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Human Rights and Land in Africa: Highlighting the Need for Democratic Land Governance

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Abstract

Human rights principles form the foundation for the move towards responsible land administration. They are embedded in such international treatises as the Sustainable Development Goals, New Urban Agenda, and Voluntary Guidelines on the Responsible Governance of Tenure, among others. These treatises provide the backdrop to the development of land policies and administration systems that seek to secure land tenure and land rights for all through adherence to human rights principles such as non-discrimination, equity and justice, gender responsiveness, transparency and accountability. Yet the human rights tradition is built on Western values and biases, and there is some contention as to the universal acceptance of this. In discussing land rights in Africa, assumptions about the universality of human rights should be weighed against such contentions if land reform programmes are to sustainably succeed. In this chapter, the arguments around human rights are presented in the context of African land reform, and a model of democratic land governance is proposed.

Keywords: land rights, land governance, land administration, land tenure, land reform, broadly African worldviews, *ubuntu*

1. Introduction

In this chapter we explore the implications on land rights of a human rights-based approach (HRBA) to development, with a focus on African land rights and administration. We note that the modern trend towards *responsible* land administration [1] is underscored by the obligation of states to ensure the human rights of their citizens. The guiding principles for achieving responsible land administration are thus based on many of the principles of human rights and good governance frameworks. The rallying cry of 'Land rights for all' [2] is likewise rooted in several international human rights treatises that reinforce and expand on the right to own property and the right to adequate housing [3]. The realisation of 'land rights for all' places the onus on governments to recognise, respect and protect a wide range of land rights and land tenures, some of which may be based on perceptions that do not accord with Western-based notions of rights. This may place tension on the realisation of responsible and effective land administration in such contexts.

In this chapter, the idea of a HRBA to development of land is explored, with focus on Africa. We discuss tensions between the human rights tradition and

cultural norms that may impact on land reform and land administration programmes. Following that, we present a pro-poor perspective on land and expound on the idea of democratic land governance [4, 5].

2. Human rights principles

The fundamental principles of human rights are identified in **Table 1**. A distinction can be made between *structural* and *operational* principles [9]. The structural principles describe legal aspects of human rights and include universality, inalienability, indivisibility, interdependence, and interrelatedness of human rights. Operational principles apply more to the application of human rights within their context. Participation, accountability, non-discrimination, transparency and the rule of law are operational principles.

Human rights may be nationally or internationally framed in a Bill of Rights, which further elaborates on the principles and makes them relevant for a particular context. As an example, the Bill of Rights ('the Bill') as set forth in the Constitution

Structural principles	**Universality**	Human rights apply to everyone, regardless of race, gender, religion, or any other means of classification, without exception. All people everywhere have human rights by virtue of being human [6–8].
	Inalienability	Human rights may not be taken away from anyone, although the enjoyment of some rights might be restricted for a time or purpose, usually for the greater good [6, 7].
	Indivisibility	All human rights have equal status and cannot be ordered hierarchically. The fulfilment of one right depends wholly or in part on the fulfilment of other rights, and the improvement of one right facilitates the advancement of other rights [6–8].
	Interdependence & interrelatedness	Whether economic, social, cultural, political, or civil, all human rights are inherent to the dignity of every person, and all human rights are interrelated and interdependent [6, 7].
Operational principles	**Non-discrimination & equality**	Purposeful discrimination (e.g. apartheid) as well as the unintended consequences of policies and practices that may have a discriminatory effect are precluded. Non-discrimination is complemented by the principle of equality [6–8].
	Participation	People have the right to participate in how decisions are made regarding protection, enforcement and fulfilment of their rights. They also have the right to access information relating to the decision-making process [6, 8].
	Accountability	Governments should be held accountable if human rights are not enforced. It is not enough for rights to be recognised in law or policy – there must be real and practical means of checking that these obligations are being met [6, 8].
	Rule of law	States should also comply with the legal norms and standards, both international and national, which ratify the protection and fulfilment of human rights. Aggrieved rights-holders should be able to seek compensation or appropriate redress in accordance with the rules and procedures provided by law [6, 8].
	Transparency	Governments should be open about decision-making processes and people should be able to know and understand how major decisions affecting their rights are made [8].

Table 1.
Human rights principles.

of the Republic of South Africa, 1996 ('the Constitution') [10] may be compared to the Universal Declaration of Human Rights [3]. While the Articles of the Declaration and the Sections of the Bill overlap considerably, there are *inter se* additions and omissions in both documents. The Bill, being far more context specific (for the nation of South Africa) than the Declaration (international relevance), holds more detail.

The Declaration is supported by Covenants and Conventions. Two notable covenants are the International Covenants on Civil and Political Rights – CPRs [11] – and on Economic, Social, and Cultural Rights – ESCRs [12]. The CPRs include rights to life, the prohibition of slavery, freedom of movement, equality before the law, freedom of religion and expression, and the right to democratic governance. ESCRs include the right to employment and trade unions, social security, food, water, basic education, and health. These were initially intended to be equally promoted, following the principle of indivisibility, but this was met with resistance from some UN member nations [13]. So, while the United Nations recognises CPRs and ESCRs as equal, it is left to signatory states to decide how these Covenants are to be interpreted and applied in their specific contexts. This has led to "internal contradictions concerning both how to promote human rights and who should be endowed with equal human rights" [14]. It is worth noting that the Constitution includes aspects of both groups of rights in its Bill of Rights, suggesting that CPRs and ESCRs may be identified as equal, at least in South Africa.

One last distinction needs to be made, and that is between horizontal and vertical relationships with respect to rights, duties and obligations. Again, the Constitution is referred to as an example. Section 8 of the Constitution refers to the application of the Bill of Rights. In the first instance, the State is obligated to respect, protect, promote, and fulfil human rights (see also Section 7 (2)) – this is the vertical relationship between the State and rights-holders. In the second instance, rights-holders – be they natural or juristic persons – are equally obligated to uphold the rights as laid out in the Bill of Rights. This is the horizontal relationship.

3. A human rights-based approach to development of land in Africa

A HRBA to development provides the conceptual and practical framework for realising human rights throughout the process of development [15] and puts human rights at the heart of development [16]. A rights-based approach to development puts power in the hands of the beneficiaries of development, as rights-holders, and obligates states to fulfil their duties and obligations towards citizens. This means "empowering marginalised groups, challenging oppression and exclusion, and changing power relations" [17]. But empowering causes power differentials and possibly also disempowerment - there are winners, but possibly also losers, in development processes. For example, an emphasis on gender *equality* changes the power dynamic and differential between men and women within a household or community. This can have negative and unintended consequences, especially in traditionally patriarchal societies [18]. The question is whether such consequences should be allowed to detract from the long-term goal of having a more equal, morally just society? We return to this question later in the chapter.

Notwithstanding the principle of universality, it is thus recognised that human rights principles are an *ideal* and are not recognised by, enforced by, nor even appropriate for, all peoples and cultures in the world. Different worldviews may yield different conceptualisations of human rights principles [19]. For example, from a broadly African worldview, the right to own land extends to the living, the unborn, and the (deceased) ancestors as well [20]. This understanding demands

that, for African contexts, land rights are interpreted cross-generationally. Such an understanding has implications on the application of human rights principles in land administration because this cross-generational understanding challenges the fundamental definition of a human as understood in Western culture.

With cognisance taken of these concerns, the human rights tradition is presented hereafter along with the potential benefits and challenges of a HRBA to development. The concerns mentioned above are explored in more detail and the implications for land administration and land reform are then discussed.

3.1 The human rights tradition

According to the United Nations Common Understanding (UNCU) on a HRBA [9, 21], the following three requirements should be met in a HRBA:

1. Development programmes should further the realisation of human rights;

2. Every development initiative should be guided by human rights principles;

3. Development initiatives should contribute to improving the capacity of duty-bearers to uphold their obligations and rights-holders to claim their rights.

The idea of states being duty-bearers draws from the human rights tradition, which is summarised [22, 23] as follows:

- People are not mere beneficiaries; they are *rights-holders*;

- States are not only service providers, they are *duty-bearers* obligated to "respect, protect and fulfil people's human rights" [23]. To this list, the Constitution adds the obligation to *promote* human rights (see Section 7 (2)). The obligation to *respect* means to avoid interfering directly or indirectly with the enjoyment of a right [13, 24]. To *protect* means to take the necessary measures to make sure that other parties do not interfere with one's enjoyment of a right. The obligation to *fulfil* may be broken into two parts [13]: facilitation and provision. To *facilitate* means that duty-bearers need to put in place the necessary structures for rights-holders to be able to claim their rights, which is equivalent to the Constitution's obligation to promote (see e.g. Section 9 (2)), while *provision* relates to an obligation to make services available to assist rights-holders to claim their rights.

- States should be *held to account* if they fail to meet their obligations in this regard. These obligations are as follows:

  ○ Guaranteeing that all rights may be exercised without discrimination;

  ○ Taking steps towards the full realisation of ESCRs without undue delay;

  ○ Not taking any measures that would hinder the full realisation of ESCRs;

  ○ Using the maximum available resources to fulfil obligations;

  ○ Prioritising actions towards assisting the most vulnerable groups; and

  ○ Guaranteeing delivery on a minimum core obligation that satisfies the minimum essential levels of each right.

The extent to which rights are claimed, and obligations are fulfilled is a function of capacity, which we link to governance in a later section (see [25]). "A person can only be held accountable if that person feels that he/she *should* act, that he/she *may* act; and that he/she *can* act" [13]. To elaborate, accountability in this regard depends on the fulfilment of these three conditions:[1]

1. Responsibility: a person must accept that it is their responsibility to fulfil an obligation.

2. Authority: a person must possess the authority to carry out the obligation.

3. Resources: a person must have the necessary resources required to fulfil an obligation.

Practically, this means that if governments follow a HRBA to development, they will employ an accountable and participatory approach that includes stakeholders in the process. There will be a consequent shift from assessing the needs of beneficiaries of development, to empowering citizens to recognise and claim their rights while also ensuring that duty-bearers honour their responsibilities [15] – the vertical obligation. This shift from charity (the optional exercise of concern for the needy) to obligation [26] avoids the pitfall of failure to consult adequately, which leads to "imposed policies which lack popular support and understanding" [27]. But if the horizontal application of human rights is enabled, as in the Constitution, then communities are already empowered to take responsibility for the realisation of human rights. Their participation in the development process is hence more effective in terms of putting pressure on the State to fulfil its (vertical) obligations.

3.2 Benefits and challenges

The following are potential benefits to following a HRBA to development [16]:

1. *Empowerment*: By adopting a HRBA to development, needs can become claims and charity can become justice. Such empowerment is likely to raise the self-esteem of the disadvantaged, poor, and marginalised and enable them to take ownership of their role in the development process.

2. *Accountability*: This is the key to improved transparency and effectiveness regarding the fulfilment of state obligations.

3. *Participation*: There should be opportunity for all stakeholders to participate at all levels and stages of the development process in a way that is active, free and meaningful. This includes enabling the poor and marginalised to identify their own development objectives and their active engagement in designing and implementing projects to meet their needs. It also means that developers need to be aware of societal power relations in this regard and how these may limit or promote the ability of some groups to participate.

4. *Integration*: A HRBA to development allows for the integration of laws, social practices, policies and institutions, and exposes societal power relations that may disadvantage certain groups.

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[1] Note that references to 'a person' include the state.

5. *Protecting and promoting ESC rights*: The legitimacy of ESC rights as human rights is contested by many governments, but a HRBA enforces the equality and indivisibility of all human rights.

Adopting a HRBA to development is challenging [16]. The first challenge is putting it on the official agenda of governments; the next challenge is implementation [22]. The *context* of development (political, institutional, cultural, and social factors) influences implementation, with the result that there is no one-size-fits-all approach. Consequently, development needs to be tailored for a particular context to make it suitable to circumstances [28] or fit-for-purpose [29]. There is also a presumption of a *level of organisation and opportunity* for participation that might not be present, especially among the poor and marginalised who may feel culturally intimidated into not sharing their views. This is especially relevant if we consider the caution raised at the beginning of this chapter: human rights are perceived by some to be culturally Western [26, 30]. There is an air of superiority about human rights that are based in Western liberal cultural norms [30] – participants who do not share those views may feel intimidated into not sharing theirs. Also, the principle of equality is not universally accepted, leading some people to feel culturally intimidated. Law and practice are not always aligned, so, although Sections 9 and 30 of the Constitution respectively affirm the equality of everyone and protect their rights to language and culture, discrimination still happens. Where participation is free and fair, it can be *time-consuming* as service providers engage in listening, educating and training, organising, conflict resolution, and empowerment. From an evaluation perspective, human rights goals are *long-term*, so assessing the impact of development that is cognisant of a HRBA is difficult (see also [9]). Adopting a HRBA to development pushes development organisations into a politicised arena where power imbalances are directly challenged. This also makes the approach unpopular with states and donors.

Thus, for a HRBA to work effectively "it needs the very conditions it is there to create" [16]. Successful implementation of a HRBA requires developers to follow its core principles, take up the mantle of facilitation, and in so doing empower rights-holders to claim and exercise their rights effectively while ensuring that duty-bearers meet their obligations.

The final and more concerning challenge for adoption of a HRBA is the issue of universal acceptance of human rights. As mentioned above, not everyone accepts the notion of human rights as being internationally recognised and universally applicable. This challenge is presented in the next section.

3.3 Human rights in Africa

> *"Human rights are currently recognised worldwide as ideals to be pursued by human societies. A growing number of instruments, organisations and mechanisms have been established at national and international levels to implement and protect them. The concept of human rights is grounded on the idea that people have rights owing to their being human... The United Nations (UN) has described human rights as those rights which are inherent in our nature and without which we cannot live as human beings ... Human rights are therefore understood as rights which belong to an individual as a consequence of being a human being – and for no other reason. One need not possess any other qualification to enjoy human rights." [31]*

The quotation above highlights the principle of universality, which is a fundamental notion of human rights: to enjoy human rights, all that is required is for you to be human. Yet the universality of human rights is contested:

> *"The more troubling questions facing Westerners and non-Westerners alike pertain to whether contemporary international human rights instruments, given their Western biases, can be said to apply to peoples from non-Western cultures." [26]*

Some authors contend that international human rights standards were built on Western values [14] without consideration of different value systems [31, 32]. "There seems to be some consensus ... that the concept of human rights as generally understood is historically a *Western* concept" ([26], emphasis added). Mutua [30] calls human rights "fundamentally Eurocentric", adding that they serve to promote Western ideals/culture over non-Western ideals/culture (which he refers to as the *Saviour* and the *Savage* respectively, which metaphor is further explained below). Murithi [33] asks "whether human rights are truly universal or do they merely represent the historically dominant Western civilisations' world view?" He further notes that the Universal Declaration of Human Rights [3] was drafted with no representation from sub-Saharan African countries and argues for a more inclusive understanding of human rights. Although the modern notion of human rights may have been introduced and imposed in Africa through colonialism [26, 30, 31], there are "rich traditions on the African continent founded on the notion of human dignity and 'humanness'" [33]. This "African indigenous conceptualisation of human rights" may be linked to the "African philosophy and principles of *Ubuntu* and African Indigenous Knowledge Systems" [31]. *Ubuntu* is noted to be difficult to define [34, 35]. It may be described as:

> *"... a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that ... a person can only be a person through others."* ² [35]

The tension, therefore, arises because international human rights treatises are grounded in liberal democracy, which is individualistically based [36], whereas the notion of *ubuntu* that informs an 'African view of human rights' is embedded in communalism [35, 37]. Yet Mokgoro [35] notes that the values on which the Constitution and Bill of Rights are based (drawing as they do from international human rights treatises) are in accord with the values of *ubuntu*. Thus we see, in the Constitution, the horizontal obligation referred to earlier.

There is a tendency to dichotomise "the West and the Rest" [36], which Mutua [30] expounds on in his Savages, Victims, Saviours metaphor of human rights. Within the context of human rights, he claims that non-European or Third World culture that deviates from the human rights norm is the Savage. Human rights proponents claim that the Savage needs to be civilised. The Victims are people whose dignity and worth have been 'violated' by the Savage. Victims are generally portrayed in the media and human rights discourses as powerless, nameless, dispirited masses. But help is at hand: Victims can appeal to international organisations like the United Nations and NGOs or Western states for help. These institutions are not the Saviour, however, but merely the vehicle of salvation. The Saviour "is ultimately a set of culturally based norms and practices" that are aligned with the human rights norm [30]. This Savages, Victims, Saviours metaphor of human rights entrenches the Eurocentrism of the human rights tradition and is condescending towards non-Western cultures.

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² In Sesotho: *motho ke motho ba batho ba bangwe*; or in isiXhosa:*umuntu ngumuntu ngabantu*

In response to such a damming metaphor, the qualities of African and Asian cultural norms are lauded as equal to, if not superior to, Western notions of human rights [26, 31, 32]. But Sewpaul [36] cautions against idealising communalism over individualism and asserts that, even in cultures that embrace the spirit of *ubuntu*, human rights violations perpetuate. On the other hand, the United States of America (as the prime example of a Western state), "which sets itself as the moral authority on human rights, has a deplorable record of human rights abuses" [36]. It seems that "there is none righteous, no, not one" (Romans 3:10 NKJV – cf. Eccl 7:20) and neither an individualistic nor a communal view of human rights is faultless.

But Nagengast [37] presents something of a silver lining, claiming that there has been a decrease in human rights violations in Africa over the past few decades. This is attributed to a general shift from communalism towards liberalism and good governance. This does not imply that Africans have discarded the notion of *ubuntu*. The claim is that human rights are being understood as political and legal safeguards of individual autonomy, both from the citizen and community perspective as rights-holders and from the state's perspective as duty-bearer. It is impossible to say whether this is because of the imposition of Western ideals on the Rest, as is claimed by [26, 30] (see also [15], quoting [38]), or due to the natural "vernacularization" of transnational ideas like human rights [32].

What is important to note is that there is resistance to the adoption of human rights as applying universally and equally to everyone everywhere, and cultural norms must be taken into account. There are many cultures in the world in which some people – due to their position in society, gender, wealth, genetics, lineage, or some other inherent or acquired trait – are afforded more respect and more rights than others. This teaches us that, no matter how good the intentions are, caution should be exercised when applying Western notions in African contexts, because while some rights are fairly universally accepted (for example, the right to citizenship), others are contested (such as equality with respect to gender, or freedom of religion).

4. The implications for land administration

4.1 Some definitions and discussions of pertinent terms

Land governance is fundamentally concerned with a government's ability to make and administer the rules, mechanisms, policies, processes, and institutions by which land, property and natural resources are accessed, used, controlled, transferred, and managed [39, 40]. A critical dimension of governance is "a government's ability to make and enforce rules, and to deliver services" [25]. When we consider land governance, the issue of state capacity is very important.

Land administration can be conceived of as the operational component of land governance in pursuance of national land policy goals, plans and strategies. It involves processes of determining, recording and disseminating information about the relationship between people and land [41, 42].

Land rights may be defined as rights to occupy, use and transact in land, including rights to exclude others from exercising such rights, and rights to enforce protection of the rights-holder. "A right refers to what the holder can do with the thing or what the holder can prevent others from doing" [43]. Thus, we say a land right determines *what can be done with land*. This includes rights to [44, 45]:

- access, occupy, enjoy and use land and resources while restricting and/or excluding others from enjoying the same benefit;

- deal in land through a land market as well as inherit and bequeath land;

- develop or improve land and benefit from the associated improved land values or rental income.

Land rights *per se* are not recognised as human rights under international law, yet they constitute the basis for access to food, housing and development [44]. For example, security of tenure underpinned by legal registration is identified as a key factor in the realisation of the right to adequate housing, along with the obligation of states to ensure such security [46]. The onus rests on country-specific land administrators, as duty-bearers, to ensure that land tenure is protected and enforced so that land rights may be realised.

A HRBA to land rights draws attention away from the purely economic value of land and instead highlights the social and cultural importance of land (see e.g. [47]). In the development of a new conceptual model for the continuum of land rights [48], land (*terra firma*) is seen as a human right common to all levels of land value complexity. Land rights are seen as essential to the realisation of other fundamental rights, particularly the rights to food and housing [49]. Yet they do not have the international recognition they warrant [45]: "there is no global instrument to protect property rights" [50] and "no human rights treaty has recognised land rights as being a core human rights issue" [45].

Land tenure refers to *how the right is held* and may be defined as "the terms and conditions on which land is held, used and transacted" [51]. Some examples are freehold, leasehold, and customary tenure. These determine "the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land" [44]. This definition identifies land tenure in terms of relations *between* people *about* things, i.e. as a social or property relationship. It is worth noting that this relationship is often defined by legislative provisions but may also be defined by customary law. Legislated land tenure forms imply a suite of land rights appropriate to that type of landholding. Legislated tenure forms deliver strong land tenure security through surveying the boundaries of the proprietary unit, registration of title, the formal processes of land transfers, the management of boundary and access disputes, and through the processes of property valuation, taxation, and land use management. The customary law approach focuses on customary norms and rules, which are those that are validated by community or family consent regarding rights of use and access. In order for custom to be considered customary law it must pass the test of certainty, reasonableness, uniform observance in the community, and endurance [52, 53]. It is like 'unofficial law' that is widely practiced and regarded as locally legitimate.

One of the goals of effective land administration is to provide land tenure security. The degree of tenure security may be an indicator of good land governance [54]. Benefits of secure tenure include sustainable development and improved livelihoods, dispute resolution, reduced land conflicts, improved land use planning, management of natural resources, and environmental protection. It also gives people more decision-making capacity and mobility. Land tenure security may be understood to reflect the certainty that land rights-holders will be able to uphold their rights to land in the face of challenges to those rights. In other words, tenure security is "the legal and practical ability to defend one's ownership, occupation, use of and access to land from interference by others" [55]. Such challenges often come in the form of investment projects such as agri-businesses, mining ventures, wind farms and irrigation projects; or they may stem from increased urbanisation, population pressure and climate change. Without secure tenure, customary land rights-holders are easily displaced by powerful elites (see e.g. [56]).

From a civil legal perspective, *ownership* in relation to property is equated with *dominium* [57], i.e. the complete power to use, enjoy, and dispose of property unless prohibited by law [58]. In Anglo-American legal systems, ownership is depicted as a bundle of rights, "envisaged as a bundle of sticks with each stick representing a right" [43]. Such analogy is inconsistent with the concept of ownership in South African law, wherein ownership is viewed as a unified, hierarchical concept that confers the greatest range of rights in land [59–61]. Hornby [62] relates that in some rural, customary contexts in South Africa, the concept of ownership is layered and there may be multiple answers – each one correct in its own right – to the question 'Who owns this land?' From a formal, legal perspective, the State may be the owner. From a customary perspective, the chief (*inkosi*) may identify as the owner, and equally the subjects to whom he has allocated occupation and use rights would identify as owners. Thus, they "all owned [the land] simultaneously, in layers. This is not so much a hierarchical organization as a layered one, with different answers to the question of ownership depending on context" [62]. Such a scenario is not possible in a land administration system built on individualistic, exclusionary human rights principles. But it is possible in a customary land administration system built on the principles of *ubuntu*.

4.2 The influence of international treatises

Several international treatises and instruments that are founded on human rights principles affirm the right to property, adequate housing, and food, all of which are relevant for land administration [63]. Land tenure security and adequate housing are given specific attention in the UN Committee on ESCR's General Comment no. 4 [64]. The New Urban Agenda (NUA) [65], items 13a and 35, likewise support the provision of adequate housing and tenure security respectively. The acknowledgement of the importance of land rights for all appears in several of the Sustainable Development Goals (SDGs) [66] and associated targets and indicators, as summarised in **Table 2**. The *Voluntary Guidelines on Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security* [67], better known as the VGGTs, include principles that are based on and reflect the human rights principles listed in **Table 1**. They also recognise the need for secure land tenure for sustainable development and improved livelihoods, especially for the poor and vulnerable.

These documents are all rooted in human rights principles that inform the guiding principles of national land policies and land administration systems. They thus draw on Western bias that may not be appropriate for the intended beneficiaries,

Goal 1	Target 4	**Ensure that all men and women have access to ownership and control over land and other forms of property**
Goal 2	Target 3	Double agricultural productivity and incomes of small-scale producers, including through secure and equal access to land
Goal 5	Target 5a	Give women access to ownership and control over land and other forms of property
Goal 11	Target 1	Ensure access for all to adequate, safe and affordable housing
Goal 15	Target 9	Integrate ecosystem and biodiversity values into national and local planning, development process, poverty reduction strategies and accounts
Goal 16	Target 3	Promote the rule of law at the national and international levels and ensure equal access to justice for all.

Table 2.
SDG targets that include a requirement for access to land for all.

especially in African customary contexts. Land policymakers and administrators should thus be cognisant of this potential conflict of principles when applying well-intended guidelines in diverse contexts. If interventions aimed at benefitting land rights-holders do not address their worldview or their understanding of land, they may lack significance for them and their sustainable success may be compromised [68].

To return to the question raised earlier: strict enforcement of human rights principles runs the risk of alienating cultures that do not accept these principles and may not do so in the foreseeable future. Their 'right' to enforce their own societal rules should be weighed against the requirement of human rights-based organisations to ensure non-violation of human rights. A potential remedy is an approach based on democratic land governance, as explained below.

5. A way forward

Achieving pro-poor land policy, which is inherently cognisant of human rights to land, requires *democratic* (rather than *good*) land governance [5]. This is a process involving three (vertically) interacting components: grassroots pro-reform mobilisations; top-down state reform initiatives; and mutually reinforcing, democratically embedded interactions between these two components. All three components are necessary for democratic land governance. This perspective marks a shift away from the usual, technical-administrative notion of land governance [40].

Linking this model to a HRBA to development, the grassroots mobilisations reflect broad-based participation by citizens and communities in response to their specific land-based needs. It relates to their full, meaningful, and effective access to use and control land in a manner that is fitting for their cultural norms. The state's top-down initiatives may relate to their obligations, as duty-bearers, towards the most vulnerable citizens as land rights-holders. The mutually reinforcing, democratically embedded interactions between the two reflect accountability, transparency, and mutually beneficial collaboration (see e.g. [58]).

Drawing from the preceding discussion, the pertinent elements of a HRBA to the development of land in an African customary setting are here identified. This starts with the human rights tradition [22] which identifies citizens and communities as rights-holders and states as duty-bound to respect, protect, promote, and fulfil their obligations in this regard. To achieve this, states are encouraged to draw on human rights as a set of *normative principles* to guide how development is done; as a set of *instruments* to aid in the development of assessments and *indicators* for the evaluation of development programmes; as a *component* to be integrated into programming; and as the *underlying justification* for interventions aimed at strengthening institutions [15].

For any development process, the cultural context needs to be understood and respected if development is to be sustainable, successful, and significant. An understanding of context is also important for acknowledging the relative importance of land rights: while land rights are not internationally recognised as human rights [45, 50], for rural African cultures they have a profound social, cultural, and religious significance that cannot be overlooked [32, 69]. Land rights must therefore be understood cross-generationally through a socio-cultural lens, i.e. land is not merely a commodity to be bought or sold; it is part of the communal responsibility for governance of society and the environment [20, 31, 47]. Land is thus viewed as territory [23].

A new model for democratic land governance is thus derived – see **Figure 1**. In this model the state is illustrated as drawing from human rights as a set of normative
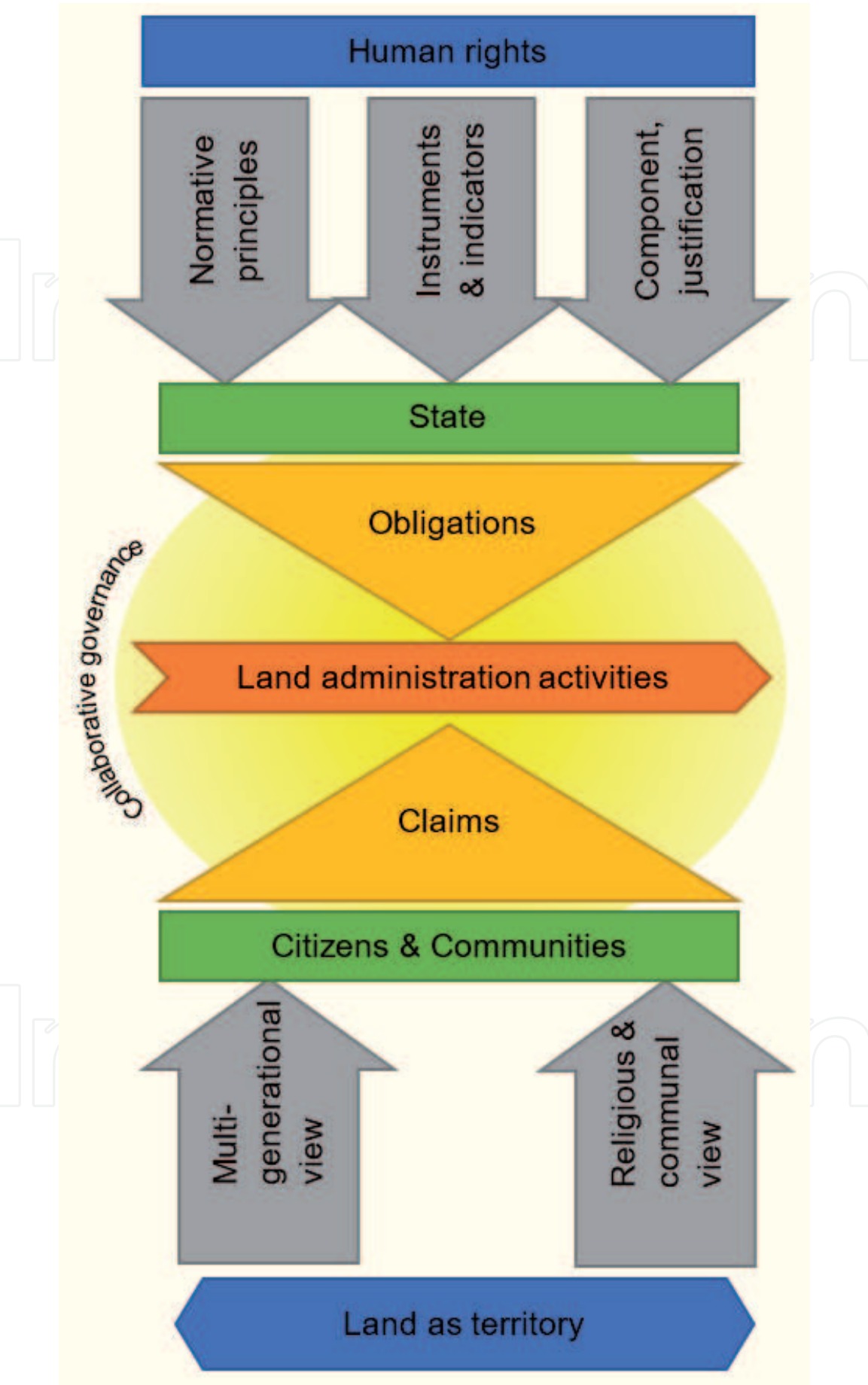
Figure 1.
A new model for democratic land governance.

principles guiding development, as instruments and indicators for evaluation of development, as a component of development, and as the underlying justification for development. Thus informed, the state is directed by the human rights tradition to fulfil its obligations to land rights-holders by initiating land administration processes in order to address human rights-related deficiencies in the current status quo. This is the top-down approach of the human rights tradition. The bottom-up approach sees people as individual citizens and communities of land rights-holders who draw on their understanding of land as territory – with corresponding horizontal obligations to one another and incorporating a multi-generational, socio-cultural, religious view of land – to claim their right to use and/or control land. (Horizontal obligations are illustrated in the figure by means of arrows on either side of the 'Land as territory' block.) This claim drives their desire for land administration/reform.

The two approaches meet and need to find mutual acceptance and understanding through a setting of collaborative governance. This is defined as [70]:

> *"the processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private and civic spheres in order to carry out a public purpose that could not otherwise be accomplished."*

Ten propositions have been put forward for successful collaborative governance that crosses these boundaries (referred to by [70] as the collaborative governance regime, or CGR). These are summarised in **Table 3**.

1. Drivers	Strong leadership, pertinent incentives, necessary interdependence, and/or uncertainty are necessary for a CGR to be initiatied.
2. Principled engagement	Interactive discovery of shared interests, concerns and values; definition to build shared meaning; deliberation between participants; and the construction of shared determinations are generators and sustainors of engagement.
3. Shared Motivation	Repeated, quality engagements build trust, mutual understanding, legitimacy and commitment for further engagement.
4. Virtuous cycle	Shared motivation enhances and sustains further principled engagement and vice versa.
5. Joint action	Principled engagement and shared motivation stimulate the institutional arrangements required for generating and sustaining joint action.
6. Capacity	Joint action requires the necessry procedural and institutional arrangements, strong leadership, shared knowledge, and resources.
7. Collaborative dynamics	The quality and extent of collaboration depends on the interactions between principled engagement, shared motivation, and capacity for joint action.
8. Collaborative action	Collaboration is more likely to result in action if a shared theory of action is explicitly identified and the collaborative dynamics function to generate the required capacity for joint action.
9. Impacts	Impacts will better align with intended outcomes if they stem from a shared theory of action using collaborative dynamics.
10. Adaptation	CGRs will be sustainable if they adapt to the impacts arising from their joint actions

Table 3.
Propositions for initiating and sustaining a CGR (adapted from [70]).

Where cultural norms challenge human rights-based approaches to development, adherence to the propositions underscoring a CGR may assist relevant parties to find common ground. This may assist in ensuring the significance of the interventions for the land rights-holders, and hence the intervention's sustainable success.

6. Conclusion

In this chapter, a human rights-based approach to development is defined as stemming from the human rights tradition. Following this tradition, citizens and communities are rights-holders who can hold states to account regarding the realisation of their rights, which is referred to here as their vertical obligation. States are obligated as duty-bearers to respect, protect, promote, and fulfil human rights. Adherence to a HRBA to development empowers the needy to claim their rights, promotes transparency of governance, and encourages active, free, and meaningful participation in development processes. But, following a HRBA to development is not without its challenges. Other than the implementation challenges, there is the challenge related to the universal acceptance of human rights: the "West and the Rest" debate. The issue of horizontal obligation – the obligation of rights-holders to uphold the rights of other rights-holders – may contribute to addressing this challenge, because the types of rights are then understood on an equal footing.

It is argued that the right to occupy and use land is not a recognised human right, though it may be a human rights *issue*, especially in a developing, African context. A human rights-based approach to land rights is important in highlighting the social and cultural importance of land, as opposed to viewing land simply as a commodity to be bought or sold. This resonates with the distinction between Eurocentric human rights and the *Ubuntu* approach. Differences aside, the human rights tradition places the onus for the recognition and protection of land rights squarely on the shoulders of states, as (vertically obligated) duty-bearers. Individuals, community leaders, and communities shoulder some of the responsibility as (horizontally obligated) duty-bearers.

Adopting a human rights-based approach to land is acknowledged to be pro-poor. Poverty reduction should be at the forefront of development, especially developments involving land. Acknowledgement of the importance of land as a social, cultural, and even religious asset is imperative for land administration and land reform programmes that are sensitive to the needs and beliefs of customary land rights-holders in Africa. The model of democratic land governance is presented as a pro-poor, human rights-based approach to development of land, and is modified to accommodate the views presented above.

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Conflict of interest

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