

Assessing Land Administration Systems and their Legal Frameworks: A Constitutional Focus

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SUMMARY

Constitutions should provide a legal basis for addressing a country's land administration system (LAS) and legal reform. Considering this vital role, a country's constitution should be evaluated to ensure that it supports, in principle, LAS and law reforms that include pro-poor objectives. In recent years, several land administration assessment frameworks have been developed, yet none give attention to the associated legal framework of LAS reform from a constitutional perspective. It is now commonly recognised that a LAS that is significant for all people in a developing country should include pro-poor approaches. A context-specific framework to evaluate a LAS and its legal framework, specifically the relevant constitution, is lacking. The study addresses this gap in developing a conceptual framework to support the holistic evaluation of a country's constitution in the context of Sub-Saharan Africa (SSA). The framework development involves secondary data (constitution, land laws, land policy, legislation, and published journal articles) collated and assessed using a sampling logic method. Three key areas of a constitution emerged as important to the delivery of pro-poor LAS: human rights, rule of law, and legal pluralism.

The impact of a constitution and potential areas of improvement may be revealed with the application of the conceptual framework. This study is aimed at LAS and the reform of its legal framework from a constitutional perspective. Because the practice of African customary law is principally in rural and peri-urban areas, it is aimed at achieving the significance of the LAS for peri-urban and rural land rights holders. The study is significant for policymakers, professionals, and academics engaged in the reform of the LAS and its legal framework in a developing country SSA context.

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1. INTRODUCTION

Most national constitutions in sub-Saharan African (SSA) countries give minimal attention to the customary legal framework while devoting much attention to the statutory legal framework for land administration (Alden Wily, 2012c). Such constitutional deficiencies may justify several LAS and legal reform interventions. However, in SSA, many such reforms have failed to provide significance and success (see Section 1.2 for definitions of significance and success) for customary land rightsholders (Alden Wily, 2012d): “The crux of the disappointing results of reforms is the treatment of customary rights. It is still rarely the case that customary rights have been considered worthy of equitable legal respect as a form of private property” (*ibid.*: 14). Hence, giving relevance to the customary legal framework in the constitution may bring about significance and success in reform initiatives.

In SSA countries, the social, economic, and political transformation has resulted in the ‘proliferation’ of new constitutions. This has necessitated the adjustment of the ‘conceptual boundaries’ of LAS and associated legal frameworks (Negretto, 2012; Alden Wily, 2018b). The extent of recognition of customary legal framework has come to the fore in SSA countries. In these countries, about 90% of land access is through customary processes resulting in customary land tenure (Bae, 2021). Moreover, two-thirds of cultivated land in SSA countries is held under customary tenure (Chimhowu, 2019).

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Although LAS and legal reform have been on the agendas of the World Bank and FAO for the past decades, their approach has been criticised for lacking thorough assessment of the local context, possibly leading to inadequate reform interventions (Burns *et al.* 2006; Boone, 2007; Zevenbergen, *et al.* 2013). Several frameworks have been developed to assess the institutional and technical impacts of LASs on land rights-holders (for example, Chimhamhiwa, 2010; Ali, Tuladhar and Zevenbergen, 2010; Akingbade *et al.* 2012; 2014; Emerson *et al.*, 2012; Yilmaz *et al.*, 2015; Adekola, Krigsholm, & Riekkinen, 2021). However, these frameworks do not fully consider the role and processes of customary land administration in their assessment, nor do they give credence to the value of African customary law in such societies.

A conceptual framework to guide cadastral system development has been designed for this purpose (Hull, 2019; Hull and Whittal, 2020). The framework was developed to ensure the three goals of success, sustainability and significance are present in the development of a cadastral system (*ibid.*). It is centred on human rights, pro-poor policies, and good governance. These triple components of the so-called 3S (success, sustainability, and significance) conceptual framework help to guide cadastral system development in customary land rights contexts.

Although Alden Wily (2018) evaluates the constitutions of African states concerning compulsory acquisition, no standard evaluation framework has been developed for the distinct aspect of LAS and its legal framework. Effective and efficient LAS with an appropriate legal framework is essential to ensure tenure security (Alden Wily, 2011; Subedi, 2016; Ghebru & Okumo, 2017; Otubu, 2018). To achieve this in land reform projects, researchers and practitioners are encouraged to understand the LAS of a country in context. In general, the law is subservient to the constitution of the state, which is the highest law in the land. The land policy directs both the development of land laws as well as institutions to deliver on policy goals. But these must be conducted in line with the provisions of the relevant constitution.

1.1 Aim and Outline

The 3S conceptual framework of (Hull, 2019; Hull and Whittal, 2020) of guiding cadastral system development addresses success, sustainability, and significance in customary land rights contexts. It focuses on LAS reform projects from the policy level down to implementation. Land administration reform is addressed at the land policy level. The framework assesses project outcomes against the needs of customary land rights holders (*ibid.*). This study focuses on LAS development at the constitutional level with special emphasis on the role of the legal framework in LAS reform. The aim is to develop a conceptual framework for evaluating the constitution in this regard, ensuring the needs of peri-urban and rural land rights holders are met.

The methodology of the study is explained in section 2. Thereafter, Section 3 develop a conceptual framework for assessing LAS and its legal framework. The conclusion is presented in section 4. In the next section, the definition of terms used in this study is presented to enable readers to understand the terms as applied to this study.

1.2 Definition of terms

Land reform in post-colonial Africa is concerned with addressing the impact of colonialism to effect greater equity in landholding and restore dignity to those previously dispossessed of their land. In Nigeria, land reform involves legal and land administration (procedural, governance, and communication) reforms. This may entail removing the provisions of amendment of the Land Use Act (LUA) from the Constitution, revoking the powers of the Governor to consent to mortgage transactions in the assignment of land, and removing the uncertainties hindering Nigerians from enjoying possessory rights to land (Atilola, 2010; Mabogunje, 2010; Ibiyemi, 2014). At all levels, this involves adopting the principles of good governance, democratic land governance, as well as responsible land administration and management among other things to allow effective land administration service delivery (see Arko-Adjei, 2011; de Vries and Chigbu, 2017; Hull and Whittal, 2021).

Land tenure reform may involve changing the terms and conditions of landholding with the primary aim of recognising locally held land rights and at the same time empowering land rights holders with these rights (Alden Wily, 2000).

Success, Sustainability, and Significance: These have been defined by Hull (2019) in terms of cadastral systems development, which includes LAS reform. The gap between planning and implementation requires successful intervention (Hull & Whittal, 2020). Suitable goals are essential to guide the processes. Whether success is obtained is measured in land administration service delivery. Assessment should be an ongoing process and built into interventions (Hull & Whittal, 2020) since LASs should continue to change and adapt to changing contexts. Successful LAS in the long term can be said to be sustainable - this is a vital outcome of a reform process (Williamson *et al.* 2010). When goals of LAS are not aimed at delivering effective land administration services, interventions may fail through a lack of significance (Hull & Whittal, 2020). Land rights holders may not access services due to inefficiency and ineffectiveness (examples are given by Ghebru & Okumo, 2017 and Nwuba & Nuhu 2018). For a LAS to be successful and sustainable, significance must be built-in (Hull and Whittal, 2020).

Rule of Law: Rule of law is a:

“... principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency” (United Nations 2004: 4). In sum, the rule of law implies that no person, natural or juridical, is above the law.

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Legal pluralism is defined by many as the co-existence of two or more laws or legal systems within a geographical space (Merry, 1988; Griffiths, 1986; Pimentel, 2011; Ndulo, 2017; Fisher & Whittal, 2020). In this paper legal pluralism is defined as a condition or system in which two or more states, groups, principles, sources of authority, etc., coexist in a manner that there are devolution, decentralisation, self-determination, and autonomy for individual bodies in preference to monolithic state control. In former African colonies, legal pluralism is most often used to describe the coexistence of African customary law and received colonial law (noting that these hybrids are ever-evolving) along with their different LASs. While the received law is mainstreamed, African customary law may often not be recognised, but even if it is, it may be treated as inferior and archaic.

Human rights refer to the claims entitled by every human being under his or her humanity (OHCHR, 2021), irrespective of race, sex, gender, nationality, ethnicity, colour, language, and religion or social group. The rights to life and liberty, the freedom of opinion and expression, the right to work and education, and many more are rights to which people are entitled without

any form of discrimination (United Nations, ND). It is, however, noted that there is no basic human right to land.

1.3 Contribution to literature

Many countries have initiated reform in land tenure and LAS (Norfolk & Tanner, 2007; Deininger *et al.* 2008; Benjaminsen *et al.* 2009; Kapitango & Meijs, 2010; Sagashya & English, 2010) with varying degrees of success and failure. The failure of LAS reform in Africa is attributed to a lack of attention to the legal status and economic activities of the poor (Mowoe, 2019). Land tenure reform initiated in Nkoranza South Municipality, Ghana failed because state policies did not sustain communal practices, land use dynamics and cultures (Anaafo, 2015). Land access and use in Ghana requires “communal dynamics” in regulating land rights (Anaafo, 2015: vii). In South Africa, land tenure form is not successful because of “inappropriate logic “of land reform (Cousins, 2016) which is not significant for land right holders (Hull & Whittal, 2017). Land tenure reform in Mozambique is considered exemplary because all land rights holder were accommodated under a single Act and backed with full legal protection (Tanner, 2002).

Land administration reform was carried out in Ghana, Uganda, Tanzania, and Ethiopia with decentralization as the central aim of reform. Ghana and Uganda recognised customary land tenure through the legal framework with traditional institutions playing important roles (Byamugisha, 2014). They harmonised customary and statutory rights and institutions. Ethiopia and Tanzania replaced traditional authorities with civil community-level institutions with less recognition of customary land rights (*ibid*). In Ethiopia and Tanzania formalization of landholders as holders of statutory and not customary rights was carried out. For the countries under study, there was an extension of the central government LAS. Financial and social sustainability is key to the legal challenges attributed to land administration reform (*ibid*, Hull and Whittal, 2020). The developed framework will help address social sustainability.

The development of this conceptual framework will help address one of the main legal challenges associated with LAS reform. The legal challenges relate to the adoption of replacement theories instead of adaptation theories (see Hull, Babalola and Whittal, 2019) in legal framework for land administration. In addition is the interaction of *inherent* and *inherited* legal framework which affects LAS reform in SSA. Inherent means legal framework in existence pre-colonial while inherited means legal framework brought about by colonisation (see Hull and Whittal, 2021). The latter is used to suppress the former making LAS reform in SSA not to be context-specific. Efforts are geared towards making customary legal framework for land administration evolve.

Equity regarding respect and recognition of customary land administration alongside statutory land administration has been at the forefront in recent debates in Africa and elsewhere (Mamdani, 1996; Cuskelly, 2011; Diala, 2019; Diala & Kangwa, 2019; Osman, 2019). Researchers, including anthropologists and social scientists, have contributed from a range of

disciplines. Some of these studies explain the mode of indirect rule of the colonial land administrators in former colonies. On the one hand, indirect rule was adopted to co-opt customary institutions within colonial land administration processes because the colonial administrators recognised the strength of “indigenous rulers” (Ismail, 1999: 7). On the other hand, indirect rule enabled colonial administrators to control land in rural areas (Ntsebeza, 2005). Subsequently, the trend of replacing indigenous African customary land law with colonial land law was motivated by western values and the commodification of land as a capital resource. At independence, the formerly colonised new states adopted the constitutions and land policies of their former colonial administrations (Alden Wily, 2012b). Leaders in the new states viewed customary land rights and tenure as a relic of a past era that would eventually evolve into western land rights and tenure. In the meantime, customary institutions have remained in place in underdeveloped rural areas of the country, administered by traditional authorities largely outside of, and unrecognised by, constitutions, laws, and state organisations. Improving the legal status of customary land rights in Africa is hence a major concern in the region (Alden Wily, 2018a). To improve the legal status of customary land rights and recognition of African customary law, the paper develops a conceptual framework addressing improvements in LAS and the reform of legal framework (including constitutional law) for peri-urban and rural areas.

2. METHODOLOGY

This paper used a desktop review of secondary data using a ‘text-based approach’ to draw on a range of secondary data sources including peer-reviewed journal articles, conference papers, doctoral thesis, books, briefs on policy issues to identify gaps in land reform. These sources reflect on land reform land tenure reform, human rights, rule of law, and legal pluralism that are specific to the SSA context. The subject search included secondary data sources dealing with LAS reform, land tenure reform, legal frameworks, cadastral systems, human rights, LAS, legal pluralism, and rule of law and land laws as about LAS reform. Documents published since 2010 were included in the sources used.

The search criteria used to identify sources are as follows:

- The combinations of the following phrases: land, LAS reform, land tenure reform, rule of law, human rights, and legal pluralism was used to interrogate for peer-reviewed journal articles, conference papers, doctoral thesis, books, briefs on policy issues. using (Google Scholar, Springer Link, ScienceDirect, and JSTOR).
- Literature is limited to English publications.
- Publications include peer-reviewed journal articles, conference papers, doctoral thesis, books, briefs on policy issues
- Sources are focused on SSA and other developing contexts.

By reading through the title and abstract a ‘saturation sampling logic’ was used and a final list of 16 publications (see Table 2- Appendix for the full list) was selected. Additional texts dealing with human rights and constitutions, but not specifically related to land, categorises emerged

during the sampling process. (See Table 3-Appendix). The sources were considered sufficient enough to address the research objective in that additional sources are not likely to affect the research findings.

Coding and categorisation of the source documents were undertaken using NVivo which helps with data transparency and reliability of the findings. NVivo is a multi-tasking software allowing researchers to make meaning from bulky qualitative data. The process helps further researchers to be able to replicate the research. Coding and categorisation of the information were conducted. Coding means the identification of key topics and explanation of these topics with ‘brief catch phrases’ (Allan, 2003). In an attempt to identify themes from the literature, similar codes are grouped into concepts with similar concepts grouped into categories.

The source text was imported into NVivo 12, and the text is categorised as human rights, rule of law, and legal pluralism. The key aspect of the research is the constitution of the country in question; the elements investigated in line with this aspect are human rights, rule of law and legal pluralism (defined in section 1.2). Through coding, these elements are identified in the literature using different colours. During the coding, potential indicators emerged which, together with the elements, provide for the conceptual framework for assessing the LAS from a constitutional (aspect) perspective. These indicators are described in section 3.

3. EVALUATION FRAMEWORK FOR CONSTITUTION IN SUB-SAHARAN AFRICAN COUNTRIES

Each constitution is the supreme law of the land – it should provide the basis of operation for land policy and land law of any country. This means all laws must be developed in line with constitutional principles (International IDEA, 2011; Fisher & Whittal, 2020). A constitution should describe the social, economic, and political use of land, forming the intersection between the legal, political, and social systems (Bulmer, 2017). A constitution should set out in clear terms how it proposes to address rule of law, human rights and, when relevant legal pluralism, concerning LAS (Pimentel, 2011; Diala, 2018). Figure 1 illustrates the role of the constitution concerning land policy and land management in LAS. The triangle shows the constitution at the apex with the land policy and land law at a level below the constitution drawing on principles from the constitution for its enactment. The land administration and land management stands at a level below the land policy operating on the principles of the land policy. The constitutional reform links the constitution to human rights, rule of law, and legal pluralism in LAS.

Three aspects of constitutions are discussed: human rights, rule of law, and legal pluralism (see Figure 1; Table 1). While human rights and the rule of law are observed in many constitutions in SSA, there is a general deficiency in recognition of the reality of legal pluralism within constitutions (Pimentel, 2011). According to Alden Wily (2018b), reform in LAS should be

embedded in the constitution of every country. State-citizen property relations need to have their basis in the constitution (*ibid.*). Beginning with constitutional reform addressing the three pillars of human rights, rule of law, and legal pluralism, LAS reform that follows will be more likely to be successful, sustainable, and significant

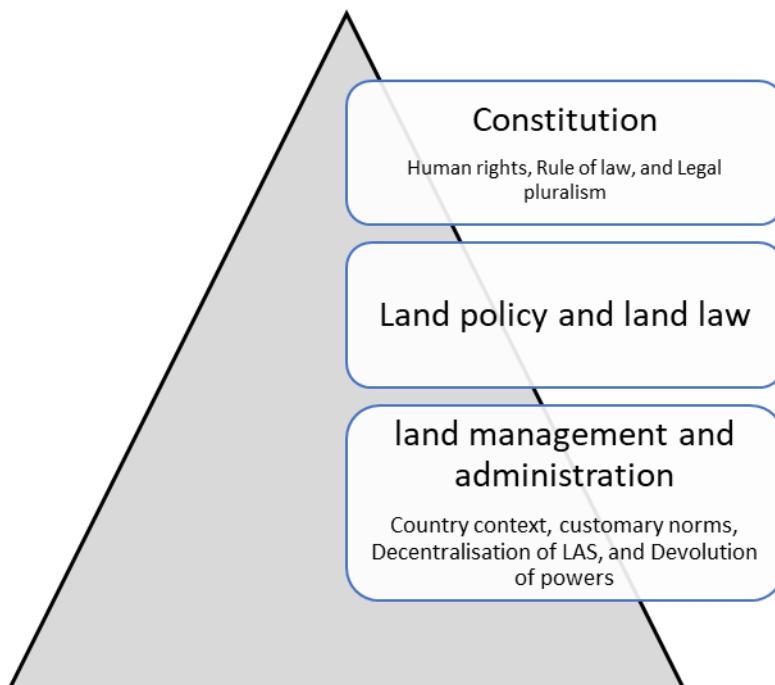


Figure 1: LAS and its legal framework: linking human rights, rule of law, and legal pluralism to Constitution

Land policy and land law should flow from the constitution. The administration of land flows naturally therefrom. The constitution is a symbol of a social compact between the governors and the governed (Bulmer, 2017). As stated by Hull and Whittal (2017), customary needs, norms and values are necessary as part of the process of policy and legislation formulation which is equally applicable to the process of the constitution formulation. This should involve the active participation of the populace, else a disconnect occurs between the government and the governed, leading to a loss of significance for the people. This may negatively influence the success and sustainability of policies and laws emanating from the constitution.

Potential indicators are identified using the conceptual framework of the constitution being the additional aspect added to the framework of Hull (2019) with its associated elements: human rights, rule of law and legal pluralism. The results of this investigation are reflected below.

3.1 Human Rights

Van der Molen highlights that although a human right to land or land access is contested and not globally recognised, “... a human right to property is not about the relationship between a human being and land ..., but about the relationship between a human being and the state. It concerns the protection of the individual against interference by the state” (Prah, 2013; Van der Molen, 2016, 54). Measures of protection should not be against unlawful and non-legitimised state interference alone but also against coercive pressures by elite groups and the powerful (Van der Molen, 2016).

Human rights are either substantive or procedural (Van der Molen, 2016). Two aspects of human rights concerning LAS should be incorporated in constitutions. Substantively, the constitution should reflect respect for land rights, whether registered, unregistered, individual, communal, or extra-legal (*ibid.*). The constitution should define land tenure and land rights through legislation and customary law (Prah, 2013; see Hull and Whittal, 2021). How land tenure and land rights are constitutionalised is of primary importance for peri-urban and rural dwellers (Randolph & Hertel, 2012).

Many human rights require positive and negative obligations to be performed by the state (Akandji-Kombe, 2007). Considering positive obligations, the state might adopt a legal framework that reflects legal pluralism in the sense that land rights holders can have access to land without any form of discrimination in terms of culture, laws, and administration. Negative obligations entail that the state desists from unlawful land acquisition, forced evictions and excessive land use controls (Mchangama, 2011). Any form of deprivation in property rights should require sufficient compensation provided for in the constitution (Alden Wily, 2018b). The absence of such sufficient compensation by the state can be termed a violation of human rights (Van der Molen, 2016; Alden Wily, 2018b). Hence, according to the human rights tradition, citizens expect that the state will not deprive them of their land rights for arbitrary reasons outside of laws of general application. Such arbitrary reasons could be based on social constructs such as status, gender, or race (Van der Molen, 2016). The state likewise has an obligation towards the citizens to respect, protect and promote their land rights. The positive obligation requires the state to *regulate something* rather than *do something*—in other words, the state is not expected to provide access to land as a human right, although it may well do so. Rather, the state is expected to protect landholding(*ibid.*).

3.2 Rule of Law and Legal Pluralism

The rule of law and legal pluralism are interlinked through their “theoretical formulations” and “practical applications” (Gebeye, 2019: 341). Rule of law and legal pluralism is premised on law and legality which links both to the instrumentality of law and its institutional frameworks (Gebeye, 2019). Rule of law is a universal feature of constitutional regimes describing a cultural commitment (Reynolds, 1986). For LAS to be successful, the constitution should preserve and promote rule of law (*ibid.*). In statutory legal reform that begins with constitutional reform,

Schmid (2001) and Berman (2007) identified legal pluralism as one of the areas embodying both conflict and opportunities.

The rule of law can be described using thinner and thicker conceptions (Tamanaha, 2004). Thinner conception “means that government officials and citizens are bound by and abide by the law” (Tamanaha, 2012: 233). This minimalist approach to the definition of rule of law is adopted in this section because it excludes democracy and human rights. Democracy is a system of governance. The human rights aspect of the conceptual framework is already discussed in section 3.1. Using this minimalist approach rule of law in this study context implies that governance is based on law and these laws must be publicly available. These laws must be consistent and not contradictory (Tamanaha, 2012). The thicker conception deals with the procedure of law-making and operation as well as the substantive content of the law as it pertains to good governance, constitutionalism, and social justice (Gebeye, 2019). Gebeye (2019) argues that legal pluralism should be taken seriously to overcome deficiencies in the conception of the rule of law. With a thinner conception of rule of law, a lack of written and clear law may compromise the legitimacy of institutions and even states (Okoth-Ogendo, 1993; Clapham, 1996). In adhering to a thicker conception of rule of law, institutions are more likely to protect the interests of all land rights holders (see also Gebeye, 2019).

Social justice can be used as a measure of the quality of governance (Diamond, 2008). Therefore, a constitution that aims for the thick conception should promote social justice. Bennett (2011) supports providing social justice to the rural and peri-urban populace. The rights to culture, as-built into a constitution, should include the acknowledgement and application of customary law as well as the customary justice system.

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Within the body of literature, legal pluralism is either supported or not. Dissenters do not see a role for legal pluralism in a post-colonial constitutional state because of the hierarchy between actors and non-state actors in land administration. In addition, they contend that statute law has more relevance than customary law in land administration. Studies on land disputes led researchers to first describe legal pluralism (von Benda-Beckmann and Turner, 2018). Those in support advocate strong, weak, and legal dualism (Woodman, 2011; Rautenbach and Bekker, 2014). Strong legal pluralism is when customary, indigenous, and religious law operate without state recognition (Woodman, 1998) while in weak legal pluralism they have state recognition and may be supported by the law (*de jure*) as well as occurring extra-legally (*de facto*) (see van Asperen, 2011). Where customary law is enshrined in a constitution, this will be further supported in other laws and state institutions (*ibid.*). legal dualism is the application of international and regional laws (these are formed through customs, treaties etc. by states) within the constitution of a state. An example could be building fundamental human rights into a constitution, as is the case in the Constitution of South Africa.

Alden Wily (2012b) states that the recognition of collective tenure in the constitution is important as failure to do the same is a major legal exclusion in the last century. “Land is for social use and must go to the tiller” (Constitution of Guyana, 1980); in South Africa, it was

declared that “the land shall be shared among those who work it” (Freedom Charter, 1955), although land policy since 1994 is more complex than a “land to the tillers” policy. Democratization, agrarian reform, and restitution are essential elements to be indicated in the constitution of a state (Alden Wily, 2000; 2008; 2011). In constitutions, the aspects of human and social rights (such as recognition of customary law) are essential for building legal pluralism into the legal framework (Alden Wily, 2018a). The importance of the constitutional link between customary law and the rights to culture in the constitution cannot be overemphasised (Diala & Kangwa, 2019).

Merlet & Merlet (2010) stipulate that a legal framework that acknowledges customary law is likely to include socio-institutional approaches to land access and land value while a legal framework that only acknowledges statutory law usually exclusively embraces a market-based approach to land access and land value. With a socio-institutional approach, social rules that are legitimate in the eyes of the users can also be reflected in law and the rules of state engagement (*ibid.*; Pimentel, 2011). However, there is a disincentive to codifying social rules by building them into law – customary land laws exist because of social processes and social constructions, which are context-specific, and continuously evolve according to claims and struggles between social actors (Le Roy, 1996; Lavigne-Delville & Chauveau, 1998; Merlet, 2007). Once social rules are codified as law, they are considerably less flexible and less nuanced.

As part of the approach to protecting social tenures, Alden Wily (2012a) states the reasons to pursue a pro-poor approach to customary rights: (1) the poor are the majority in the customary sector (75% by international measures); (2) the poor are most dependent on common resources, which are the natural capital most easy for states and private sectors to appropriate; (3) not just the state, but also the local elites have proven to be best able to manipulate customary norms in their favour, and at the expense of the poor majority; (4) elites have proven most able to escape the subordination of rights to customary landholdings by states.

A form of devolution of administration from the state to non-state actors is essential (von Benda-Beckmann *et al.* 2009; Pimentel, 2011; Krueger, 2016). These administrations can be informed of recording land rights, protecting land rights, or resolving disputes arising from the same (Weeks, 2013). In defending land tenure and rights in a situation of uncertainty, individuals, families, and communities holding unregistered rights need to be allowed access to easy and cheap mechanisms to defend their rights (Janse, 2013; Weeks, 2013).

Table 1 shows the conceptual framework resulting from this investigation. It identifies the potential indicators related to understanding the LAS and its legal framework concerning the conceptual framework of the constitutional aspect and its three elements identified at the outset of the investigation.

Table 1. Elements of the constitution that address human rights, rule of law and legal pluralism,

Aspect	Elements	Potential Indicators
Constitution	Human rights	forced evictions, expropriation with or without adequate compensation, record land rights whether registered or unregistered, protection against state interference and powerful groups, recognition of indigenous laws, non-discrimination and human dignity, equitable rights and tenure, equitable access to land, an integrated and sustainable approach to LA.
	Rule of law & Legal pluralism	The clarity in the law, availability in a local language, enactment through democratic procedures, substantive demand (civil and political rights, justice, and social welfare), accommodation of social rules and protection of social tenures, the exclusive power to customary institutions, recognition of customary law, local dispute mechanisms and social justice, devolution of powers, hierarchy, and self-determination.
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The contribution in this paper is the extension of the 3S conceptual framework of success, sustainability, and significance (Hull, 2019) in the addition of the aspect of constitutional law along with the three elements and identified indicators. The study also identified an essential part of the land policy that was missing from the understanding of the LAS context in the 3S conceptual framework of success, sustainability, and significance (Hull, 2019).

4. CONCLUSION

LAS and legal reform have failed to provide significance for customary land rightsholders. It is suggested that this arises out of reliance of statutory legal framework. As a means of addressing this gap, a conceptual framework for assessing LAS and legal framework is

proposed. Drawing on the strength of empirical research that uses case study methodology, a ‘sampling logic methodology’ was adopted to develop the conceptual framework for evaluating the constitution in the context of LAS reform. This was achieved by linking the aspects of the legal framework for LAS reform in the constitution (Figure 1). The framework is based on human rights, rule of law, and legal pluralism. The substantive and procedural potential indicators of human rights are described. It is shown that there is positive and negative obligation to be performed by the state. As per rule of law and legal pluralism, socio-institutional approach to land administration may help recognise customary legal framework for LAS.

The evaluation area – Constitution is proposed to be relevant to LAS and legal framework development in any context as well as the associated elements and potential indicators. This is because the focus of this conceptual framework is geared towards LAS and legal framework reform. Land administrators and LAS developers operating in any context may find the conceptual framework effective for the development that ensures the 3S of success, sustainability and significance. It is conceptualised that reform that will be *successful* must also be *significant* and *sustainable* for all land rights holders (Hull & Whittal, 2017).

To determine the applicability of the conceptual framework, countries undergoing LAS and legal reform needs to be interrogated as per their understanding of LAS and their experiences of LAS and legal reform concerning the goals of LAS and legal reform and the role of stakeholders in achieving these goals. The perspective of land policy-makers and land administrators on LAS and legal reform needs to be determined. In doing this, the framework will be refined from the findings of these case studies to keep with the whorled nature of scientific research (Hull, 2014).

This study focuses on LAS development at the constitutional level with special emphasis on the role of the legal framework in LAS reform. The aim is to develop a conceptual framework for evaluating the constitution in this regard, ensuring the needs of peri-urban and rural land rights holders are met. This considers the customary law and integrates this within the constitution. Acknowledgement of the importance of the constitution reflecting customary law will support sustainable LAS and legal reform which may address the needs of rural and peri-urban dwellers in developing contexts. A framework to assess LAS and its legal framework is developed to target the reform at a constitutional level.

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6. Appendix

Table 2. Sources used for the LAS and its Legal Framework Context.

Citation	Abbreviated title	Case study areas
Merlet & Merlet (2010)	Legal pluralism as a new perspective to study land rights	Nicaragua
Mchangama (2011)	CATO Policy Report, May/June 2011 the right to property in global human rights law.	
Bennett (2011)	Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform.	South Africa
Van Asperen (2011)	Evaluation of pro-poor land administration from an end-user perspective	Zambia

Alden Wily (2011)	The Law is to Blame: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa	SSA
Alden Wily (2012)	Customary Land Tenure in the Modern World. Rights to Resources in Crisis Brief 1 to 5	SSA
Woodman (2011)	Legal pluralism in Africa: The implications of state recognition of customary law	Africa
Van der Molen (2016)	Property, human rights law, and land surveyors	
Hull & Whittal (2017)	Human rights in tension: guiding cadastral systems development in customary land rights contexts	
Diala (2018)	legal pluralism and social change: insights from matrimonial property rights	Nigeria
Alden Wily (2018)	Risks to the sanctity of community land A critical assessment of new legislation regarding forestlands	Kenya
Von Benda-Beckmann & Turner (2018)	Legal pluralism, Social Theory, and The State	
Alden Wily (2019)	Compulsory Acquisition as a Constitutional Matter	Africa
Diala & Kangwa (2019)	Rethinking the interface between customary law and constitutionalism	SSA
Gebeye (2017)	Legal Theory in Africa: Between Legal Centralism and Legal Pluralism	
Gebeye (2019)	The Janus face of legal pluralism for the rule of law promotion	SSA

Table 3: Text about Human Rights and Constitution

Author/Year		Aspect
Akandji-Kombe (2007)	Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights	Human rights
Mchangama (2011)	CATO Policy Report, May/June 2011 the right to property in global human rights law.	Human rights
Bulmer (2017)	What is a constitution? Principles and Concepts	Constitution
Nhlapo, T., Arogundade, E & Garuba, H. (eds) (2013)	African Culture, Human rights, and Modern Constitutions	Human rights and Constitution
Hull and Whittal (2021)	Human Rights and Land in Africa: Highlighting the Need for Democratic Land Governance	Human rights

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BIOGRAPHICAL NOTES

Kehinde Babalola is a PhD student at the University of Cape Town. He completed his Master of Science in Geomatics specializing in land administration and cadastral system research in 2018. In 2019 he started his PhD working on land administration systems and their legal framework. He is a Nigerian registered professional land surveyor and in 2022 became a South African registered professional engineering surveyor. He is a member of the Nigerian Institution of Surveyors and the Geoinformation Society of South Africa.

Simon Hull is a senior lecturer and 2019 PhD graduate at the University of Cape Town (UCT). His doctoral research was in the field of customary land tenure reform. He completed his MSc at UCT in the field of digital close-range photogrammetry in 2000 whereafter he spent two years working as a marine surveyor. He spent a further four years completing his articles and is a registered South African Professional Land Surveyor. In 2006 he changed careers and became a high school Maths and Science teacher in a rural village in northern Zululand. He has held his current position at UCT since 2012, where he lectures in the foundations of land surveying, GISc, and cadastral surveying. His research interests are in land tenure, land administration and cadastral systems, and the use of GIS to address Sustainable Development Goals.

Jennifer Whittal is a Professor in the Geomatics Division at the University of Cape Town. She obtained a B.Sc. (Surveying) and an M.Sc. (Engineering) specializing in GNSS from the University of Cape Town. In 2008, Jenny obtained her PhD from the University of Calgary applying critical realism, systems theory and mixed methods to a case of fiscal cadastral systems reform. She is a Professional Land Surveyor and lectures advanced surveying and land law. Research interests are land tenure and cadastral systems, sustainable development and resilience in landholding for the poor, historical boundaries and property holding, and cadastral issues in the coastal zone.

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