

**How to integrate statutory and customary
tenure? The Uganda case**

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INTRODUCTION

The last two decades have witnessed extensive land tenure reform in East and Southern Africa, with almost every country in the region having undergone some kind of reform. The reform process has been accompanied by much discussion on the need to integrate customary and statutory land tenure systems in policy and legislation. Indeed, so much has been said that sometimes it is difficult to draw the line between what is real and what is fiction; the essential concepts have become blurred by the divergent and some times controversial interpretations of these two seemingly irreconcilable concepts.

The implementation of structural adjustment programmes in many African countries over the last two decades has promoted economic reform and liberalisation, including in the agricultural sector. Tenure reform is often seen as an integral component of these wider changes. With all the flurry of activity, there is still a marked lack of analysis and assessment of the need to integrate customary and statutory systems in the whole reform process. What seems to persist is the notion that western economic theories, which support formal registration of land through titling, is the only viable option.

This paper seeks to examine the extent to which Uganda has tried to integrate statutory and customary systems in land policy and legislation with particular emphasis being placed on the Uganda Constitution of 1995 and the newly enacted Uganda Land Act, 1998.

THE POLICY AND LEGISLATIVE REFORM PROCESS IN UGANDA

Background

The process of policy and legislative reform in Uganda in recent times began with a study of land tenure and agricultural development commissioned in 1989 at the recommendation of the Agricultural Policy Committee. The Committee comprised four Permanent secretaries of the Ministries of Agriculture, Finance, Trade and Industry, and Natural Resources. The study was undertaken by Makerere Institute of Social Research in collaboration with the Land Tenure Center, University of Wisconsin, USA under the auspices of the Ministry of Planning and Economic Development. The main purpose of the study was to analyse the land tenure systems operating in Uganda and make recommendations on changes in land tenure policy.

The study team produced several recommendations, the most important of which included the following:

- the abolition of the Land Reform Decree 1975, which vested all land in the state.
- the conversion of all *mailo* land to freehold¹.
- a requirement that customary tenants on former public land should apply for freehold, citing the requirements of a modern cash economy in general, and of modern agriculture in particular. It was felt that the indigenous land tenure system was not adequate.
- leases on public land to be converted to freehold.
- the update and decentralisation of the Land Registry.

In 1990, a technical committee consisting of nine people was set up to produce legislation based on these recommendations. The technical committee carried out a survey of public opinion about the prevailing land law. After the study, the Tenure and Control of Land Bill was drafted together with a memorandum explaining the need and meaning of the proposed law. The Bill was presented to the National Executive Committee, which instructed the technical committee to carry out more public consultations. This they did, consulting 1,459 people around the country. After the consultation exercise, a land law was drafted in 1993. When the new constitutional provisions, which vested land in the citizens of Uganda, came into force in 1995, the technical committee met again to consider the changes that had occurred. This culminated in the drafting of a new land bill, the Tenure and Control of Land Bill, 1996. Between 1996 and July 1998 when the Bill was finally passed as law, five versions of the Bill had been drafted.

Land Policy in Uganda

It should be mentioned from the outset, that Uganda has no land policy. The 1995 Constitution and the newly enacted Land Act contain some policy statements with policy implications but there is no land policy as such in Uganda. Therefore, when the Land Act was being drafted, it was not premised on any land policy document or White Paper. Rather it was based on the preliminary studies and Constitutional provisions on Land. These were

¹ Under the Uganda Agreement of 1900, land in square mile blocks (termed *mailo*) was allocated to various political notables. About 9000 sq.mls were given to political officials, including a small amount to the king, churches and some non-Africans. *Mailo* land has been acquired by others through inheritance and sale.

primarily derived from country-wide consultations during the consultative exercise leading to the drafting of the Constitution. Therefore unlike other countries, Uganda did not commence its land reform process with the formulation of a systematic policy on land. Rather, policy development was more or less thrust upon government as the emotive nature of land issues began to tear through the political process.

INTEGRATING STATUTORY AND CUSTOMARY TENURE SYSTEMS IN POLICY AND LEGISLATION

Until the implementation of the 1995 Constitution and the enactment of the Land Act 1998, customary tenure was not recognised under the laws of Uganda. Only three types of tenure were acknowledged, namely freehold, leasehold and *mailo*. Customary tenants were regarded as occupiers of crown land. As such, they were merely tenants on sufferance from the state who could evict them after a three month notice period and compensation for any developments on the land. All land had been vested in the state under the Uganda Land Commission and it was common for politicians and government officials to award themselves leases of large portions of land to the detriment of customary occupiers who were given neither notice nor compensation. Under these circumstances, customary tenants faced extreme insecurity.

The constitution of the Republic of Uganda 1995 brought about fundamental changes in land holding arrangements in Uganda. The constitution began by vesting all land in Uganda in the citizens of Uganda according to four land tenure systems:

- customary
- freehold
- *mailo*
- leasehold

This provision dramatically changed the relationship between the individual and the state. The state no longer held absolute title to land in Uganda. The government could only acquire land in the public interest under Article 237(2)(a). However, the government retained control of the natural resources in the country. Article 237(1)(b) provides that the government or local government shall hold in trust for the people and protect various categories of natural resources: natural lakes, rivers, wetlands, forests, game reserves, national parks and any other land to be reserved for ecological and tourist purposes for the common good of all citizens.

For the first time in Uganda, customary tenure was recognised by the Constitution which provides that all citizens owning land under customary tenure may acquire a certificate of customary ownership. It further provides that such land may be converted to freehold land ownership by registration.

The Land Act 1998 operationalises the reforms brought about by the constitution by providing that any person, family or community holding land under customary tenure on former public land may acquire a certificate of customary ownership in respect of that land. In addition, and in line with the Constitution, it provides that any person, family, community or association holding land under customary tenure on former public land may convert the customary tenure into freehold. Immediate title can be obtained under the regime in the same way as other tenure without having to go through the conversion process. Further still, certificates granted under customary ownership may be leased, mortgaged and pledged where the customs of the community allow.

Finally the Land Act enables holders of customary tenure, who wish to use land as a group, to establish common land associations to manage and protect their interests in the communal land. The communal land association may be reinforced by the establishment of a common management scheme for any of the following reasons: grazing and watering of livestock, hunting, gathering woodfuel and other natural resources, building materials and other natural resources that any member of the community may gather for use of his or her family. These provisions for common land associations and common management schemes are an attempt to accommodate the rights of communities that practise communal tenure. However they were not included in any of the Bills preceding the final law, but were the result of the lobby and advocacy work of the Land Alliance and other interest groups². This lobby focused on the need to integrate customary and statutory tenure generally, but also catered for specific needs of unique customary practices such as those of pastoralists.

Therefore, in the Ugandan context, much has been achieved both at the constitutional and legislative level to integrate customary tenure, including communal ownership and statutory tenure, notwithstanding the lack of a policy in this regard. The important question that remains to be answered however, is to what extent this integration is realistic. Does it offer any meaningful

² The Land Alliance is a consortium of local and international NGOs with the mission of ensuring that land policies and laws are reviewed to address land rights of the poor and to protect access to land for the vulnerable and disadvantaged groups in Uganda.

opportunities for the customary tenant? What are the constraints that it presents? These and other questions are examined in the following discussion.

OPPORTUNITIES FOR CUSTOMARY TENANTS IN UGANDA

The 1995 Constitution provided a great opportunity for customary tenants in Uganda. By vesting all land in the citizens of Uganda and recognising customary tenure rights to land, it raised the status of the customary tenure system. Tenants on former public land now enjoy security, and may no longer be evicted as before. This has been reinforced by enabling a tenant to acquire a certificate of customary ownership. This certificate is important because it is conclusive evidence of customary rights and the interests in the land to which it refers. To further strengthen their land rights, customary tenants may convert their certificates of ownership to freehold, or alternatively, they may apply directly for freehold on customary land. It is important to note that the conversion of a certificate of customary ownership is optional under the Land Act 1998.

Moreover, a certificate has value beyond mere evidence of customary rights to land. It confers on the holder the right to undertake, subject to the conditions, restrictions and limitations contained in the certificate, the right to lease the land or any part of it, permit a person usufructuary rights over the land, mortgage, or pledge the land, subdivide the land, create easements on the land, transfer the land in response to a court order or a land tribunal, or dispose of the land by will.

Customary tenure involves several practices which place traditional authorities and leaders at the centre of most activities relating to land. This central role has been recognised under the Land Act by the inclusion of traditional authorities in the dispute settlement mechanism provided for under the Act:

“Nothing in this Act will hinder or limit the exercise by traditional authorities of the function of determining disputes over customary tenure or acting as mediator between persons who are in dispute over any matter arising out of customary tenure.”

The Act further provides that at any time during the hearing of a case, a Land Tribunal may advise the parties that, in its opinion, the nature of the case is such that the parties are better served by a mediator to resolve their differences rather than by continuing with litigation in the tribunal. Where such opinion

has been given, the Land Tribunal may adjourn the case for such period as it considers fit to enable the parties to use the services of the traditional authorities or mediator.

This preservation of the role of traditional leaders in the dispute settlement system allows for the proper implementation and enjoyment of the newly recognised customary rights. This mechanism will be very important because customary tenants will have the option to register their land. This is likely to lead to a number of controversies as the people verify their land in order to have it registered. Therefore, the Land Act 1998 has gone a long way to integrate customary tenure with statutory tenure systems.

CHALLENGES AND CONSTRAINTS FACING CUSTOMARY TENURE IN UGANDA

In spite of the many provisions for customary tenants under the 1995 Constitution and the Land Act 1998, they still face a number of challenges and constraints. The opportunity to convert a certificate of customary ownership to freehold without the reverse option being possible, clearly indicates the inferior status of the customary certificate. It must be upgraded through conversion to be level with a title under statutory tenure.

Further to this, there is no provision for the cessation of customary rights in favour of new freehold rights on conversion. As defined in the Act, freehold and customary tenure are not essentially different except that freehold tenure involves the holding of registered land whereas customary tenure does not. Hence the Act assumes that the acquisition of the freehold brings new freehold rights which replace those under customary tenure. However, it may not be this simple. Customary land tenure is associated with many customs and taboos that may continue to apply even after this land has been converted to freehold. While the Land Act can legislate for the conversion from customary land to freehold, it cannot legislate for the cessation of customary practices and cultural beliefs about land which may take a long time to change.

Another issue regards certification of customary land. While the Act makes the acquisition of a certificate optional, in order to avoid controversy over the size and boundary of landholding, a customary tenant will need to obtain a certificate, especially if others have acquired one. There is very little option, therefore, but to obtain one once the race for securing property rights in land begins.

It is provided in the Land Act that a certificate of customary ownership shall confer on the holder the right to lease, mortgage, pledge, sell, create third party rights on the land, discharge easements, permit usufructuary rights on the land or any part of it in response to a court order or land tribunal if the certificate does not restrict any of these activities. This provision bestows rights that seemingly give a certificate value. However, a closer analysis shows that these rights may not be as valuable as first perceived. Very few customs in Uganda permit the implementation of these rights especially those relating to mortgaging, pledging and selling even where the holder is an individual. It is unlikely, therefore, that the customary tenants will be able to enjoy these rights. Because of these restrictions imposed by customs and traditions, few people may be willing to buy this kind of land, nor financial institutions be willing to accept it as security for credit. However, this constraint notwithstanding, the Act goes a long way towards opening up customary tenure to the market. Whether or not this will actually happen is not an issue for legislation; rather it will depend largely on changes in the culture and practice that will accompany economic liberalisation.

However, beyond these constraints is the capacity of the people to receive and enjoy these rights. The degree of documentation provided for under the Act is alarming. Virtually every stage of verification of rights requires documentation. This means that for a person to be able to acquire, for example, a certificate of customary ownership, or to convert it, they will need a certain level of literacy. Experience in Uganda and elsewhere shows the inability of rural people to handle documentation or to verify their rights which has sometimes led to fraud, to the detriment of the intended beneficiaries. The chances of collusion, coupled with corruption, thus pose a big threat despite the Act's provisions to ensure community verification.

In addition to this, many poor rural customary tenants will be unable to afford the costs associated with the acquisition of a certificate of customary ownership or its conversion. Thus they may have no option but to stay on their land, unverified and unregistered.

The Land Act makes provisions for the formation of communal land associations and common land management schemes by which land may be managed by the community. However, the same Act provides that where any member of a community wishes to own, in their own capacity, land which is held communally then that individual can apply for a certificate of customary ownership or a freehold title. This provision illustrates the extent to which the Act aims to facilitate individual titling. Research carried out by the Uganda Land Alliance revealed that, in those areas where communal ownership of land

was practised, individual holding was not permitted. Because most of the land is semi-arid, the few areas that have pasture and water have to be used communally by everybody. Allowing individual ownership would lead to a scramble for fertile and watered areas for cattle grazing, and would result in social disruption. Therefore, for such a community, individualisation of land is not an option. The Act therefore creates potential contradictions for communal land associations and individual certificates of customary ownership. This may either be a dead letter³ in the law (since most customary practices will not permit the acquisition of an individual certificate of customary land on communal land holdings) or it will cause social upheaval every time someone tries to secure an individual piece of land from a communal land holding.

In order for customary tenants to be able to enjoy their newly created status under the Constitution and their rights under the Land Act, the government needs to put in place all the administrative and dispute settlement mechanisms provided for under the Land Act. It also needs to equip them with the necessary manpower and infrastructure. This is important because whereas the statutory systems already have mechanisms in place (however inefficient they may be) the survival and implementation of the customary system largely depend on the new mechanisms which were not designed specifically for that purpose. The administrative and dispute settlement mechanisms set up under the Land Act range from the District to the Parish level in accordance with the overall government policy of decentralisation.

These institutions will all need support staff, office space, and equipment. There will also be a demand for training and capacity building to acquaint these officials with the new provisions of the Land Act. In addition to the above, government needs to put in place the rules and regulations required under the Act for it to be fully operational. In all, at least 33 rules and regulations, notices, forms and fees need to be prescribed before the Land Act can be implemented.

In spite of the elaborate administration and dispute settlement mechanism set up under the Act, there is very little room provided for the involvement of traditional institutions. Land tribunals may pass on to traditional authorities the cases which they think fall within their jurisdiction, but this can only be done at the discretion of the tribunals. The same applies to the administrative set up. The Act only provides that

³ A dead letter is a law or ordinance that is no longer enforced but has not been formally repealed.

“the parish committee may, in the exercise of its functions in relation to application for a certificate of customary ownership, refer any matter to any customary institution habitually accepted within the parish as an institution with functions over land for its advice and where relevant use it with or without adaptations.”

Again the role of the traditional authorities is relegated to the periphery. They can only enter the administrative structure at the discretion of the parish land committee, which even then is not bound to accept or adopt their recommendations. For an Act which goes to great length to integrate customary with statutory tenure, it shoots itself down when it fails to utilise existing traditional institutions, particular at the initial stages of the implementation of the Land Act. Most tribes in Uganda have well-developed administrative and dispute settlement mechanisms, which the Act could have used. However, for purposes of this study, the structures of two tribes will be used to illustrate how they could have been used more effectively in the Act.

Case Study 1: Land management and dispute resolution in Karamoja

In Karamoja, land administration and dispute resolution are handled by the Ekokwe or Akiriket, an assembly of initiated male elders. These elders are well known and respected in their areas and follow clear procedures in their administration and dispute settlement mechanism, which also provides for appeals. The ultimate authority in Karamoja is the council of representatives from the ten territories (the Ekiriket and Ekitala). This body would therefore be the parallel for the district Land Board under the Land Act, with the assembly of elders, the Ekokwe or Akiriket, being parallel to the parish land committees under the Land Act.

Case Study 2: Land management and dispute resolution in Gulu

In Gulu, dispute resolution is implemented independently of the Land Administration system. Locally appointed chiefs - Rwot Kweri (Chiefs of Hoes) - are responsible for allocating and verifying the boundaries of fields for cultivation while clan leaders (Rwodi Kaka) handle disputes. In Gulu, the highest authority is the senior clan leadership, which coincides with the county level, which could well parallel the parish committees under the Act. Although the system does not have a parallel with the District Land Board, the parish parallel could well serve a useful function especially since it is at the parish level that the actual work of verifying peoples' rights in land will be carried out.

The integration of traditional authorities in the administrative and dispute settlement mechanism under the Land Act would have been a good starting point for establishing a workable land administration and dispute settlement mechanism. This failure, together with the imposition of a statutorily determined land administration and dispute settlement mechanism in the Act, are likely to lead to avoidable expenses in terms of time, money and human resources.

Building on these and other available systems would have played a big role in the implementation of the Act especially on provisions relating to customary tenure. Customary systems do have problems of their own, notably the exclusion of women, the poor and the young in decision making. However, building on the existing infrastructure and adopting best practices while rejecting those which are inconsistent with good governance and natural justice, would have provided many benefits for the implementation of the Land Act especially at the initial stage.

CONCLUDING REMARKS

In conclusion, it is important to note that whereas the 1995 Constitution and the Land Act 1998 may have gone a long way towards integrating statutory and customary land tenure systems in Uganda, there are still many constraints to the full integration of the two systems. Provision is made for the acquisition of a certificate of customary ownership and for conversion to freehold. There are also elaborate provisions on how to acquire a freehold title to customary land. Indeed, provisions on customary tenure and conversion make up a quarter of the Land Act. This clearly shows that Uganda still pursues the old line that, if everybody had title to land, they will have access to credit which will facilitate the emergence of a land market, attract foreign investors and eventually lead to the economic development of the country. Indeed, this is the justification that was given by the Minister of Lands for the provisions in the Land Act. Secondly, the link between titling and growth has continued to elude both its proponents and opponents. Besides, conversion of customary tenure, which involves titling, has been shown to be tedious, bureaucratic, expensive and socially disruptive with no clearly discernible benefits. The case of Kenya is a good illustration.

This is not to say that Uganda should completely shun titling. What should be borne in mind is that titling alone is not a panacea for development. It should be implemented selectively as the conditions for its implementation slowly take root in Uganda. Due to increased land pressure, land sales, and the degree of land litigation, titling may be possible in areas in and around Kampala where

people actually want it. Yet to insist on titling in Karamoja, which is a largely pastoral community where vast areas of land are not intensively settled, would be unnecessary. That is probably why the Act makes it optional to convert customary tenure to freehold. In practice, there are many areas in Uganda where both titling and customary tenure co-exist. While titling is extensively carried out in urban areas, the rural areas still predominantly practise customary tenure. This situation is likely to continue for some time before titling becomes a uniform practice throughout the country in both rural and urban areas.

Customary tenants have contributed greatly to the economic development of Uganda. As an agriculturally based country, Uganda relies heavily on exports of cash crops like coffee and cotton, which contribute over 80% of the country's foreign exchange earnings. Coffee and cotton are produced by local peasants on small pieces of land governed by customary tenure. Therefore, one way of ensuring that the customary sector can play an active role in the economic development of the country is to give that land value. Whereas titling would enhance the value of customary land, this alone would not be sufficient to raise output and productivity substantially in a country like Uganda. There is a need to improve the infrastructure: roads, electricity, water and other social amenities such as telecommunications. As a first step, this would make customary land, most of which is in the rural areas, more valuable, productive and economically viable. Once land has acquired that value, owners would be more likely to seek title in order to protect their interest and the land value. As of now, there is no real incentive to title land unless it is located in the city or an urban area. Land in remote villages with no roads, electricity, telephones or water, will not have much value even with title.