultation on the constitution.

Other than the debate about whether land is owned by ‘the communities’ or ‘the people’, both the new policy and the Constitution have several big wins worthy of mention. These include recognition of women’s land rights and communal land rights;⁵ envisioning efficient, equitable, sustainable and environmentally friendly land management; and recognising ideological and ethnic conflicts over land ownership by placing them within their historical context. The new policy describes this situation as involving ‘contesting visions of development and authority over land’ that date back to the colonial era and post-independence Sudan.

Be that as it may, there has been little analysis of the question of whether land should belong to communities or the government. This chapter addresses that question, as well as the further question of what the implications are of absolute ownership by either side. To this end, it analyses contestation over ownership and other critical land tenure issues and develops recommendations for consideration in the constitution-making process in South Sudan. The chapter draws on insights the author gleaned from his research on land tenure and his experience in 2021 as a land policy consultant seconded from the Intergovernmental Authority on Development (IGAD) to the South Sudanese National Ministry of Land, Housing and Urban Development.

After this introduction, the rest of the chapter (1) outlines its methodology; (2) explores the concepts of land ownership by the people and the communities; (3) examines contesting visions of land ownership; (4) reviews the existing policy and legal framework and relevant issues in the realisation of an efficient and inclusive land tenure arrangement in South Sudan, and as part of this undertakes a comparative analysis of land tenure systems in the region and other parts of the world in order to derive lessons for the new South Sudanese constitution-making process; and (5) makes recommendations on what should be considered in that process.

⁵ In fact, classifying land as belonging to the people does not negate the fact that communal rights to land are also recognised in the same policy as well as in the country’s laws.

2 Methodology

To achieve its objectives, the chapter undertakes a review of legal, policy and academic literature to examine the extent to which South Sudan's current land tenure system is efficient, secure and ensures protection for and access by everyone. The chapter also draws on insights from the author's recent experience of reviewing land policy for the Ministry of Land, Housing and Urban Development, an exercise which was supported by IGAD.⁶

Content analysis was employed to assess the extent to which these policy and legal documents integrate best international practices in land tenure. Academic literature was reviewed in order to identify international best practices against which to compare practices in South Sudan. For the purpose of this analysis, the author examined the situation in East Africa, West Africa, and North America and selected one country from each region to use as comparators.

To gauge popular perspectives, media sources were reviewed to identify a variety of opinions on preferred forms of land tenure. Documents from local and regional conferences, such as the South Sudan National Dialogue, were also reviewed to obtain a better understanding of how various groups see land tenure issues.

3 Land and associated rights

'Land' means different things to different people. This section defines land and land tenure or land ownership, and identifies associated rights and how they are protected. In the context of South Sudan, the Land Act, 2009, under Section 4, defines land as 'all land-based natural resources, including urban land, rural land, forest land, pastureland, swampland, floodplains, flora, and local fishing grounds, and lands under which subterranean resources exist, but not those subterranean resources themselves'. In this definition, land is understood basically as everything crucial for sustaining life on earth.

⁶ In 2021, the National Ministry of Land, Housing, and Urban Development reviewed the old draft National Land Policy. The author of this chapter was seconded to the Ministry by IGAD to provide technical support to the Ministry; the analysis contained in the chapter draws in part from the experience of reviewing both the 2014 and 2019 version of the draft policy.

The rules and social relations⁷ that govern land access and rights are known as land tenure.⁸ Land tenure is ‘a system of legal rights and obligations governing the holding, acquisition, use, and disposal of land’.⁹ Simply put, land tenure is a system in which people gain access to land ‘for temporary or permanent use and ... for purposes of shelter, productive activity or the enjoyment of recreation and rest’.¹⁰ Land access may be gained through ‘direct occupation, by exchange (purchase or rental), through membership of family and kin groups or by allocation by government, other landowners or management authorities’. Access to land must be secure.

Land tenure affords one a range of rights. These include (1) the right to use the land for various purposes; (2) the right to exclude illegal occupants; (3) the right to own the land for an indeterminate time; (4) the right to make decisions on how the land can be exploited; (5) the right to gain income from land development; (6) the right to have protection against land grabbers; and (7) the right to transfer land to a different owner through sale, lease, or inheritance, among other things. These parcels of rights can be interfered with based on the tenure security put in place. In other words, whether land can be secure, efficient, sustainable or inclusive depends on the nature of the property rights arrangements or security of tenure.

To protect the rights above, land owners must have security of land tenure. This is defined as

(1) the degree of confidence that land users will not be arbitrarily deprived of the rights they enjoy over land and the economic benefits that flow from it; 2) the certainty that an individual’s rights to land will be recognized by others and protected in cases of specific challenges; or, more specifically, and (3) the right of all individuals and groups to effective government protection against forced evictions.¹¹

Land tenure security is extremely important for livelihoods and economic freedom. Security of tenure can be achieved through land

7 J Small & FN Mhaga ‘Gender, land tenure and environment’ (1996).

8 N Badiey ‘The strategic instrumentalization of land tenure in “state-building”: The case of Juba, South Sudan’ (2013) *Journal of International African Institute* 57.

9 DW Nothale ‘The customary system of land tenure and agricultural development in Malawi’ (1982) African Pamphlet Collection.

10 D Mitchell *Assessing and responding to land tenure issues in disaster risk management* (2011).

11 Mitchell (n 10).

administration, which includes registering people's parcels of land, surveying and demarcating land (that is, marking boundaries), and issuing title deeds to individuals or groups.

As property, land exists under different types of property-right arrangements, namely as state property, communal or common property, private property, and open access property.¹² State property-right arrangements assign land to government institutions. Under this arrangement, we have national parks, wetlands, forests, and land owned by various government departments.

Customary tenure rights are informal, which means that land rights are not documented – that is, they are not owned exclusively through title deeds and registration by a government agency. In this case, land can be accessed and used only through kinship or one's membership of the community that owns the land. Such arrangements are lacking in dimensions that ensure efficiency and security of tenure, such as exclusivity, transferability and enforceability of ownership. If one occupies a piece of land through customary tenure, one loses access to it should one leave it, as ownership is not permanent and someone else from the same community can come and take over that piece of land. In other words, ownership is based on usage: if one abandons the land, it ceases to be one's own unless one has planted trees on it or has ancestors buried on that site. However, customary tenure rights do enable one to have access to land whenever one is in need of it and so long as there is space available in one's communal lands.

4 What does ownership by 'the people' and 'the communities' entail?

South Sudan is witness to a clash of visions over land ownership by the people or by the communities. Yet before analysing this contestation, it is crucial to ask the question: What does ownership by 'the people' and 'the communities' entail? It might be assumed that 'communities' are the same as 'people', but there is a clear distinction. The phrase 'the people' refers to South Sudanese regardless of ethnic or social background, while 'the communities' comprise people who belong to a specific setting. Therefore, it follows that a parcel of land owned by the people is owned

12 Mitchell (n 10).

by everyone regardless of background, whereas land ownership by a community is exclusive of non-community members.

But this is not the only dimension of the word 'people'. It also means the 'public', and thus when a policy confers ownership of a property to the people, it is interpreted as public ownership of that property, which is synonymous with government ownership. People's ownership of land and natural resources stems from the public trust doctrine, according to which anything that the people own is held in trust on their behalf by the government.¹³ The public trust doctrine works well in a context where the government is accountable and responsive to public needs; conversely, governments that are not accountable abuse the public trust doctrine through rent-seeking behaviour.

As such, there are two dimensions to why the land question has become emotive. First, many citizens are concerned about assigning ownership of the land to the people because they see this as assigning it to the government, which they regard as unresponsive and unaccountable given the experiences since 2005 on issues of land. The second dimension is that government ownership of the land evokes unpleasant memories of the Khartoum government in Sudan declaring unregistered land in the Sudan as government's land through the Unregistered Land Act of 1970.

Ownership in the context of land is defined by the Land Act of 2009, under Section 4, as 'the right within the limits provided by law to possess, occupy and use land in perpetuity [and such] right thereon can be inherited by devise or intestacy, and is subject to lease, sale, mortgage, or other transfers and transmissions within the limits of the law'. The allocation of land, by contrast, is 'the process by which a right to hold and use land is provided for by government or customary institutions to an individual, group or corporate body'. Neither the Transitional Constitution nor the Land Act defines the word 'regulation'. Regulation in essence means to control, restrict, direct or manage something. So, in this case, the government is given the power to control or restrict the use of land, or direct the use of it, for public purposes, while the people are given the right to 'posses, occupy, and use the land in perpetuity'.

But if we go by the definition of the public property as the government's property, the current Constitution and the new policy have

13 E Ryan 'The public trust doctrine, property, and society' in Graham, Davies & Godden (eds) *Handbook of property, law, and society* (2022).

basically given the government the power to own and regulate the land. This is contradicted by other stipulations in both the new policy and Constitution as well as existing sectoral laws. For example, in the Land Act, as in the Constitution as amended, the ownership of the land is not limited to the people only. The Constitution and the Act classify the land into public, communal, and private lands. Public land, in this case, is land held by the government in trust on behalf of the people to serve the public interest and is described as (1) land owned by the government institution; (2) land transferred to the government through reversion or surrender; (3) land in which there is no private or communal ownership; (4) land without heir; and (5) land occupied by roads, railways, airports, rivers, lakes, canals, *hafirs*, wetlands and other areas underwater, and forests and wildlife areas gazetted by the government. The land owned by the community is recognised by both the existing laws and the new policy as 'all lands traditionally and historically held or used by local communities or their members'.

Furthermore, the recognition of communal rights to land is not limited solely to ownership. It also means communities should have a say in the land-related decision-making process. For example, in the event of the expropriation of communal or individual land by the government, the Constitution, the new policy, and the Land Act, 2009 (all using nearly identical wording) entitle communities and persons affected to 'prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest'. The Constitution also stipulates that the expropriation must be carried out only after consultation with the concerned communities and persons. The idea of 'prompt and equitable compensation' for communities whose land is taken for the public interest is a big win in the current laws. However, this global best practice has rarely been put to use in South Sudan.

5 Competing visions of land ownership

While current laws acknowledge that the land belongs to the people of South Sudan and should be administered and regulated by the government, the notion of ownership by the people is still contested. The issue is not new; indeed, it has been debated over the years without any headway having been made, consequently holding the efficient and sustainable management and allocation of land to all users hostage to the

outcome.¹⁴ The debate has centred not only on land rights but also on citizenship rights.¹⁵

Three visions of land tenure have emerged so far. The first supports ownership of the land by the government such that it has the power to dispose of the land as it pleases and no community may obstruct access to land by any citizen or business. But for this vision to be one that serves the best interests of the people, the government must be democratically elected and act on behalf of citizens. In this vision, the notion of land belonging to communities undermines the principle of equal citizenship in, and membership of, South Sudan. Adherents of this vision adopt a universalist conception of land in which citizens can access land anywhere, whereas the vision of communal land ownership is one in which citizens who are non-members of a community are excluded from accessing particular areas of land.¹⁶

The second vision supports ownership of land by the communities. This vision stems from the principle of recognising communities' historical land ownership. In a nutshell, it holds that communities are the source from which individual investors as well as the national, state, and local government should obtain land. The third vision vests the right of ownership of land in the people of South Sudan and the right and power to regulate its ownership and usage in the government of South Sudan. This is based on the principle of social contract, in terms of which the people are sovereign and a democratically elected government exercises power in their best interests. The idea of people's ownership is also in line with the public trust doctrine, which 'creates a set of sovereign rights and responsibilities with regard to certain resource commons, obligating the state to manage them in trust for the public'.¹⁷ In this sense, the 'public' is synonymous with the 'people' (as stated previously). Again, for this to hold true, the government must be democratically elected and be responsive and accountable to citizens.

All of these clashing visions are enshrined in the new policy and existing laws. While communal rights are recognised, the communities do not want land ownership to be attributed to the people, as they fear

14 Badiey (n 8).

15 Badiey (n 8).

16 Badiey (n 8).

17 Ryan (n 13).

losing their land to the government. This explains the contestations since 2005.

Two of the three visions were explicitly exhibited during the National Dialogue. For example, the Greater Bahr al Ghazal Regional Conference of the National Dialogue, held in Wau in 2019, recommended that the government be given full ownership and management of the land.¹⁸ However, the Greater Equatoria and Greater Upper Nile Regional Conferences of the National Dialogue, held in Juba on separate occasions in 2019, rejected the idea of the government owning land, as was proposed at the Greater Bahr el Ghazal Regional Conference. Instead, the Greater Equatoria Conference recommended that land should be owned by the communities, while the Greater Upper Nile Conference recommended that gazetted urban land be owned by the government and that rural land fall under the ownership of communities, except for protected areas such as wildlife parks and forests.

The same disagreement over the issue of land ownership could not be resolved at the National Conference of the National Dialogue held later in November 2020. This left the issue without consensus. Therefore, to pursue a policy position that has been overwhelmingly rejected at inclusive dialogues like these would negate the intention of the policy – namely the resolution of the attendant problems.

In the current context, ownership and control of the land by either the government or the communities (or both) would be a recipe for a tragedy of the commons.¹⁹ The government is, in most cases, not an efficient manager of a public resource like land or other natural resources due to the prevailing rent-seeking behaviour among public resources managers.²⁰ Holding public resources in trust on behalf of the people can be effective only when there is a governance framework with checks and balances that can ensure that land tenure is secure, equitable, and exercised in a sustainable manner.

Communities are not any better at managing common resources.²¹ In the absence of a strong governance framework, powerful individuals can use their influence to manipulate land allocation to serve their

18 The South Sudan National Dialogue 'Comminique of Bahr al Ghazal Regional Conference' (2020).

19 G Hardin 'The tragedy of the commons' (1963) *Science* 1243.

20 Tietenberg & Lewis (n 1).

21 Tietenberg & Lewis (n 1).

personal interests at the expense of communities. Malpractices in land management and the allocation of large swathes of land to foreign investors are attributed to the fact that the land belongs to communities who are exploited by elites.²²

The mantra that 'the land belongs to the communities' has never existed in land laws in South Sudan.²³ While it is often attributed to the Comprehensive Peace Agreement (CPA), what the CPA did – and what was incorporated in the interim regional Constitution of Southern Sudan and later in the current Constitution – was to recognise communal rights to land as well as communal practices and local heritages. This was ground-breaking given that the previous Sudanese laws denied this right. However, recognising communal rights to land does not mean that communities own the land without regard for access to it by other entities. Much of the disagreement has been fuelled by fear among the communities that granting the government power over land would lead to their losing their land. This is not far-fetched, especially in view of the experience of the past 18 years.

Unfortunately, assigning land ownership to communities seems to encourage tribal citizenship 'at the expense of national citizenship'.²⁴ This is in stark contrast to the government's vision of an inclusive society where citizens belong, and live, anywhere.²⁵ While it is a problem that affects the entire country, this contradiction is more prevalent, and nagging, in Juba, which serves as the capital of both South Sudan and the state of Central Equatoria.²⁶

Between 2005 and 2023, the national government, the Bari community, and Central Equatoria clashed over control of land.²⁷ The Government of South Sudan has sought to control land in Juba, in particular previously gazetted land, as the Transitional Constitution gives it power over the national capital. In this way, it would then be able to allocate the land to all citizens of South Sudan regardless of their

22 DK Deng 'Land belongs to the community: Demystifying the "global land grab" in Southern Sudan' (2011) Land Deal Politics Initiative.

23 Deng (n 22).

24 C Boone 'Property and constitutional order: Land tenure reform and the future of the African State' (2007) *African Affairs* 557.

25 Boone (n 24).

26 DK Deng 'Land, conflict and displacement: A conflict-sensitive approach to land governance' (2021) Conflict Sensitivity Resource Facility.

27 Badiey (n 8).

background. However, the population of Juba has been growing and this previously gazetted land will not be able meet the increasing demand for space for residential areas and other land uses in the capital. The national government thus proposed an expansion of Juba beyond the original limits of the gazetted Payams of Kator, Munuki, and Juba town. It also proposed that the Central Equatoria government relocate to Yei to avoid jurisdictional conflict over Juba. The government of Central Equatoria, however, sees itself as the custodian of Bari land and has wanted to negotiate on its behalf and to protect its interests.²⁸ Perhaps a look at regional contexts might help South Sudan address this crippling challenge.

6 Consequences of a lack of consensus on landownership

Lack of consensus on land ownership has complicated land management, as discussed below.

6.1 Widespread insecurity of land tenure

Lack of consensus on land ownership has in part created widespread tenure insecurity in the country. Land tenure insecurity arises where there is a lack of legal, social, and institutional recognition of land rights, as well as a lack of enforcement of safeguards against illegal action that deprives people of their land rights. Most people do not have title deeds, or if they do, they have acquired them through means that are not socially, legally, and institutionally recognised. For example, some of the lands have been acquired without consultation with communities. In other instances, there is contestation over available land.

Key issues responsible for widespread land tenure insecurity include inadequate capacity of governance institutions to administer land and lack of consensus on land ownership. This has serious implications for efficient use of the land. It scares investors away, as none of them would want to invest in land without clear ownership rules. By contrast, mechanisms that strengthen tenure security include land surveying, land boundary demarcation, traceable land title deeds, social and legal recognition of land rights, and recognition of seasonal access rights. Yet,

28 Badiey (n 8).

in several cases, these land security mechanisms have been found to be lacking. For example, in an assessment conducted by this author and others in Aweil and Tonj in 2016, land tenure security guarantees were found to be either completely lacking in practice or only partially applied across towns and rural areas (see Table 1). This lack of application of land tenure security mechanisms has engendered widespread land tenure insecurity in South Sudan.

Table 1: Land tenure security in Tonj and Aweil

Aspects	Customary				Statutory			
	Towns		Rural areas		Towns		Rural areas	
	In practice	In law						
Land surveying	P	√	X	√	P	√	X	√
Communal boundary demarcation	P	√	X	√	P	√	X	√
Communal land title deeds	P	√	X	√	P	√	X	√
Individual land title deeds	P	√	X	√	P	√	X	√
Season rights recognition	P	√	√	√	P	√	√	√
Social norms recognition	P	√	√	√	P	√	√	√
Communal reciprocal support	X	X	√	X	X	X	√	X
Land administration and management approaches	P	P	P	P	P	P	P	P

Key: P = partial, X = absence, √ = yes or it exists

Source: Author's analysis of land tenure security based on a 2016 study he and others conducted in Aweil and Tonj; study published in 2017 by the Sudd Institute²⁹

29 Tiitmamer and others (n 3).

6.2 Land use incompatibility

Lack of consensus over land ownership has crippled efficient land management. For example, mining areas overlap with protected wildlife areas, while oil and gas areas overlap with agricultural areas, protected wetlands, and other protected areas. The new national land policy strives to resolve tensions over conflicting land uses, such as those between pastoralists and farmers, but it falls short of establishing strong governance mechanisms to resolve land use incompatibilities and tensions between other resources and resource users, such as in the case of minerals and farmers, wildlife and pastoralists, farmers and wildlife, and forest and farmers.

Accordingly, the new constitution should incorporate a governance framework that can govern the movement of cattle within South Sudan by designating specific passages and corridors for cattle grazing and by adopting a market-based approach to issues of grazing so as to incentivise co-existence between various groups and, specifically, restrict land uses to avoid degradation of natural resources. For example, ecologically and socially sensitive zones should be barred to mining and oil exploration. Moreover, there is a need to establish special courts to resolve land use conflicts in order to enhance both co-existence and land productivity.

6.3 Environmental and resource degradation

Due to land use incompatibility, as well as to weaknesses in land tenure rights and enforcement engendered by a lack of consensus on land ownership, land pollution is ubiquitous in South Sudan. Much of it happens on communal lands. For instance, in Juba, waste is dumped on communal land, which degrades the land value. This relates to tenure security, which needs strengthening. In Paloch and other oil-producing areas, what used to be an agriculture area has been turned into oil fields, with farmers and agro-pastoralists continuing to graze their animals in polluted oil fields and, in so doing, exposing animals and people to toxins from the oil industry.³⁰ Pollution is both a major destroyer of land value and a major cause of deprivation of land rights.

³⁰ MB Bol 'Oil industry's impact on land use patterns in Upper Nile State' (2014) European Coalition on Oil in Sudan.

Thus, the issue of environmental degradation and land pollution needs serious consideration in current and future land policies. In other words, combatting environmental degradation in all aspects of development should be emphasised in the constitutional process.

6.4 Ambiguity of land jurisdiction

Jurisdictional roles are not specified, as no specific land is allocated to particular levels of government to administer and regulate. This is due in part to the lack of consensus over land ownership. This has led to confusing overlaps in responsibilities for land management. In the law, the National Ministry of Land, Housing and Urban Development is responsible for policy development (see Table 2). State ministries responsible for land play similar roles. Local governments, such as counties and *payams*, also play their roles. Yet there is no clear jurisdiction such that each can regulate a particular area of land (as is the case in other contexts).

The state ministry responsible for land in Central Equatoria, for example, has been in a tug-of-war for several years with the national government. Similarly, as noted previously, the Bari community has demanded recognition of its ownership of land in Juba and has argued with the government over the expansion of Juba.³¹ Originally, Juba City was composed of the three *payams* of Kator, Juba and Munuki, which together had a population of 250 000 at the time of the signing of the CPA. This population has tripled over the years, further complicating land management as demand for land increases. This rising population requires land, yet the parties – the national government, the Bari community, and Central Equatoria – do not agree on how to meet this need. This has left the city to expand on its own, with many people choosing to settle as and where they wish – a situation that leads essentially to widespread land grabbing.

31 E Martin & I Mosel *City limits: Urbanisation and vulnerability in Sudan Juba case study* (2011).

Table 2: Institutional framework for land management

National Land Ministry	National Land Commission	State Land Ministry	County Land Authority
<ul style="list-style-type: none"> • Policy formulation • Oversight for efficient land administration • Allocate adequate financial resources • Provide logistical support and adequate number of trained human resources • Develop master plan for the capital city • Intervene in town planning • Manage land cadastre and registration 	<ul style="list-style-type: none"> • Resolve land conflicts • Research land issues • Provide quasi-judicial function with regard to land disputes 	<ul style="list-style-type: none"> • Land management and land administration within each state jurisdiction • Town and rural planning • Demarcate boundaries between community land • Resettle IDPs and returnees • Land zoning and gazetting • Evaluate land quality 	<ul style="list-style-type: none"> • Hold and allocate public land • Advise on gazetted land planning

6.5 How land ownership is assigned in other regional contexts

Here we take a brief look at other contexts by comparing land ownership, the integration of best practices such as the principle of prompt and just compensation in the event of expropriation of land for public interest, and recognition of informal settlements (see Table 2). We begin with Kenya, one of South Sudan's neighbours. The Kenyan 2010 Constitution grants ownership of land to the people of Kenya 'collectively as a nation, as communities and as individuals'. While the Transitional Constitution of South Sudan gives land ownership to the 'people', it does not emphasise

ownership by the various categories of the people of South Sudan 'as a nation, as communities and as individuals', as the Kenyan Constitution does.

Kenya has specified the three categories of owners of land – the nation, communities, and individuals – to avoid confusion as to who owns the land; moreover, it clearly assigns particular land to each level of government. In South Sudan, by contrast, neither the Constitution nor the new land policy specifies the land that each level of government should hold. This has created the jurisdictional conflicts that were identified earlier.³²

Currently, South Sudan's Constitution describes public land as land acquired at various levels to serve the public interest or as land that which is owned neither privately nor by a community. This creates ambiguity, as many people are afraid that community land which is not registered might not be recognised as such and could therefore be at risk of falling under the category of public ownership and depriving communities of their historical land rights.³³ While the Land Act of 2009 elaborates on what constitutes public land, it does not go further to delineate this in terms of jurisdictions, as is the case in Kenya. The new policy does not resolve this either.

While the South Sudanese Constitution grants the ownership of subterranean resources to the Government of South Sudan, and top-surface land to original landowners such as communities, the Kenyan Constitution grants mineral and oil-rich lands to the government. The difference is that the Kenyan government owns the lands under which minerals and oil have been found, whereas in South Sudan the government owns subterranean resources while the communities still own the surface of the same land. This has serious implications if one owns the resources beneath the land but does not own the surface, given that the surface is likely to be damaged. Conversely, if the owner of the top surface has weak rights, then it is unlikely that the powerful owner of the resources underneath the surface could exploit them in a manner which is environmentally and economically efficient, a situation that could result in a 'tragedy of the commons'.³⁴

32 Deng (n 22).

33 Deng (n 22).

34 Hardin (n 19).

In other contexts, such as the United States, each level of government has a clear area of what it has been given by law to dispose and regulate. For example, the federal government of the United States owns and manages 'about 28% of the 2.27 billion acres of land in the United States'.³⁵ This federal public land is owned by the people of the United States and is managed on their behalf by five different government agencies, namely the Bureau of Land Management, the Fish and Wildlife Service, the National Park Service, the Forest Service, and the Department of Defense. These agencies manage the land for the purpose of preservation, recreation, and development. In South Sudan, the government owns national parks, wetlands, forests, land that houses government institutions, and gazetted urban land in major urban areas such as Juba, Malakal and Wau. However, the amount of land that each level of government holds in South Sudan is not clear, which is indeed a source of confusion and conflict.

In Ghana, about 80 per cent of land is owned by communities through customary arrangement, while 18 per cent of it is owned by the government.³⁶ Communal land in Ghana is vested in various stools and managed on their behalf by designated government agencies, yet in South Sudan there is no designated government agency that manages and administers communal land. While much of the land is owned by the communities through customary arrangements, the exact amount of land owned by communities in South Sudan remains unknown.

Table 3: Land tenure in selected countries

	South Sudan	Kenya	Ghana	USA
• Who is assigned ownership of the land?	People of South Sudan	People of Kenya as 'a nation, as communities and as individuals'	President on behalf of the people of Ghana	Federal government State government Individuals Native Americans

35 Congressional Research Service 'Federal land ownership: Overview and data' (2020).

36 JT Bugri & E Yeboah *Understanding changing land access and use by the rural poor in Ghana* (2017).

• Who owns the land rich in subterranean natural resources?	Government of South Sudan owns only the subterranean resources without owning the land	Government of Kenya owns the subterranean resources together with the land	Government of Ghana owns all minerals under and on land	The owner of the land also owns subterranean resources
• Is prompt and just compensation integrated?	Yes	Yes	Yes	Yes
• Is consultation before the takeover of land for public interest integrated?	Yes	Yes	Yes	Yes
• Are customary land rights recognised?	Yes	Yes	Yes	Yes
• Are informal settlements formalised?	No	Yes	Yes	Yes

Source: Compiled by the author from scholarly articles, constitutions and other legal documents from selected countries

7 Conclusion and policy implications

Both the Constitution and the new policy recognise communal land rights, yet at the same time assign ownership of land to the people of South Sudan. Ownership of the land by the 'people' denotes public or government ownership. This is, therefore, the main cause of contestation. The disagreement is due in part to a lack of trust in the government, which is compounded by the inability of institutions to be responsive to the needs and concerns of the communities with regard to land rights. For the communities, attributing land ownership to the people of South

Sudan undermines the recognition of their land rights, as they fear that people anywhere can come and grab their land under the pretext that the land belongs to the people of South Sudan. They also fear that the government can take over their land since the policy gives ownership to the people, which by virtue of the public trust doctrine entails government ownership on behalf of the people. This contradiction overshadows other important aspects of the new land policy, such as the entitlement of communities to 'prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest', as well the requirement of consultation by the government before any activity that might affect the land.

As regards contestation over ownership, we can take a few lessons from the practices that were briefly reviewed. On the one hand, these are similar in various ways to what South Sudan does; on the other, some jurisdictions, such as Kenya, assign land ownership to the people as 'a nation, as communities and as individuals' to avoid confusion. This is something that South Sudan itself should seriously consider doing. Other contexts, such as the United States, grant ownership of minerals and other natural resources to the landowner, while others yet, such as Kenya, grant the land and land-based natural resources like oil and minerals to the government. In the former, the natural resource developer leases the land from the landowner to develop and extract the resources and pays rental fees and royalties; in the latter case, the government or resource developer pays the original landowner compensation and a share of revenue. Again, South Sudan should seriously consider these two cases in order to develop a model which is equitable and sustainable.

Most importantly, controversial matters such as land ownership should be resolved through a constitutional referendum or broad-based popular constitutional consultation. The key illustration is Kenya, where land matters were part of the 2010 constitutional referendum. This is a practice South Sudanese leaders should consider as part of the constitution-making process.

Overall, contestation over land has grave policy implications. Therefore, the Government of South Sudan should seek consensus first before proceeding with any major land policy. Failing to do so will continue to cause disagreement and frustrate necessary policy interventions meant to engender efficient and sustainable management and the allocation of land to all users. In the absence of consensus, the

consequence is pervasive land tenure insecurity, land use incompatibility, and environmental degradation.

In conclusion, it is clear that, under both the new policy and the Constitution, the land belongs to the people of South Sudan, which in this case is also the government, given that any public property is held in trust by the government on behalf of the people. However, while the laws and the policy grant land ownership to the government, there is no consensus on this legal and policy choice. As a way forward, the question of whether the land should belong to the people (that is, the government) or the communities (entitling different stakeholders to own a specific territory of land) should be answered through an inclusive, democratic constitution-making process that potentially includes a free and fair constitutional referendum.

8 Recommendations

We have examined the land ownership question and identified critical issues in regard to which we make the following recommendations:

- *Build consensus first on land ownership:* Focus on resolving contestation over land ownership by building consensus through the constitution-making process, where the land question can be decided by a constitutional referendum or a constitutional popular consultation, with the outcome incorporated into the new constitution.
- *Eliminate ambiguity in land jurisdiction and establish a strong governance framework for efficient and sustainable land allocation and management:* The new constitution should incorporate a framework that can govern land use to minimise conflicts, land tenure insecurity, land use incompatibility, and corruption. For each communal land, allocate a percentage of it to the federal and state government for public purposes. Each level of government can then regulate the area of land allocated to it by the constitution. For example, the federal capital territory and other federal lands could be regulated and administered by federal land agencies, while the state capital territory and other lands could be regulated and administered by state land agencies. Communal land or land recognised under customary arrangements should be administered by a special land agency established for this purpose and overseen by the national (federal) legislature.
- *Adopt a data- and evidence-based approach to resolving land ownership contestation:* Commission studies on land issues to inform policy formulation and decisions.

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