Development Policy Review, 2004, 22 (2): 173-191

Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land Act

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Empirical studies of land rights privatisation have tended to underemphasise the unintended impacts of land rights reform relative to establishing whether the predicted impacts have occurred. This article, in reviewing some of the unintended consequences of the 1998 Uganda Land Act, draws attention to ways in which intended impacts may be undercut by lack of both consultation and foresight in anticipating responses to new legal provisions and by lack of adequate resourcing of the reform process. It also recognises that unintended outcomes may sometimes reflect appropriate adaptations of legal provisions at the local level, and briefly considers what light the Ugandan experience can throw on recent proposals for formalisation of informal property rights in the Third World.

1 Introduction

For more than two decades sub-Saharan Africa has been the focus of a lively debate on whether governments should intervene to privatise land rights, various intellectual foundations for which have been well rehearsed in the literature. Recently, however, the debate on the developmental significance of formally documented property rights has received a new impetus with the publication in 2000 of Hernando De Soto's *The Mystery of Capital*.[1] It is impossible to do full justice to De Soto's argument in a few sentences, but the following summary seeks to encapsulate its essence.

De Soto argues that the key to economic development in the West has been the establishment of a formal, comprehensive, generally accepted and generally accessible system of property rights documentation, underpinning a wide range of transactions based on records of asset ownership, including the development of credit systems and multiple ownership through shareholdings, and the provision of utilities to identifiable holders of property rights. The establishment of such a system of property ownership facilitates transactions, such as credit use, which lead to the production of additional value: 'surplus value' in De Soto's terminology. De Soto supports his argument with a review of property rights evolution in the United States, demonstrating that this was a lengthy, piecemeal and pragmatic process. Drawing on lessons drawn from the past, he then sets out the steps that need to be taken in today's developing economies in order to create formal property rights for all, thereby giving everyone, including the poor, the

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1. Reviewed in *DPR* 19 (2): 251-2.

Published by Blackwell Publishing, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA.

opportunity to realise 'surplus value' from assets (such as land and housing) which currently consist of unrecorded, 'dead' capital. To achieve this, the informal property rights of the majority – the poor – need to be incorporated into formal legal systems, which, in the Third World, currently affect only a privileged minority.[2]

Various criticisms can be, and have been, levelled against De Soto's analysis. They include concerns that the North American analogy fails to recognise the much greater difficulties which arise in attempting to formalise rights over long settled land, over which there may be various layers of sometimes competing claims (Drake, 2002: 22) and that De Soto fails to recognise the widely differing opportunities, and capabilities, of those currently excluded from the formal legal system: hence his proposals offer no certain protection for the poorest (Haramata, 2001: 21). Another practical concern is the failure to adequately address the fact that a property rights system cannot be effective in facilitating transactions without an efficient, adequately resourced administrative and legal system with low tolerance for corruption.[3] As we shall see in what follows, De Soto is probably also overoptimistic concerning the ability of formalised property rights to unlock access to new resources, such as formal sector credit, for the poor, as well as the existing capabilities in some countries to draft and administer effective property rights legislation. Certainly Uganda has been, and is, going through an important learning experience in these regards with respect to legislation on land rights.

Although De Soto makes little reference to sub-Saharan Africa, his book, and the debate which it has generated, resonate with aspects of the recent and on-going debate on land rights reform in that continent. Over the past decade there has been much discussion concerning whether governments in sub-Saharan Africa should intervene to privatise land rights in areas of traditional (communal) tenure. Those in favour argue that this will lead to more efficient land use and higher rates of investment in land. Privatisation is expected to underpin both the development of a land market and enhanced credit supply to farmers. Opponents of externally promoted privatisation argue that property rights evolve endogenously in response to changing resource pressures, that the outcomes of externally promoted privatisation are likely to be inequitable and that the benefits are unlikely to justify the costs. (This last point is based both on reports of past failures to achieve anticipated benefits and on the assumed high costs of intervention.)

Uganda's 1998 Land Act attempts to reconcile these two perspectives: it provides the basis for formalising traditional land rights and for accelerated transition to freehold tenure, while it also contains provisions to enhance the land rights security of underpriviledged groups. As such, the Act can be interpreted as an example of the type of reform advocated by De Soto, and at the end of this article we consider the relevance of some of the impacts of the Act to De Soto's proposals.

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2. The four elements in De Soto's reform programme are: identification of the main categories of assets which currently lack formal legal recognition, provision of political leadership to champion property rights reform on behalf of the poor, development of an operational strategy for identifying and recording property rights, and provision for accompanying measures to promote the professional skills and services required to activate these rights (such as banking services, public utilities and insurance).
3. Academic purists might also note De Soto's undiscussed reinterpretation of Marxist concepts and his failure to acknowledge prior contributions in his field, including the work of Alchian, Demsetz and North.

Evidence of failure of land rights reform to generate intended outcomes dominates assessments of the impacts of land rights privatisation in sub-Saharan Africa (for example, Haugerud, 1983; Shipton, 1988; Mighot-Adholla et al., 1991; Bruce and Mighot-Adholla, 1993). The conclusions reached include that land markets are not driven solely by efficiency objectives, that much farm investment and innovation has occurred on land held under indigenous tenure systems, and that land titling has had little impact on farm credit supply – findings which appear to call into question De Soto's arguments, at least with respect to the farm sector in sub-Saharan Africa. However, the focus of this article is on a different, but related, set of issues. Also relevant to the debate on whether to intervene to promote changes in land rights is any evidence of unintended impacts of intervention. These have been less systematically studied, however;[4] the research agenda has focused on testing for predicted outcomes derived primarily from economic logic. Unintended impacts may themselves be favourable or unfavourable but in either case may be relevant to future policy formation. In what follows, we review some of the unintended consequences of the 1998 Uganda Land Act, the reasons for them and their policy implications.

The article is structured as follows. Section 2 briefly reviews the background to Uganda's 1998 Land Act. Section 3 summarises the Act's main aims and provisions and Section 4 examines its unintended impacts. Section 5 reviews the policy implications.

2 Historical background[5]

The 1998 Land Act is the latest in a body of legislation on land issues in Uganda which dates from the Uganda Agreement of 1900 between the British Government and the Kingdom of Buganda (in southern Uganda), which granted ownership rights over tracts of land measured in square miles (hence 'mailo' land) to the Kabaka (king) of Buganda and his notables. Most of this land was occupied by small-scale cultivators who, under the previous tenure system, held land from a chief to whom the land had been allotted by the Kabaka. Although such land was previously held under a system of reciprocal obligations (Richards, 1954: 126-7), the Uganda Agreement did not address the rights of the occupiers.[6] An attempt to regularise these rights was made in 1927, with the passage of the Busulu and Envujo Law, which commuted traditional peasant dues into a fixed annual payment (*busulu*) and endorsed an additional levy per acre (*envujo*) on cotton production. However, the occupiers still had no formally recognised long-term security of tenure. At the time of the Uganda Agreement, further complications were created by the transfer by the British of land from the Kingdom of Bunyoro in western Uganda to the Kingdom of Buganda. On parts of this land, *mail*o estates were also granted. In 1966, four years after independence, the land was restored to Bunyoro as Kibaale County, but with the *mailo* landowners retaining their ownership rights.

Under the Uganda Agreement, approximately half of the land in Buganda was designated *mailo* land and the other half, much of it also occupied, was designated

4. One notable exception is Firmin-Sellers and Sellers (1999).
5. Much of the following summary is based on McAuslan (1999: 2-9).
6. West (1972), cited in McAuslan (1999: 2), suggests that Harry Johnson, the British promoter of the Uganda Agreement, was motivated primarily by a belief in the importance of 'individual property rights as a fundamental principle of civilisation and social order'. Mailo tenure (a form of freehold) brought new rights to buy and sell land as well as to bequeath it (Richards, 1954).

Crown land vested in the protectorate government. Under the British protectorate freehold and leasehold concessions were made from Crown land both in Buganda and elsewhere in Uganda. In 1969 (seven years after independence), the Public Lands Act vested all public land (land which was neither *mailo*, freehold, nor leasehold, but held under customary tenure) in the Land Commission. This Act gave some recognition to rights of customary occupants: 'land occupied under customary tenure was public land and could still be alienated in freehold or leasehold but only with the consent of those occupying the land under customary tenure and such persons would be entitled to compensation' (McAuslan, 1999: 5).

Under Idi Amin's administration, the 1975 Land Reform Decree declared all land in Uganda to be Public Land. The Decree converted freehold and *mailo* land into leaseholds held from the state as sole landowner, while it weakened the position of customary landholders: the land which they occupied could now be alienated without their consent. In practice, however, the decree was ignored both by landowners and by administrators.

In 1988, early in President Museveni's administration, and in the aftermath of years of civil war, the World Bank and USAID sponsored a study of land tenure in Uganda undertaken jointly by the University of Wisconsin Land Tenure Center and the Makerere Institute of Social Research. The ensuing report advocated promotion of freehold tenure throughout the country, arguing that this would facilitate both operation of a land market and use of land title as collateral for credit. The primary focus was the promotion of commercial agriculture. Other interest groups then entered the debate on land legislation. President Museveni was determined to honour his commitment to bring security of tenure to occupants of *mailo* land in the 'Luwero Triangle' (Kibaale County) who had suffered badly during the civil war of the mid-1980s. *Mailo* landowners, some of them absentees, foresaw a consequent reduction in their rights and demanded full compensation. Meanwhile, women's groups used the debate to press for the strengthening of women's land rights, and others, too, pressed for greater emphasis on security of basic land rights for all, including minors.

In sum, advocates of new land legislation were variously motivated by five main goals:

- a concern on the part of spokespersons for Uganda's larger commercial farm sector and some sources of foreign aid to establish freehold land tenure throughout the country;
- a concern to create greater security of land rights for all who were using land under customary tenure;
- a concern to provide stronger protection for the land rights of underprivileged groups, notably women and minors;
- the President's concern to provide security of tenure to tenants on *mailo* land;
- a concern on the part of *mailo* landowners to obtain compensation for any curtailment of their rights.

The second and third objectives gained influence in the mid-1990s, initially in the context of the drafting of the 1995 Constitution and then in reaction to the first draft of the Uganda Land Bill which became the subject of public debate in 1997 and was oriented heavily towards promotion of freehold tenure (McAuslan, 1999: 9). The 1995

Constitution provided that holders of land under customary tenure should be able to acquire certificates of customary ownership, that customary owners and leaseholders should be able to convert to freehold, and that legislation should be enacted not later than June 1998 to regularise the position of tenants on *mailo* land. This date became the deadline for the passing of the Land Act.

3 Main aims and provisions of the 1998 Uganda Land Act

The 1998 Land Act affirms, in accordance with the 1995 Constitution, that all land is vested in the people of Uganda. The Act aims to strengthen customary ownership rights and the rights of tenants by occupancy, by providing the opportunity to obtain certificates of customary tenure and of occupancy and by setting out the basis for upgrading these to freehold title. It also contains provisions designed to strengthen the land rights of women and of others with derivative land claims (children and orphans). It establishes new systems both of land tribunals and of decentralised land administration, and provides for central and local government to hold environmentally sensitive areas in trust for the people of Uganda. Finally, it provides for the establishment of a Land Fund, which is intended to provide support to tenants by occupancy who seek to obtain certificates of occupancy as well as compensation for landowners whose rights are curtailed by the issue of such certificates.

The Land Act does not spell out the policy goals which it is intended to achieve, nor was there a clearly stated land policy at the time of the passing of the Act. However, elements of such a policy can to some extent be pieced together from the content of the Act and from other policy documents. According to a report prepared for the Uganda Government in 1999 (Uganda Government, 1999: 16-19), these include recognition of a role for land rights reform in:

- poverty alleviation via strengthening the rights of customary occupants;
- agricultural development via facilitation of a land market and improved access to credit;
- gender equality via strengthening women's land rights;
- protection of the environment; and
- decentralisation of government via decentralised land administration.

The following paragraphs elaborate on some of the Act's provisions.

3.1 Certificates of customary tenure and occupancy

The Act sets out procedures by which customary occupants of public land can apply for a certificate of customary tenure. Such a certificate provides the holder with various transfer rights, including those of sale, lease or mortgage, albeit in accordance with customary law. The holder of a certificate of customary ownership may also apply for conversion to freehold tenure, conditional upon having the land surveyed (Land Act, Section 10). Meanwhile, customary tenants on *mailo* land, and other *bona fide* occupants of land which has been occupied and used or developed unchallenged by the owner for at least twelve years, can apply for certificates of occupancy. Section 32.5 of the Act sets the annual rent to be paid by a tenant by occupancy at the nominal sum of

Uganda Shillings 1000 irrespective of the area or location of the land; (in 1999, at the official exchange rate this was worth less than £1 sterling).[7] Once issued, the certificate entitles the tenant by occupancy to sublet, pledge and undertake any other lawful transaction in respect of the occupancy, subject to the consent of the landowner and with right of appeal to the Land Tribunal (Section 35). A tenancy by occupancy may also be inherited. With the agreement of the landowner, it may also be upgraded to freehold title. It is notable that these provisions appear to be in close accordance with De Soto's advocacy of the incorporation of informal, *de facto* property rights into formal property law.

3.2 Protection of the rights of dependants

Section 28 of the Land Act states that:

> Any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally, shall be in accordance with the custom, traditions and practices of the community concerned; except that a decision which denies women or children or persons with disability access to ownership, occupation or use of any land ... shall be null and void.

Section 40 explicitly prohibits all transactions in respect of land where a person normally resides with a spouse, and from which they derive their sustenance, as well as of land on which reside dependent children or orphans below majority age with a claim on the land, without the consent of these dependants or, in the case of minors, the consent of the local Parish Land Committee (see below) on their behalf.

A further clause (the so-called 'Missing Amendment'), not included in the Act apparently because the Amendment was not moved in time, provided for joint ownership by women of their husbands' property. Pressure from the supporters of this amendment to incorporate it into the Act has continued since the passing of the Act.

3.3 Land management and administration

Under the Land Act, the Uganda Land Commission is assigned responsibility for the management of government land. The Act also provides for the establishment of District Land Boards (DLBs), the members to be appointed by District Councils (elected local governments) on the advice of their District Executive Committees[8] and with the approval of the Minister for Lands. The functions of the DLBs include to:

- hold and allocate land which is not owned by any person or authority;
- facilitate land registration and transfer;
- take over the role of lessor in the case of land leases previously granted by urban authorities.[9]

7. The maximum annual ground rent may be revised every five years.
8. Composed of senior members of the local administration.
9. Most urban authorities fall under a district administration. Only the city of Kampala has district status.

The Act also provides for the establishment of Parish Land Committees whose primary function is to receive, assess and grant or refuse applications for certificates of customary ownership as well as to provide the first stage in the hearing and resolution of any disputes relating to land which is the subject of an application for a certificate of customary tenure (Sections 6-8).

3.4 Land tribunals

The Act provides for dedicated land tribunals to be established at sub-county and district level, members being appointed by the Lord Chief Justice (Sections 75-89). All lower-level land cases are to be transferred from local council courts and magistrates courts to the tribunals with immediate effect.

3.5 The Land Fund

Section 42 of the Land Act provides for the establishment of a Land Fund, the primary roles of which are: to support customary tenants in obtaining certificates of occupancy and to fund payment of compensation to landowners whose rights are diminished by virtue of the issue of these certificates. The first role reflects Museveni's concern to honour his pledge to secure the land rights of tenants by occupancy in the 'Luwero Triangle', and the second was a necessary concession to Baganda landlords in order to ensure the passing of the Act (McAuslan, 1999).

Thus, running through the Act are two concerns: to strengthen individual land rights and to protect the underprivileged. Those who had pressed for the former had argued their case primarily in terms of anticipated impacts on agricultural development.

4 Unintended consequences of the 1998 Act

Unforeseen and unintended consequences of Uganda's 1998 Land Act include impacts on:

- urban authority costs relating to zoning and infrastructure development and urban authority revenues;
- costs of rural infrastructure maintenance and development;
- willingness of commercial banks to lend on residential land as collateral;
- equity between genders;
- the government's fiscal balance.

An act which was expected to have important agricultural sector impacts has in its outcome had significant urban sector impacts which ideally should have been anticipated prior to enactment of legislation. Meanwhile, anticipated agricultural sector impacts appear to have been exaggerated.[10]

10. In Mozambique too, prior to the passage of the 1997 Land Act, land was seen as a single sector – i.e. agricultural – issue (Tanner, 2002: 12).

4.1 Impacts on urban and district administration costs and urban authority revenues

Under the Land Act, customary occupants of urban land who are forced to move to comply with zoning regulations and/or are required to release land for infrastructure development can claim ownership rights and, hence, compensation for the value of their land as well as for developments on it (Section 74.3). This new protection of occupants' rights has had unanticipated adverse implications for urban authority budgets. In rural areas too, land must be acquired for infrastructure development. Recognition of customary ownership throughout the country means that all local authorities must henceforward negotiate, and pay compensation for, land acquisitions for public use.[11] By mid-1999 urban authorities also reported difficulty in enforcing access to the land of customary occupants for infrastructure maintenance. Refusals of access had to be addressed by obtaining court orders – a further direct cost to the authorities as well as a source of delay in carrying out work.

Yet, while the Act raised urban and rural administration costs, its impact was also to reduce urban authority revenues. Prior to the passing of the Land Act, Uganda's urban authority revenue base consisted of: a graduated poll tax, market fees, fees for trading licences and permits, levies on operators of buses and taxis, property rates, premia charged on new leaseholds granted on urban authority land, and rental income from such leaseholds. For expanding urban centres, leasehold premia, payable upon entry, plus annual rentals were reported to constitute a substantial and rising share of total revenues.[12] The Land Act adversely affected urban revenues in the short term as well as longer-term revenue prospects. These impacts derive respectively from the transfer of rights to collect urban leasehold revenues to the District Land Boards and from the right the Act gives to leaseholders to convert to freehold.

Prior to 1995 all public land gazetted as falling within an urban zone was controlled by the urban authority and could be alienated in leasehold by that authority, including land under customary occupancy. However, under the 1995 Constitution and the Land Act, control over all land not held in freehold by an individual or authority was transferred to the newly created DLBs, including land gazetted as within an urban zone, while Section 60 of the Act states that the DLBs will 'take over the role and exercise the powers of the lessor' in the case of leases granted by a former controlling authority. Although Section 91 of the Act requires all rents, fees and other revenues received by the DLBs in respect of urban land to be transferred to the relevant urban authority, following the passage of the Act some DLBs refused to do this. For the urban authorities these provisions appeared to generate a 'Catch 22' situation: either the DLBs would withhold part of the urban land revenues or, if compelled to pass them all on, they would have no incentive to collect them. The situation in 1999 was in a state of flux, with many urban authorities having experienced short-run revenue losses, but it appeared that in most districts these problems would be resolved through discussion and

11. Private developers have been similarly affected.
12. 34 urban authorities which reported their 1998/9 budgets to the centre predicted an average share of property tax in their total revenue of 14%. However, authorities in Soroti and Lira municipalities and in south-west Uganda reported a much higher share for land-related revenues; with revenues from leaseholds more important than those from property rates (Hunt and Eturu, 1999: 50).

negotiation.[13] However, a further probable consequence of the Act is that revenues from leaseholds will fall dramatically, as leaseholders apply to convert their land to freehold. Already in 1999, some leaseholders were claiming ownership and withholding rents.

In sum, while a fundamental citizens' right to own land, based on customary tenure as well as freehold, has been recognised by the Land Act, the Act's proponents failed to recognise the consequent impacts on public authority budgets: the need to plan for additional revenue in order to meet local authority costs arising from the redistribution of land rights from the authorities to private individuals was not anticipated. Further tension was created by transferring to the DLBs the right to collect significant revenues previously accruing to another authority. This weakened the urban authorities' ability to meet their obligations in the short term. In the longer term, conversion of urban leaseholds to freehold may also generate a need for further adjustments to revenue structures. These adjustments fall within the purview of the public sector. The main constraint on their implementation lies in the limited capacity for efficient revenue collection. However, other impacts of the Act fall outside the purview of the public sector.

4.2 Impacts on commercial bank credit supply

Agricultural sector impacts

In assessing the likely future impact of the Land Act on credit markets, both rural and urban, two issues are pertinent: (i) the extent to which credit expansion is an essential precondition for farm output expansion, and (ii) whether implementation of the Act can be expected to lead to credit expansion. The following paragraphs caution against overoptimism with respect to (a) the role of credit in raising farm output and (b) the likelihood that the Land Act will, by introducing the option of obtaining certificates of customary ownership and of lawful and *bona fide* occupancy, have a major impact on farm credit supply.

Farm output expansion in Uganda during the past century was undertaken largely without access to formal sector credit.[14] Still today, when farm output is stagnating, this is not necessarily due to a lack of credit: it may also be due to lack of profitable market opportunities or of security in reaching markets.[15] Furthermore, while credit facilitates cash outlays beyond those which small-scale farmers can finance themselves, the risks involved in borrowing to finance output development can also be high, particularly for those with no prior experience of running a substantially larger, or completely new, enterprise. In the small-farm sector, expansion based largely on self-financing of inputs allows skills to develop through accumulated experience and may be more appropriate,

13. Although the Town Clerk for Lira, for example, was sanguine that these problems could be resolved, as of July 1999 the DLB in Soroti District was still reported to be insisting on retaining 35% of urban leasehold revenues raised in Soroti Town, a proportion unacceptable to the urban authority.
14. This applies both to food crops and to diffusion of most cash crops, including cotton and coffee in the first half of the twentieth century and, in the late 1980s, sesame seed (simsim) production.
15. On earlier overoptimism concerning the potential contribution of credit to farm output, see Hunt (1975). This study of the production impacts of credit channelled to small and medium-scale farmers in Uganda in the 1960s concluded that about 50% of the credit provided had been redundant, either being channelled to individual farmers for purposes which they could have funded themselves, like many of their neighbours, or being provided for purposes which could not raise farm income.

with the exception of those cases where there is deliberate promotion of capital-intensive enterprise innovation, combined with the provision of supporting technical advice and necessary marketing arrangements (for example, smallholder tea production, with high establishment costs).

Meanwhile, for formal sector lenders, both administrative costs and risks are higher in rural than in urban areas, and are inversely related to the quality of the rural infrastructure.[16] Dispersed small-scale borrowers are unlikely to be known to commercial bank managers, either in person or by repute. Either the costs of visits to potential borrowers' farms must be incurred, both to inspect collateral and to assess the proposed use of the loan, or risks must be incurred by forgoing potentially risk-reducing information. The administrative costs of granting, disbursing and collecting loans rise as a proportion of the sum lent as loan size falls, as do the costs of foreclosing and selling the collateral. Loan risks are also higher in agriculture than in other sectors, because of natural hazards and volatile markets, and are enhanced by difficulties in selling land held as collateral in land markets governed by kinship norms. Small-scale farmers seeking commercial bank credit thus face multiple disadvantages, by virtue of size of loan requirement, location and type of activity. In practice, most commercial banks in Uganda, as elsewhere in sub-Saharan Africa, simply do not lend to individual small-scale borrowers. The one bank in Uganda which emphasises small-scale lending (the Centenary Rural Development Bank: CERUDEB) had in 1999 made 1,800 of its 12,000 outstanding loans for farming,[17] lending to fewer than 0.01% of Uganda's farm households.

Among small-scale farmers micro-finance may be a more significant potential source of credit.[18] However, in 1999 it was still unclear whether ability to offer certificates of customary tenure or occupancy as collateral would significantly affect micro-finance lending by externally promoted agencies. For local micro-finance schemes, the designation and commitment of land as collateral without using a formal certificate of title was already happening in some areas, through witnessed designation of the boundaries of the pledged land.[19]

Large farm options for accessing formal sector credit in Uganda are also limited, even though owners often possess freehold title. These options diminished in the late 1990s in the context of a commercial banking crisis generated by poorly managed and excessively risky loan portfolios. By 1999, for most large-scale farmers needing bank credit the Uganda Commercial Bank (UCB) was their only option, the other commercial

16. For expansion of the rural banking system, relevant components of rural infrastructure include road communications, telephone and other telecommunications (for communicating both with borrowers and with head office) and power supplies (important in determing the scope for computerisation).
17. D. Van Hoof, Chief Executive, CERUDEB, pers. comm., 13 July 1999.
18. Occasionally this may interlink with formal credit, as when a commercial bank takes part in a micro-finance programme by managing a group deposit account and/or by managing group loan disbursal and collection for a progamme sponsor who has supplied loan capital. In 1999, the CERUDEB management had plans to develop such a role.
19. See Mugisha (1992: 42). When individuals in one parish in Kabale District were asked in 1999 whether they might be interested in acquiring certificates of title, their response was negative. Although a locally initiated micro-finance programme operated in the area, they did not raise access to micro-finance as something which would influence their interest in certificate acquisition (Hunt and Eturu, 1999).

banks having withdrawn from agricultural lending.[20] Moreover, the UCB had reduced its own lending to agriculture as part of a retrenchment of more risky loans: in 1999, agriculture absorbed about 5% of the value of its outstanding loans.

Given the very small scale of commercial bank lending to farming in Uganda, and the reasons for this, it would be unrealistic to expect the Land Act to contribute to a large increase in farm credit in the short to medium term. Following recovery of the banking sector and in a favourable macroeconomic environment, the scale of lending might be expected to build up over time, but to establish whether, given the terms of the Land Act, this is a realistic expectation, we also need to consider other impacts of the Act, notably those on the value of land offered as collateral. These apply to lending in both the farm and the non-farm sectors.

Impacts of Section 40 and provisions for customary tenants[21]

Representatives of Uganda's commercial banks expressed two main concerns regarding the Land Act: that the consent provisions in Section 40 were unworkable and that the Act had devalued land which the banks either already held as collateral or might have accepted as collateral in the future. Since most commercial bank credit, including that secured by land, is outstanding to the non-farm sector, primarily in the larger urban centres, it is here that any unintended negative impacts of the Act on credit provision will be most strongly felt.

Uganda's commercial banks have traditionally relied on urban residential land as an important source of collateral. Section 40 (which prohibits transactions in residential land without the consent of the vendor's dependants) created new risks for the banks because they have no way of ensuring the accuracy of borrowers' statements regarding who has a claim on land. The concerns expressed included the possible existence of undeclared illegitimate children and/or an undisclosed spouse, either of whom would have the legal right to block the sale of land should the bank foreclose. The Act also failed to provide a clear definition either of dependent orphans or of the property covered.[22] Sworn affidavits from borrowers regarding who has a claim on land provide no real protection to the banks: if error or falsehood in the affidavit were to be disclosed when collateral is put up for sale, the bank's only redress would be to sue the borrower but s/he, following failure of the loan, would be unlikely to be able to pay compensation. In the United States, the State of California operates a consent provision, but this is confined to a single spouse: children are not included. This provision thus does not face the uncertainties surrounding the provisions of Section 40 in Uganda (Van Hoof, pers. comm.).

Legal advice obtained by the Uganda Bankers' Association following publication of the Land Act was to cease lending on the security of residential land. While the banks had not fully implemented this advice, their other responses to Section 40 were to

20. The manager of one of the leading foreign commercial banks in Uganda informed us that his bank had decided to lend to agriculture only indirectly, through provision of crop-buying finance.
21. Much of what follows is based on interviews with representatives of three commercial banks, one foreign-owned and two incorporated in Uganda, one of these representatives also being the spokesman for the Uganda Bankers' Association.
22. For example, with respect to the latter, if the bank were to take as security land on to which the borrower's family subsequently moved and which then became the family's main residence, how would this affect the status of the land as collateral?

increase the total collateral demanded for a loan, to increase the emphasis given to past knowledge of the borrower in granting new loans, thereby making it harder for new applicants with no proven track record to enter the credit market,[23] and to encourage some borrowers to transfer land ownership to specially created companies in order to avoid the provisions of Section 40, thereby undermining the Act's intended protection of dependants. Some commercial banks, including the UCB, also required completion of consent forms pursuant to Section 40, but loans staff had no confidence in them.

The Land Act, by acknowledging the right of lawful and *bona fide* occupants of land to acquire certificates of occupancy and by determining the rent to be paid by these tenants, has strengthened parallel claims over such land. It is the intention of the Act that holders of certificates of occupancy may use these as collateral for credit. As of July 1999 issue of the certificates had not started and it was therefore too soon to observe their impact on the credit market. However, the size of loan demanded by the majority of holders, urban as well as rural, may prove too small to interest most commercial banks. Meanwhile, commercial bank representatives were concerned that these provisions had reduced the market value of *mailo* title deeds which they already held as security, while creating problems in determining the value of such deeds for the purposes of future lending: 'if each occupier pays a maximum of Shs.1,000 in rent, what should be the banker's perception of the value of occupied land offered as collateral?'[24] In this regard too, the banks face a problem of lack of disclosure, which cannot be resolved by checking on parallel claims at the land registry because the Land Act affirms that the rights of customary, lawful and *bona fide* occupants of land exist also without the possession of a certificate.

In sum, the drafters of the Land Act, by attempting to promote both enhanced equity in land rights and an active credit market based on land as collateral, have brought to the fore fundamental conflicts of interest between banks, potential borrowers and protected dependants. The adverse impacts of attempts to protect dependants on the banks' third-party interests in land (as collateral) were not anticipated.

4.3 Women's land rights

So far, we have considered Section 40 from the perspective of the banks. Two key determinants of the more general impacts on women and other dependants of Sections 28 and 40, as well as the Lost Amendment if this is reintroduced, will be their enforceability and, linked to this, the scope for compensating measures which might be undertaken by those whose interests are threatened (both adult males with controlling interests in land and the commercial banks, although we have seen that the latter have little redress, other than to curb accepting residential land as security). Section 28 provides general protection to women and minors with respect to land transactions under customary law. Section 40 and the Lost Amendment are more specific and it is on these that the following comments focus.

23. Officials of both the UCB and CERUDEB stated that Section 40 posed particularly serious problems with respect to new loan applicants.
24. Question posed by a representative of the UCB.

The enforceability of Section 40

In 1999 interviews with officials in four districts prompted the expression of a range of concerns regarding the enforceability of the provisions of Section 40, including that the granting of consent for land sales on behalf of minors would be treated as a formality and that many rural women, especially those with little formal education, might be pressured by their husbands when their consent to a sale was required. It was suggested that this risk is particularly high in polygamous households, where a husband may wish to sell land used by one wife in order to benefit the children of another wife.[25]

The Lost Amendment

The implications of the Lost Amendment are discussed here because of both the sustained efforts to reintroduce the amendment since 1998 and the emphasis which it has received in some quarters as a radical attempt to redress gender inequity. The aim of the Lost Amendment was to strengthen the land rights of those – women – who, in Uganda as in much of sub-Saharan Africa, are usually the main cultivators of land, but who have limited rights over both the income generated and the pattern of land development, and often no rights at all over land transfers and the proceeds therefrom. The main provisions of the amendment were that land acquired by either spouse before marriage would remain the property of that spouse (female as well as male), whereas land acquired after marriage by either party as either the matrimonial home or as land for the maintenance of the family would automatically be jointly owned (McAuslan, 1999: 22). It is the joint ownership provisions that have attracted attention, giving rise to a range of concerns and to considerable male opposition. Concerns, including genuine uncertainties, expressed to the author and her fellow consultant concerning the implications of this proposed change in customary law included:

- whether women should have co-ownership rights from the day of marriage;
- whether a woman would/should retain rights in land of her husband's clan if either she left this land (for example to return to her father's home) or, following her husband's death, she brought a non-clan member to live on land which she had co-owned;
- whether co-ownership should be allowable at all for clan land, or only for bought land;
- whether women benefiting from co-ownership with their husbands would retain rights to land at their father's home;
- whether brothers might use the amendment to justify denying their married sisters rights in their father's land (with potentially adverse consequences for divorced or separated women who seek to return to their father's home);
- whether the amendment might lead some women to treat marriage, including divorce and remarriage, as a means of wealth accumulation;
- whether fathers might stop giving land to their sons while they themselves are still living, and instead only lend it;
- the need to distinguish between the rights conferred by joint ownership, on the one hand, and co-ownership, on the other.[26]

25. Polygamy is legal in Uganda.
26. The distinction determines the structure of inheritance rights on the death of one of the owners.

This list of outstanding issues highlights some of the difficulties involved in legislating to promote gender equity in property rights. These derive not only from the need for precision in drafting but from the fact that any equity-enhancing measure which is applied to rights over a fixed resource entails rights redistribution. Hence, for legislation to achieve its intended goal it is important that the drafters should anticipate the likely responses of the losers. The drafters of the Lost Amendment left a range of issues outstanding, including scope for undermining the intentions of the amendment itself. It is not clear whether a sensitisation campaign, as proposed by supporters of the amendment, would be sufficient to prevent this from occurring on a significant scale.

4.4 Impacts on dispute settlement

The Land Act annulled the role of existing lower-level courts in hearing land disputes with immediate effect, but it did not make the necessary provisions for activation of the new tribunals, thus creating a hiatus in dispute resolution. By 1999, there was a growing backlog of unsettled land disputes and probably already some, albeit unquantifiable, negative impact on farm production and income generation.[27] There were several interconnected reasons for the delay in activation, including lack of personnel and uncertainties about the role of the Judicial Services Commission (Uganda Government, 1999: 4.2.3). However, funding constraints were the key issue, with respect to both training costs and recurrent salaries.

4.5 The Land Fund

Section 42 (4) of the Land Act states that the Land Fund will:

- give loans to tenants by occupancy in order to enable them to acquire registerable interests in the land which they occupy;
- fund government purchase of registered land in order to enable tenants by occupancy to acquire registerable interests;
- provide for resettlement of persons rendered landless by government action or natural disaster;
- assist other persons to acquire titles.

Purchases of registered land by government shall be at 'a fair market valuation assessed on a willing buyer willing seller basis'. However, the 1999 *Land Act Implementation Study* revealed that the cost of implementing buy-outs of *mailo* landowners on this basis was likely to be exorbitant, with major opportunity costs in terms of diversion of public funds from other uses (ibid.: 3.3, 4.2.1).

27. From July 1998, the standard advice given by local mediators to disputants became to stop using disputed land until the dispute had been settled under the new system. However, funding constraints may also have been an important issue.

4.6 Implementation costs

The Land Act was passed just within the deadline of end June 1998. MPs debated through several nights and the final weekend in order to meet the deadline (McAuslan, 1999). That the schedule was so tight may perhaps help to explain the failure of civil servants to develop a detailed budget for either the start-up activities or the recurrent implementation costs of the Act before it was passed. Alternatively, detailed budgeting may have been postponed for political reasons (namely, from fear that this would scupper the Act). In any event, in 1999 estimates of implementation costs demonstrated that these were likely to exceed the preliminary budget allocations which had been ratified by Parliament by some 500%. Even after allowing for cost-saving changes to the administrative and judicial structures introduced by the Act, as proposed by the *Land Act Implementation Study*, implementation costs would still exceed annual budget provisions by almost 400% (Uganda Government, 1999: 5.4-5.9).

The additional resources to fund implementation of the Act would have to be found by either cutting other public sector expenditure or raising taxes – the latter unlikely, given Uganda's weak tax base and tax administration – and/or by staggering implementation of the Act. With respect to the first two options, justification for the opportunity costs entailed must lie in the anticipated benefits from implementation. It is therefore a matter for concern that the Act's proponents had, and have, little firm evidence available to them regarding these. Short-term land market impacts are likely to be limited because a land market, albeit to some extent constrained by kinship ties, is already operating in much of Uganda even without certificates of ownership or occupancy, while the short- to medium-term credit supply impacts on aggregate farm production are, as we have seen, likely to be negligible. Meanwhile, the unintended impacts on urban credit supply are negative: reduced lending secured by title to residential land and increased difficulty in accessing credit for first-time borrowers. There are also important uncertainties regarding the equity impacts of the Act.[28]

4.7 Local modification of new land institutions

Firmin-Sellers and Sellers (1999) report that in Cameroon both farmers and government officials modified the interpretation of formal land law (the 1974 Land Ordinance): farmers focused on obtaining concrete boundary markers rather than formal title, while local officials sought to protect rights held under customary tenure. Preliminary evidence from Uganda suggests that by 1999 here, too, local initiative had already led to modification of the legislated provisions. For example, in Kabale District, an area with a high incidence of land disputes, at least one parish, having established, like other parishes in Kabale and Rukungiri Districts, a Parish Land Committee soon after the passage of the Act and before the districts had budgeted for them, had also assigned to the committee chairman a role in general land dispute mediation and settlement which extended beyond that envisioned in the Act itself.[29] Yet this seemed an appropriate role

28. In contrast to some parts of eastern Kenya, we found no evidence that farm investment was significantly constrained by lack of permanent exclusion rights over land (Hunt and Eturu, 1999:26-7; also Hunt, 2003).
29. The primary role of Parish Land Committees, as specified by the Land Act, is to assess applications for certificates of customary and freehold title and to adjudicate in disputes arising therefrom.

for such an official to play in a context where respect for the traditional authority of clan elders is declining.[30] Berry (1997: 1229) argues that our analytical focus with respect to informal institutions should switch from structures to process: 'from rules and outcomes to on-going negotiation and debate'. As Firmin-Sellers and Sellers illustrate, and preliminary evidence from Uganda confirms, this perspective is also relevant to analysis of the evolution of newly introduced formal institutions.

5 Policy implications

The unintended impacts of Uganda's 1998 Land Act may be classified into three groups: those that can be remedied or recognised by increased precision of drafting, by modification of specific provisions or by supplementary administrative provisions; those that require modification of the Act because of resource constraints on ability to administer existing provisions; and those which derive from fundamental conflicts of interest which can be overcome either by weaker pursuit, within the provisions of the Act, of a specific policy objective or by additional resource commitment to persuade acceptance by, or to compensate, the losers. These unanticipated impacts reflect issues which received insufficient attention at the time the Act was drafted. At that time there was:

- a propensity to see land as a single-sector issue primarily affecting agriculture, with insufficient attention given to potential urban impacts of national land legislation;
- a failure to recognise the full range of constraints on commercial bank lending to agriculture;
- a failure to recognise, and take cognisance of, the fact that *any* redefinition of rights in land generates 'winners' and 'losers', and to recognise that this applies whether the objective is to transfer rights within the public sector, to privatise land and/or to strengthen the rights of the underprivileged;
- a failure to recognise third-party interests which may be affected by land rights redefinition, including those of credit institutions;
- a failure to recognise, and confront, the potential for conflict between diverse objectives (as between enhanced equity and enhanced credit supply);
- a failure to recognise the scale of direct implementation costs which were entailed by the Act; and
- a failure to foresee a broader potential role for the chairperson of the Parish Land Committee in the mediation of local land disputes.

Unforeseen impacts which are susceptible to correction through supplementary administrative provision include, for example, urban authority revenue losses and enhanced urban authority costs. These jointly imply a need to review both the level and the structure of urban authority revenues and the efficiency of revenue collection, and to introduce appropriate changes therein. Meanwhile, some of the uncertainties pertaining

30. This decline is due partly to high rates of male out-migration and the relative prosperity of returning migrants, plus diversication out of farming by many remaining males (Hunt and Eturu, 1999: 70-1).

to the Lost Amendment might be removed through more precise drafting. Below we review some of the other interventions which may be called for.

The dominant concerns of the commercial banks with respect to the Land Act were focused on its adverse impacts on lending risks. These derived from the consent provisions of Section 40 and the formalisation of parallel claims to *mailo* land. With respect to Section 40, there was pressure from the banks for redrafting this Section in order to curtail the range of dependants protected by the Act. However, the problem in Uganda, as in other societies where polygamy is legal, is where to draw the line while maintaining the principle of enhancing equity. An alternative would be to recognise the broad range of dependants currently specified in the Act but to do so in a way which offers greater protection to the banks. This might be done by requiring the banks to inform the relevant Parish Land Committee of all land offered as collateral. The committee would then be required to advertise the offer for a specified period and to collate the names of those known to be *currently* dependent on the land for their residence and/or subsistence. Other 'dependants' not currently dependent on the said land could then legally be ignored by the bank.

With respect to other land transfers, it might have been appropriate to require, in the Land Act regulations, either that all consents should be given in the presence of representatives of the relevant Parish Land Committee, who should check that those giving their consent understand its significance, and/or that the Committee itself should assess the likely consequence for relevant dependants. Enforcement of such provisions presupposes that all land transfers, including those under customary tenure, are either reported to the Parish Land Committee, which is not required under the Act, or else that information regarding them is very likely to reach the Committee. While the role suggested here would be analogous to that assigned to District Land Boards in Kenya, where reporting of transfers is incomplete and not enforceable, by assigning this role to committees operating at parish level the probability is increased that the members would receive information regarding all land transactions.

With respect to the Act's implications for the central government budget, the 1999 *Land Act Implementation Study* proposed four main solutions: (i) a reduction in the number of land administration units and local land tribunals (district and sub-district land administration units and land tribunals to be replaced with professional services shared by clusters of districts), (ii) a shift from payment of salaries to allowances for personnel working part-time in land administration or land tribunals, (iii) a major reduction in the range and scale of operations of the Land Fund, and (iv) staggered implementation of the Land Act, with new administrative structures not being introduced simultaneously in all districts. While the case for staggered implementation is primarily pragmatic, it is also strong. Firstly, without it, it is impossible to see how the Act can be implemented. Secondly, Kenya's comprehensive land adjudication and titling programme has been diffused across districts over more than four decades, starting in the 1950s in the most densely populated high-potential farming areas, with the result that annual public sector costs have been reduced, while informal diffusion of knowledge about adjudication has also been promoted.[31]

31. The *Land Act Implementation Study* also proposed that, in parishes where demand for certificates reaches a threshold level, the community should be encouraged to apply for systematic registration of all land in

Uganda's legislators could also have provided for some delay in the transfer of cases to the new Land Tribunals: for example, by providing for existing lower-level systems of dispute resolution to remain in place for a specified period. This would have allowed time for capacity building and organisational reform. In practice, this was done retrospectively but only after the build-up of a substantial backlog of cases. Sensitisation measures are also needed to promote acceptance of (amended) measures designed to protect the land rights of women and minors. Finally, there is an on-going need to monitor, and where appropriate respond to, local adaptations of the Land Act's provisions.

What do these findings imply for De Soto's proposals to incorporate informal property rights into the body of formally recognised rights? The findings of this article relate in part to each of the first three elements in De Soto's reform programme (see footnote 2 above), but they also extend beyond his four key elements, thereby suggesting that De Soto may have underemphasised a range of issues which also need to be confronted when formalising informal property rights systems. These additional issues include: the need for consultation and foresight in anticipating the impacts of reform, including impacts on third-party interests; the need to recognise that there are other major constraints on the formal provision of credit to the poor, in addition to their lack of title to mortgageable property, particularly in the farm sector; and the need to recognise that protecting the rights of the poor in the context of competing claims may diminish the value of the assets of the better-off, thereby reducing their ability to create 'surplus value': the implications of reform for investment and growth may not *all* be positive, at least in the short term.

The Ugandan experience also highlights the need for clear recognition of the resource costs involved in different stages of the reform process and for provision for these, whether through immediate and realistic budget commitments or through a planned staging of the reform process. These resource costs include, in addition to the sensitisation campaigns advocated by De Soto, those which arise from the needs to resolve conflicting claims over property, and to operate an effective system for recording and administering property rights, and the costs of training and equipping personnel not just in the related sectors identified by De Soto but also in the sector of property rights administration itself. Finally, there is a need for effective monitoring of the reform process and of its impacts, and for sufficient flexibility in system design to allow for adaptations to be made when the need for these is identified.

first submitted May 2003
final revision accepted October 2003

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