

**WHAT SHOULD BE DONE TO ENHANCE TENURE SECURITY IN UGANDA AND
FURTHER DEVELOPMENT? -
THE LAND (AMENDMENT) BILL 2007, ITS SHORTCOMINGS, AND ALTERNATIVE
POLICY SUGGESTIONS**

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Abstract

Ugandan Government on February 5, 2008 tabled the new Land (Amendment) Bill 2007 before Parliament which is supposed to enhance tenure security and protect lawful and *bona fide* occupants and occupants on customary land from evictions. The Bill has instigated a heated public debate and has been met with a lot of rejection. Taking the public debate as a starting point, this paper analyses the merits and shortcomings of the Bill and especially looks at whether the Bill fulfils its promise of enhancing tenure security. Since conflict and tenure insecurity generally have a significant productivity-reducing impact and discourage land-related investment, the latter is of great practical interest.

The paper shows that the proposed provisions concerning so called *bona fide* and lawful occupants will not enhance tenure security because they do not address the real cause of evictions and the main problem of the current law which lies with the contradictory relationship of rights of registered owners and *bona fide* and lawful occupants on so called *mailo* land and the lack of a functioning land administration and registration system. Instead, the proposed amendment simply replicates the current law and introduces institutional changes which are either unconstitutional or impractical. To actually enhance tenure security, it is suggested that the relationship between owners and occupants would need to be redesigned more fundamentally. Further, the land administration and registration system as established by the Land Act would need to be equipped with the resources necessary to carry out its functions.

The paper further shows that the provisions concerning customary tenure are likely to reduce tenure security since they weaken traditional dispute mechanisms and are ambiguous as to their scope of application and their relationship to other provisions. They should therefore not be adopted. Instead, it is suggested that traditional dispute mechanisms should be strengthened as proposed by the Draft National Land Policy and that the current law which provides for the issuance of certificates of customary ownership should be simplified and implemented.

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Introduction

Government on February 5, 2008 tabled a new Land (Amendment) Bill¹ before Parliament which is currently being scrutinised by the Committee on Physical Infrastructure and on Legal Affairs². Since and even before its tabling in Parliament, this Bill has instigated a heated and controversial public and parliamentary debate. The declared purpose of the Bill is to enhance tenure security and protect lawful and *bona fide* occupants and occupants under customary tenure from unlawful evictions³. However, both in Parliament and in the general public the amendment is met with hostility and rejection. Allegations about the Bill range from the claim that it will threaten Ugandan stability⁴ to the assertion that Museveni wants to destroy the Buganda Kingdom⁵. There is a general suspicion⁶ towards whatever the Government does regarding land matters which has been fed by current reports about how the Uganda Land Commission and other agencies have allocated big chunks of land to affiliates of the government or army generals⁷. Debate has become so heated that NRM MPs have been threatened by Museveni to be withdrawn support in the next election if they do not support the Land Bill⁸.

Most of Ugandans derive their livelihood from land, with land constituting 60 % of the total assets owned by a sample household⁹ and with more than 43 % of gross domestic product, 85 % of export earnings and 80 % of employment being generated from land use¹⁰. It thus is clear that land is a sensitive issue. Any land tenure reform may affect wealth distribution and has implications for economic and agricultural development. Studies have shown that conflicts and tenure insecurity generally have a significant productivity-reducing impact and discourage land-related investment¹¹. It thus is of great practical interest whether the proposed

¹ The Land (Amendment) Bill 2007, The Uganda Gazette No. 72, Volume C, dated 28th December, 2007.

² "MPs to be fair on Land Bill", The New Vision, February 6, 2008.

³ See Memorandum of the Land (Amendment) Bill 2007 and Prime Minister Apolo Nsibambi's address at Statistics House, Kampala, January 27, 2008, "Reforms to strengthen landlord tenant ties", Daily Monitor, January 30, 2008.

⁴ "Uganda: Land amendment bill threatens Uganda's stability", The New Vision, February 8, 2008.

⁵ "Why Buganda opposes the Land Bill", Daily Monitor, February 7, 2008.

⁶ This suspicion is e.g. expressed by FDC shadow minister for Lands, MP Florence Ibi Ekwaru (Kaberamaido) when she says: "We feel the government has a hidden agenda that's why they want to hurriedly rush the Bill down our throats", see: "Mengo gives MPs 10 point guide on land", Daily Monitor February 5, 2008.

⁷ See e.g. about allocation of Butabika Hospital land to officials from State House, Ministry of Lands and members of the first family: "List of Butabika plot owners shocks MPs", Daily Monitor, April 3, 2008.

See about the allocation of land in Kiboga and other areas to army generals: "MP brings evidence of land lord generals", Daily Monitor, March 14, 2008.

⁸ "Land Bill: Museveni to fail dissenting MPs", Daily Monitor, March 4, 2008.

⁹ See Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda, World Bank Policy Research Working Paper 3868 (2006), p. 13.

¹⁰ See Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007), 3.2.2, 47.

¹¹ A survey undertaken by the Economic Policy Research Council jointly with the World Bank in 2001 found that the mean output per acre on plots without conflict is, with US\$ 201, more than double the US\$ 90 observed on plots affected by conflict. Parametric estimations show that conflict induced loss of agricultural production is between 5 % and 11 %. Further, according to the subjective assessment, in 24 % of cases households responded

amendment will actually enhance tenure security as purported. This paper analyses this question and the general value of the Land (Amendment) Bill. Since some of the public critique of the Bill is caused by ignorance of the current legal situation, it will also give an overview of the current legal situation. The finding of the paper is that the Bill will not enhance tenure security and that it also has many other faults. As there is a need for action, however, the paper also looks at what could be done instead to provide better tenure security and foster development. More concretely, the paper makes two main statements:

First, it shows that the part of the Land (Amendment) Bill concerning the so called *bona fide* and lawful occupants will not enhance tenure security because it simply replicates the current law and because the institutional changes introduced are either unconstitutional or impractical. The Bill does not address the real cause of evictions and the main problem of the current law which lies with the contradictory relationship of rights of registered owners and *bona fide* and lawful occupants and the lack of a functioning land administration system. To actually enhance tenure security, the relationship of owners and occupants would need to be fundamentally redesigned and the current law which provides for an elaborate land administration system equipped with the resources necessary to carry out its functions.

Second, the provisions concerning customary tenure are likely to even reduce tenure security since they are weakening traditional dispute mechanisms and are ambiguous as to their scope of application and their relationship to other provisions. Contrary to what the Act does, traditional dispute mechanisms would need to be strengthened as proposed by the Draft National Land Policy. Further, the current law which provides for the issuance of certificates of customary ownership would need to be implemented.

This paper is divided into four sections. In the first and second part, I will shortly outline the content of the proposed Bill (I) and give an overview about the objections made (II). In the main part of the paper (III) I will then show the shortcomings of the proposed amendment and make some alternative policy suggestions taking into account the Draft National Land Policy. In the conclusion I will make concrete suggestions as to which parts of the Land (Amendment) Bill should be passed or not (IV).

that conflict discouraged investment, see Deininger/Castagnini, *Journal of Economic Behavior & Organization* 60 (3) (2006), pp. 321-45.

I. Content of the Land (Amendment) Bill

According to Government, the principal objective of the proposed amendment is to enhance security of tenants on registered or customary land. For that purpose five amendments to the current law have been suggested.

First, by amendment to Section 31 of the Land Act, the Minister shall be given the power to determine the nominal annual ground rent payable by lawful or *bona fide* occupants on *mailo*¹², freehold or leasehold land in case the District Land Boards (which under current law have this task) fail to do so.

Second, by insertion of a new Section 32 A, evictions of lawful and *bona fide* occupants on so-called *mailo* or freehold land may only take place upon an order of eviction issued by “a court” and only on grounds of non-payment of rent. At the same time, the period before a registered owner may apply for a court order for eviction is shortened from formerly two years to one year of non-payment of rent.

Third and similarly, according to a new Section 32 B, a person claiming interest in land under customary tenure may only be evicted upon a court order. The order shall provide for an adequate compensation and shall only be issued after a hearing of the interested persons has been conducted, a report of the land committee has been received and the *locus in quo* has been visited. Besides, the proposed Sections 32 A and 32 B provide for a seven year jail term for any person who unlawfully evicts occupants.

Fourth, by amendment to Section 35 of the Land Act, it is stipulated that a tenant by occupancy who wishes to assign his/her occupancy rights and does not give the first option to the landlord is liable on conviction to a fine not exceeding 96 currency points (US\$ 1,920,000) or imprisonment not exceeding four years or both. On the other hand, if a landlord wishes to sell his/her land which is occupied by a tenant and does not give the first option to buy to that tenant, such transfer is invalid and shall not be registered on the title.

Fifth and lastly, an amendment to Section 92 of the Land Act is introduced to tighten the penalties for people who wilfully and without the consent of the owner occupy land belonging to another person. Whereas currently it is stipulated that such offence makes liable to conviction to a fine not exceeding 25 currency points (500,000 US\$) or imprisonment not exceeding one year or both, the proposed amendment is providing for the payment of a fine not exceeding 96 currency points (US\$ 1,920,000) or imprisonment not exceeding four years or both.

¹² *Mailo* means “mile” in Luganda and refers to the land (normally occupied by peasants) which had been allocated to the Kabaka, notables and chiefs under the 1900 Agreement between the Buganda Kingdom and the British protectorate government.

II. Perception of the Land (Amendment) Bill in public

All five amendments have provoked a heated public debate, the new section 32 A and 32 B probably being the most contentious. Whereas Government and supporters of the Land Bill have pointed out the need for amendment in view of rampant evictions, often carried out with the involvement of the army¹³, opposition to the Bill comes from various sides and for different reasons. From the debate as displayed in the paper, four main points of objection can be identified:

Firstly, strong opposition comes from Mengo Government and supporters of the Buganda Kingdom. Mr. Apollo Makubuya, the Buganda Kingdom Attorney General, has issued a "10-point guide" explaining why Mengo is pitted against the proposed amendment. He mainly purports that the law is not necessary since current provisions are sufficient to deal with unlawful evictions. He points out that both the Constitution and the Land Act already guarantee security of tenure and that the problem is not the lack of laws but impunity and/or corruption. He asserts that there is also no need for further criminalisation of evictions since the Penal Code already provides for adequate penalties. Furthermore, he criticises that the Bill gives power to the Minister to determine the annual ground rent, thus defying the principle of decentralisation in land administration as introduced by the Land Act 1998¹⁴.

More generally, the Bill is criticised for being silent on the land which before 1900 had been Kabaka's land and had been expropriated in 1967 after the abolishment of the Kingdom and which Mengo has been asking to be returned to the Kabaka since the reinstallation of the Kingdom in 1993¹⁵. Supporters of the Kabaka even allege that the amendment is a ploy by the NRM to grab Kabaka's land and destroy the Kabakaship¹⁶.

Besides, a **second** major opposition to the amendment comes from the northern regions where customary land tenure is paramount. Especially MPs from the Acholi, Lango, Teso and Karamajong caucus have pitted themselves against the amendment. Opposition from Acholi is induced by the fear that those currently living in IDP camps might not be able to retrieve their

¹³ E.g. in Busiro South district alone 120 cases can be cited where the army had participated in evictions, cf. "Stop using Kabaka to fight NRM - Museveni", The New Vision, February 18, 2008.

¹⁴ See Makubuya, Attorney General of Buganda Kingdom, 10 Points Why the Land (Amendment) Act Bill 2007 Should not Pass (2007).

¹⁵ Makubuya, Attorney General of Buganda Kingdom, 10 Points Why the Land (Amendment) Act Bill 2007 Should not Pass (2007) point 8 and "9,000 square miles: that land may not be there after all", Sunday Monitor, Special Report, February 24, 2008. On the basis of what has been indicated in the 1900 Agreement, this land is claimed to include some 9000sq miles of land, some 1500 sq miles of forest and some 160sq miles of County and Sub-County Headquarters. However, new surveys have shown that it is in fact substantially less. In addition, land in Buyaga and Bugangayizi has been returned to Bunyoro Kingdom and land in Masaka, Singo and Buruli allocated under the Ranching Schemes. According to Attorney General Khiddu Makubuya, of the 9000sq. miles today only 4,638 sq. miles are left, see "9000sq miles no more ...unless Buganda accepts regional tier", Daily Monitor, March 7, 2008.

¹⁶ See Kanyike, „Why Buganda opposes the Land Bill“, Daily Monitor, February 7, 2008.

land which they have left deserted for years and which might have been taken over by squatters¹⁷. Teso and other Northern MPs fear that pastoralists encroaching on their land, may not be evicted if the Land Bill is passed¹⁸. More generally, the fact that only courts are allowed to issue evictions orders undermines traditional dispute settlement and is feared to cause confusion and disadvantage the poor¹⁹.

Thirdly and more generally, opposition is coming from lawyers arguing that the new law contravenes the Constitution. These lawyers allege that the Bill violates Article 26 which provides for the protection from deprivation of property²⁰.

Fourthly, besides this more fundamental opposition, critique also comes from those who in general support the Bill, but find that certain details must be changed. Buganda MPs who met President Yoweri Museveni in Entebbe State House in February 2008 have e.g. criticised that according to the amendment, illegal land grabbers are supposed to be liable to a four year jail term “only”, whereas a landlord who evicts squatters without a court order suffers a seven-year sentence²¹. Taking up this critique, the Technical Committee scrutinising the Bill has proposed that illegal land occupants and those carrying out unlawful evictions should both be jailed for seven years to avoid any discrimination²².

¹⁷ See e.g. concerns expressed by Gulu district youth council chairman Christopher Omara in: “Northern youth oppose Land Bill”, Daily Monitor, February 12, 2008.

¹⁸ Agnes Akiror Egonyu, Woman MP for Kumi District, in: “Keep off Teso land, MP tells government”, Daily Monitor, February 22, 2008 or Youth MP Denis Hamson Obua, in: “MP Obua asks youth in North to reject Land Bill”, Daily Monitor, February 8, 2008.

¹⁹ “The Land Bill will leave many poor people landless”, The New Vision, March 12, 2008.

²⁰ Yusuf Kagumire of Kateera, Kagumire and Company Advocates, in: “Land Bill is illegal, says Kampala lawyer”, The New Vision, 25 February, 2008 and Thadeus Mabasi of Uganda Pentecostal University, in: “Land Bill: Constitution needs to be amended, The New Vision, February 22, 2008.

²¹ “Behind the scenes at the Museveni-Buganda MPs Entebbe meeting”, Daily Monitor, February 20, 2008.

²² “Jail land grabbers – Buganda MPs”, Daily Monitor, February 22, 2008.

III. The impact of the Land (Amendment) Bill, its shortcomings and alternative suggestions

As I will show below, much of this current critique is correct, whereas other parts are ill-founded since they are ignorant of the present legal situation. This part of the paper is divided into two sections, one concerning *bona fide* and lawful occupants and the other concerning the provisions on customary land. In each section, I will give an overview of the current provisions, analyse the problems of current law, and the impact of the amendment and finally make some alternative policy suggestions as to how to improve tenure security and foster development in Uganda.

1. The Land (Amendment) Bill and the problem of *bona fide* and lawful occupants

a) Legal situation of *bona fide* and lawful occupants in history, under current law and under the proposed amendment

The major legislations governing the land tenure system today are the 1995 Constitution and the 1998 Land Act (Cap. 227). Further, the Registration of Titles Act (Cap. 205) is pertinent in many cases.

The Constitution and the Land Act recognise four systems of tenure, namely customary, *mailo*, freehold and leasehold. Further they both guarantee security of occupancy of so-called *bona fide* and lawful tenants living on registered *mailo*, freehold or leasehold land (Article 237 (8) and (9) Constitution and Section 31 (1) Land Act).

Most lawful and *bona fide* occupants are occupants of so called *mailo* land situated in Buganda. Before colonisation, most of this land was controlled by the *Kabaka* who assigned it to his *bakungu* and *batongole* chiefs²³. It was occupied under a semi-feudal system by peasants who had to pay tribute to the chief or work for him²⁴. In the 1900 Agreement Buganda land was distributed between the British Protectorate Government and the *Kabaka*, the royal family and some thousand chiefs and notables. The Government's land was called Crown land and the other part became known as *mailo* land. The local peasants or cultivators (*bibanja* holders) who had previously settled on *mailo* land became tenants who had to pay ground rent (*busuulu*) and tribute on produce (*envujjo*) for the crops like cotton or coffee they grew²⁵.

Over the years, land lords increased their *busuulu* and *envujjo* which led to riots and the

²³ The rest was owned by heads of clans and sub-clans (*bataka*) under customary law and by some individuals, cf. Justice Odoki, The Report of the Uganda Constitutional Commission (1992).

²⁴ Ibid.

²⁵ Rugadya, Land Reform: The Ugandan Experience (1999), p. 4.

Busuulu and *Envujjo* reform law in 1927. These laws fixed the *busuulu* and *envujjo* at a certain rate and at the same time stipulated that no *bibanja* holder could be evicted by the owner except upon a court order and save for public purpose or for other good and sufficient causes²⁶. In Toro and Ankole, the *Toro Landlord and Tenant Law* of 1937 and the *Ankole Landlord and Tenant Law* of 1947 introduced similar provisions for the relationship between tenants and registered owners²⁷.

These laws were abolished by the 1975 Land Reform Decree which, at least in theory, transformed all *mailo* and freehold land into leasehold and left *bibanja* holders without security of tenureship and owners without a right to charge *busuulu* or *envujjo*²⁸. It was not until the 1995 Constitution and the 1998 Land Act that both *mailo* and freehold tenure were reintroduced and security of occupancy guaranteed again.

In the effort of reinstalling the legal situation as it was before 1975, the 1998 Land Act now defines *mailo* tenure as a form of tenure which involves the holding of registered land in perpetuity but permits separation of ownership of land from the ownership of development on land made by lawful and *bona fide* occupants (Section 3 (4) Land Act).

“Lawful occupants” are defined by the Land Act as those who (a) occupied land by virtue of the *Busuulu and Envujjo Law* and the *Toro or Ankole Landlord and Tenant Law*, or (b) entered the land with the consent of the owner and include a purchaser, or (c) occupied land under customary tenancy but whose tenancy was not disclosed or compensated for when a certificate of leasehold was issued (Section 29 (2) Land Act).

“*Bona fide* occupants” by law are those who have been living on a plot unchallenged by the registered owner or agent for 12 years before the coming into force of the 1995 Constitution (i.e. since October 1983), irrespective of whether they have been squatters or not. *Bona fide* occupants also include those who have been settled on land by the Government before 1995 (Section 29 (1) Land Act), but in this case the owner needs to be compensated. Thus, even people who have come on land after the 1975 Land Decree and who had been illegal tenants these years, now enjoy security of tenureship under the Land Act.

It is important to note that even under current law the eviction of such *bona fide* and lawful occupants may only be effected on grounds of non-payment of rent and only by order of a Land Tribunal. In Section 31 of the Land Act 1998 as amended by Section 14 of the 2004 Amendment Act, it is provided that tenants are to pay a nominal rent which is to be determined by the Land Boards with the approval of the Minister. This rent has to be of a

²⁶ Porter, *Philippine Journal of Development* No 52 (2001), pp. 205-23 (214).

²⁷ Justice Odoki, *The Report of the Uganda Constitutional Commission* (1992).

²⁸ Mugambwa, *Source Book of Uganda's Land Law* (2002), pp. 7/8.

non-commercial nature. Only failure to pay this rent for more than two consecutive years may lead to the termination of the tenancy. Before evicting tenants, the owner has to follow a detailed procedure. This includes the need to send a notice to the tenant and the Land Committee and allow the tenant 6 months to provide good reason why the tenancy should not be ended for non-payment of rent. Only then may the owner apply to the Land Tribunal for an order terminating the tenancy (cf. Section 31 (6) and (7) Land Act and Section 14 (c) 2004 Amendment Act). Except for non-payment of rent, the Land Act does not list any other grounds which could allow owners to evict lawful and *bona fide* occupants.

Security of occupancy is further entrenched in the Registration of Titles Act which in its Section 64 (2) stipulates that land included in any certificate is subject to the interest of any tenant even if it is not specially notified as an encumbrance on the certificate. This means that any buyer of titled land buys subject to any encumbrance on it including rights of *bona fide* and lawful occupants. Thus, under current law, even a purchaser of land may carry out eviction only for non-payment of rent and only upon court order.

In sum, this means the proposed amendment, by stipulating that eviction may only take place on grounds of non-payment of rent and only upon a court order (new Section 32 A), does not introduce any new rights for tenants. It restates, albeit more clearly, the current law. The only new provision introduced by the Bill is that it is now the Minister alone who may decide on the amount of rent if the Land Boards fail to do so. Further, at least according to the text, it can be any “court” and need not necessarily be a Land Tribunal which decide on evictions.

b) The effect on “Kabaka’s land”

Against this background it is clear that the allegation that the proposed amendment is a ploy by NRM to destroy the Kabakaship and grab Kabaka’s land²⁹ is unfounded.

It is true that the amendment by requiring an eviction order of a court and giving the Minister of Land more power to decide about the amount of rent is restricting Kabaka’s rights over the land which has already been returned. However, whereas the first part is not new, the second part is unlikely to have any major impact on the authority of the Kabaka over occupied land. According to the proposed amendment, the Minister may only determine the rent but has no say in the assignment of titles. The latter authority is and remains with the Land Boards and the Uganda Land Commission. Even today, rent is to be determined by the Land Boards with the approval of the Minister so that the change is marginal. Further, the influence of the Minister would be limited anyway, given that rent has to be of non-commercial nature. Thus it is hard to see how these provisions could allow the grabbing of Kabaka’s land or even

²⁹ See Kanyike, „Why Buganda opposes the Land Bill“, Daily Monitor, February 7, 2008.

“destroy the Kabakaship”.

c) Reasons for the Land (Amendment) Bill

In view of these rather marginal and purely institutional changes one might wonder why the amendment has been proposed at all. Considering the current situation of the land administration system, it appears that the main reason for the amendment is neither to enhance “security of occupancy” nor to grab “Kabaka’s land” but to respond to institutional shortcomings.

The 1995 Constitution and the 1998 Land Act introduced a decentralised system of land management and dispute settlement. The main authorities responsible for all land matters at district level are supposed to be the District Land Boards, assisted by Land Committees at division or sub-county level (Section 64 Land Act as amended by the 2004 Land Amendment Act). Land disputes shall be handled by special Land Tribunals at district level (Section 76 Land Act as amended by the 2004 Land Amendment Act). However, to date both the Land Tribunal and the District Land Boards could not fulfil their functions for lack of funding and an ineffective regulatory framework. According to the Land Act, District Land Boards are supposed to be supported by five technical staffs (Registrar, Valuer, Surveyor, Physical Planner, Land Officer). To date, most Land Boards are only manned by one Land Officer³⁰ or have not been set up at all. The Boards also lack the technical tools to carry out their work and a reasonable pay level to attract qualified staff³¹. Land Tribunals have even been totally abandoned, resulting in the piling of land cases with civil magistrate courts³².

The proposed amendment, in an apparent move to circumvent these resource problems, now gives the Minister the authority to determine the rent and empowers normal courts to issue eviction orders. These institutional changes are not only unconstitutional as will be explained later, but still worse, they do not address the real cause of evictions.

d) The cause of evictions and the problems of the current law

The cause of current eviction is not the lack of laws protecting occupants but rather these laws themselves, which create conflicting rights over land, as well as the lack of a functioning registration system and a coherent land policy that could guide land administration.

The current provisions which allow the owner to only charge a non-commercial rent and to

³⁰ The Uganda Land Alliance, *The Land (Amendment) Bill: Transforming Power Relations on Land Equivocally* (March 2008), p. 4.

³¹ “Objectives of the Land Act were not fulfilled”, *The New Vision*, March 25, 2008.

³² African Peer Review Mechanism, *Uganda Country Self-Assessment Report* (November 2007), p. 459.

only evict tenants for non-payment of this rent leave the registered owners with practically no authority over “their” land. This might be understandable and apt for land which is occupied by tenants who are heirs of *bibanja* holders who already had been on the plot with authorisation of the *Busuulu and Envujjo Law of 1928* or the *Toro or Ankole Landlord and Tenant Law*. It is however problematic for so called *bona fide* occupants who are given security of occupancy by the mere fact that they have been occupying land unchallenged by the owner for 12 years before the coming into force of the 1995 Constitution (i.e. since October 8, 1983)³³. At first glance, it appears that by providing security of tenure for such occupants, the Land Act only replicates the position that already exists under the Limitations Act. According to this Act, no action for recovery of land shall be brought before a court after the expiration of 12 years from the time such rights arose. However, under the Limitations Act, the period of 12 years does not apply where the person having right of action was under legal disability. This means it would not apply to landlords who, due to exile, displacement or being minor, were unable to enforce their rights. However, the Land Act makes no provision for such instances. Since many owners cannot be blamed for not claiming their rights during the years of unrest in the seventies and beginning of the eighties, it appears unjust to deprive them of all their authority over their land.

The situation is further complicated by the fact that most landlords are not identical with, or heirs of those to whom land was assigned by the 1900 Agreement. Rather, they bought their land from somebody, and thus expect authority over their land as return for their investment.

The restriction of rights is also problematic in cases where landlords have allowed people to settle on their land without special licence or leasehold contract for less than 12 years. These occupants, even if allowed to only settle temporarily, qualify as “lawful occupants” under the Land Act and cannot be evicted if the owner wants to use his land differently. This is hard to understand given that it was solely the consent of the owner to temporarily settle on the land which made them lawful occupants. Where consent is given only for a limited time, after that time, it should be possible to end the occupancy and use that land otherwise.

Correspondingly, it is often hard to understand for registered owners why they should have no authority over their land. Meanwhile, there is a great demand for land, especially in the central region, which steadily increases in commercial value. As a consequence, land owner’s have tried to circumvent the restrictions imposed by the law by selling of the land titles to people who have either the money to compensate the occupants or the army muscle to evict them forcefully³⁴. The major cause of the evictions taking place is thus not non-payment of

³³ For this position cf. also: The Uganda Land Alliance, *The Land (Amendment) Bill: Transforming Power Relations on Land Equivocally*, (March 2008), p. 6.

³⁴ Cf. “Land: 87.8% are potential evictees”, *The New Vision*, Special Report, February 23, 2008 and “Sudanese refugees back Mengo on Land Bill”, *Daily Monitor*, March 12, 2008.

rent, but the conflict of rights of registered owners and occupants. This conflict of rights also explains why surveys have found that disputes over *mailo* plots are significantly higher than for plots under e.g. customary law³⁵.

In some cases, evictions are also simply caused by flawed judgements of courts or because local authorities lease or sell land to investors even though it is occupied by tenants or customary owners. For example, according to newspaper reports, 400 residents of Bugonga, Entebbe were threatened with evictions in February 2007 after Wakiso Land Board gave out a six acre chunk of land to some investors³⁶. According to a lawyer's report, registrars and magistrates have been giving eviction orders without visiting the land in question to establish what is on the ground or without even hearing the evidence from the person to be evicted³⁷. Since the current law already is clear as to the procedure to be followed³⁸, this ignorance of the law will not be redressed by simply restating it in an amendment or by transferring power to the Minister to determine land, but only by better training of the competent persons and establishment of an overview mechanisms which insures better compliance.

Another reason for land conflicts and unlawful evictions is the fact that there is no functioning land titling system. The chairman of the Surveyors' Registration Board, Mr John Musungu, estimates that 99 % of all land conflicts are caused by unregistered occupants³⁹. This might be overestimated but points into the right direction. A survey carried by the World Bank in cooperation with the Economic Policy Research Council in 2001 showed that boundary conflicts and tenant-landlord conflicts account for the majority of disputes⁴⁰. This together with the fact that over 90 % of households have no formal documentation⁴¹ indicates that proper titling especially in *mailo* and urban areas could significantly reduce conflicts⁴².

As pointed out above, Land Boards are lacking Registrars and, as the "Daily Monitor" reports⁴³, as of 2005 the country had only two registrars at the central Land Registry in Kampala to handle all nationwide applications for land titles. Except for customary land

³⁵ Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006), table 2.

³⁶ See "Previous evictions", Daily Monitor, February 5, 2008.

³⁷ See "Courts are to blame for the illegal evictions", The New Vision, April 1, 2008.

³⁸ See e.g. the Practice Direction No. 1 of 2007 of the Chief Justice (legal Notice No. 11 of 2007 published in the Gazette on August 5, 2007) on orders relating to registered land which impact on the tenants by occupancy. This notice emphasises the need to visit the *locus in quo* and to hear all interested parties and their witnesses. It applies to proceedings before registrars, judges and all courts subordinate to the High Court, including the Land Tribunals and the local council courts.

³⁹ "Sort out land survey mess", Daily Monitor, March 25, 2008.

⁴⁰ See Deininger/Castagnini, Journal of Economic Behavior & Organization 60 (3) (2006), pp. 321-45 (table 3).

⁴¹ See Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006), p. 12.

⁴² In contrast, in rural areas governed by customary law *formal* surveying of rights is likely to yield rather limited benefits, given the costs incurred cf. Fitzpatrick, Development and Change (2005) 36 (3), pp. 449-75 (453).

⁴³ "Mess at land registry", Daily Monitor, March 22, 2008.

titling which selected District Boards are mandated to carry out, all other land holdings can currently only be formalised through the city-based Land Registry. This arrangement and the scarce staffing of the central Land Registry caused an enormous backlog of unprocessed land title applications. As a result, certain crucial document verification steps were skipped and the system of filing back land titles/certificates to ensure orderly record keeping has collapsed⁴⁴.

This vacuum has been used by criminals to forge titles. Officials at the Ministry of Lands estimate that about 300 forged land titles are in circulation in Kampala⁴⁵.

Even the titles registered by the Land Registry under due procedure are often inaccurate since so-called beacons were destroyed in the 1970s and 1980s. Beacons are points of known latitude, longitude and height values used as control references during land surveys. As a consequence of the destruction of these land marks the field data feeding into the national Land Registry has been inaccurate for years thus adding to the mess of the registration system⁴⁶. This lack of proper record keeping and persistent inaccuracies in the registry have also severely contributed to tenure insecurity, especially in urban areas and areas under *mailo* tenure, thus making evictions easier⁴⁷.

e) The impact of the current system on development

The described conflict of statutory rights and the lack of accurate land titling not only cause insecurity and evictions, but still worse, are adverse to development.

Studies have shown that conflicts and tenure insecurity generally have a significant productivity-reducing impact and discourage land-related investment⁴⁸. As regards *mailo* tenure, the law itself has additionally logged out large areas of land from the development process. Since owners of occupied land lack authority over their land and cannot evict tenants, they are prevented from developing their land or from renting it out to tenants who might be more productive⁴⁹. Given the encumbrance on the land, selling and buying occupied *mailo* or freehold land is also little attractive – except for those who want to engage in illegal evictions. Selling is further complicated by the fact that owners lack certificates and have difficulties

⁴⁴ Ibid.

⁴⁵ Much of the forgery happens as people obtain a photocopy of the original land title held at the Land Registry. This is possible because by law individuals who lose their land titles can require the Land Registry to issue a registrar's file copy if they pay Shs 10,000, see *ibid*.

⁴⁶ Ibid.

⁴⁷ For this assessment see also Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007), 7.1., 132.

⁴⁸ See note 11 and Deininger/Castagnini, *Journal of Economic Behavior & Organization* 60 (3) (2006), pp. 321-45.

⁴⁹ *Mailo* land already by definition is land where the right of development of land is separated from the right of ownership (Section 3 (4) Land Act).

receiving one.

It is also difficult for owners to use their land as a financial security and thus allow money-borrowing for new investments and economic development. Financial institutions are hesitant to accept owners' titles as the law does not allow banks to evict tenants on land to recoup their money in case the borrower defaults. And as long as it is occupied by tenants who only have to pay a non-commercial rent, its value is near zero⁵⁰. Banks also have the fear that owners might deliberately impose tenants on the land as a means of preventing banks from taking over the land in case of default⁵¹.

Occupants, on the other hand, who by law have the right to develop the land, either lack the resources or the will to develop the land. Given the chaos at the Land Registry, occupants have difficulties in acquiring certificates of occupancy, adding to their insecurity and making them more prone to being evicted. Since insecurity generally discourages land related investment⁵², occupants – who by law are the ones supposed to develop the land – remain hesitant to engage in long term investments. This hesitance is increased by ignorance of the legal provisions. As a survey conducted by the World Bank in 2004 in collaboration with the Ministry of Water, Land and Environment, Makerere University and FASID showed, more than 50 % of *mailo* tenants are not aware of the tenure security afforded to them under the law and almost 70 % mistakenly believe that the landlord can prevent them from land-improving investment⁵³.

Development of land is also hindered by the fact that most of *mailo* occupants belong to low and medium income groups and thus lack the resources needed to develop their land or acquire more land to allow commercial agriculture and invest in modern farming methods⁵⁴. One way to overcome their resource impasse would be to borrow money. Getting loans however proves difficult⁵⁵ since most commercial banks do not lend to individual small-scale borrowers due to the high administrative costs involved and the difficulties of selling such plots⁵⁶. Development Finance Company of Uganda Bank (Dfcu Bank) has recently announced the launch of land loan scheme for purchase of *mailo*, freehold or leasehold land, however, this scheme is accessible only by employees who earn at least Shs200,000 per month or

⁵⁰ Cf. Hunt, Development Policy Review 22 (2) (2004), 173-91 (184).

⁵¹ Cf. "Banks oppose Land Bill", Daily Monitor, March 6, 2008. According to this article banks only express these fears vis-à-vis the proposed law. However, the position is the same under current law.

⁵² Deininger/Castagnini, Journal of Economic Behavior & Organization 60 (3) (2006), pp. 321-45.

⁵³ Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006), p. 14 and table 5.

⁵⁴ See African Peer Review Mechanism, Uganda Country Self-Assessment Report (November 2007), p. 458.

⁵⁵ According to a study of the Economic Policy Research Council jointly with the World Bank of 2001, only about 2 % of households had access to credit, see Deininger/Castagnini, Journal of Economic Behavior & Organization 60 (3) (2006), pp. 321-45, table 5.

⁵⁶ Hunt, Development Policy Review 22 (2) (2004), pp. 173-91 (182).

business owners⁵⁷. In addition, the 2004 Land Amendment Act has abolished the right to pledge the certificate of occupancy, allowing occupants to only sublet, assign or subdivide his right of occupancy (Section 34 Land Act) but leaving them without possibilities to use their land as collateral.

In sum, the current law combined with the mess in the land registration system discourages investment and causes the concerned land to fall out of the land market and the credit system. By doing so, it is adverse to development.

Many studies have shown that functioning land markets and in particular rental markets, can raise productivity and help households to diversify their incomes⁵⁸. For example, in China rental markets have helped to transform occupational structures and significantly increased productivity by transferring land to better farmers from those with low ability or little interest in agriculture⁵⁹. Experience with sales markets in India⁶⁰ has shown that land went to better cultivators and to land-scarce households⁶¹. Consequently, the current *mailo* tenure system, by hindering rent and sale of considerable proportions of land in the Central Region, has a negative impact on reallocation for optimal use and income diversification. This is reflected in the fact that most of the land occupied under *mailo* tenure was found idle and not utilised by the owners⁶².

As for using land as collateral, it is rather unlikely that rural occupants would like to use their plots in that way even if they could, given the high risks of defaulting under rain-fed agriculture, the high costs involved (from 42% to 125% annually)⁶³ and the fact that land is often their only source of income⁶⁴. Meanwhile, in urban areas and the non-farm sector where there is more demand for loans⁶⁵, not being able to use land as collateral is an impediment to development of land.

The proposed amendment does not address any of these problems. Rather, the new Section 32 A simply reiterates the current law by stipulating that occupants might only be evicted for non-payment of rent. Since evictions are rarely caused by non-payment of rent, empowering

⁵⁷ See "Dfcu bank now offering land loans", Daily Monitor, April 4, 2008.

⁵⁸ World Bank, World Development Report 2008: Agriculture for Development (2007), pp. 141 et seq.

⁵⁹ See *ibid.*, p. 142, box 6.3. with further references.

⁶⁰ *Ibid.*, p.141/42.

⁶¹ However, sale markets are more affected by speculation and imperfections in other markets than rental markets (such as money lending markets which result in owners ceding their land to banks). Thus, to ensure allocation of land to the most productive users, land markets need more regulation than rental markets, *ibid.*

⁶² Businge, Uganda's difficult path towards an agreeable National Land Policy, published at www.ugpulse.com. (March 30, 2007).

⁶³ Adoko/Levine, A Land Market for Poverty Eradication? A case study of the impact of Uganda's Land Acts on policy hopes for development and poverty eradication (June 2005), p. 23.

⁶⁴ Hunt, Development Policy Review 22 (2) (2004), pp. 173-91 (181).

⁶⁵ Cf. *ibid.*, p. 183/84.

the Minister to determine rent and courts to issue orders of evictions for non-payment of rent will not stop evictions. The real problem, i.e. the relationship between the occupants and the registered owners, the lack of a functioning land administration and registration system, and the consequences this has for development, is not addressed by the amendment.

f) The impact of criminalisation of unlawful evictions and of illegal land grabbing (new Section 32 A, B and amendment to Section 92 (4) Land Act)

Similarly, the part of Section 32 A and B which criminalises forced evictions will do little to actually stop evictions or have any positive impact on land utilisation. As pointed out by the attorney general of the Buganda government, Apollo Makubuya, there are existing provisions of the Penal Code which already criminalise evictions. Makubuya has namely cited Section 77 of the Penal Code which forbids forced entry on land and Section 76 of the Penal Code that forbids going armed in public⁶⁶.

As for Section 76 of the Penal Code, it has to be conceded that it only prohibits carrying of offensive weapons “in public”. Since Section 76 is contained in the Chapter on “offences against public tranquillity” and since Section 2 (z) defines “public places” as places where the public are entitled or permitted to have access, somebody carrying weapons to evict people on *private* property cannot be considered to fall under this provision. Consequently, all evictions taking place on private land will not qualify as an offence under Section 76. And even armed evictions carried out on *public* land would “only” hand down a five year term of imprisonment under Section 75 of the Penal Code – in contrast to the seven year term proposed by the amendment.

Meanwhile, under Section 77 of the Penal Code, any forceful eviction constitutes an offence already today. This provision qualifies as a misdemeanour any entry on land in a violent manner, in order to take possession thereof, irrespective of whether the person is entitled to enter or not. The only exception is when the person enters upon lands or tenements of his or her own which is in the custody of his or her “servant or bailiff”. Since tenants cannot be considered “servants” or “bailiffs”, under Section 77 of the Penal Code, any forceful eviction of *bona fide* and lawful occupants constitutes a criminal offence. The only difference which remains, compared to the proposed law, is that under the Penal Code the offence is solely qualified as “misdemeanour” which according to Section 23 of the Penal Code means that it is punishable with imprisonment not exceeding two years. In contrast, under the new amendment it would be a major offence which would hand down a jail term up to seven years.

⁶⁶ Makubuya, Attorney General of Buganda Kingdom, 10 Points Why the Land (Amendment) Bill 2007 Should not Pass, point 1.

This means the only novelty introduced by the proposed amendment in this regard is that evictions could be prosecuted with a jail terms up to seven instead of two (or five) years (respectively). Given that even today people commit criminal offences when they engage in evictions but still do not hesitate to do so, simply increasing the jail term will do little to stop the evictions. As the Attorney General of the Buganda Kingdom Apollo Makubuya points out rightly, in this respect it is not lack of laws, but impunity which allows evictions⁶⁷.

In contrast, the proposed amendment to Section 92 (4) of the Land Act, which tightens penalties for people who wilfully and without the consent of the owner occupy land belonging to another person, concerns an offence which is not punishable under the Penal Code. This provision would e.g. allow the punishment of pastoralists who have been encroaching on land belonging to peasants especially in the northern regions.

It has been criticised both by Buganda MPs and the Technical Committee that illegal land grabbers are supposed to be liable to a four year jail term “only”, whereas a landlord who evicts squatters without a court order suffers a seven-year sentence. It has been proposed that the seven year jail term should be applied to both⁶⁸. However, this does not address the actual problem of the provision. More generally, it is questionable whether criminal courts are the right place to solve conflicts, especially those between pastoralists and peasants. Further, it will be difficult to actually establish an offence under Section 92 Land Act. In order to establish that the person “wilfully” occupies land belonging to another person it needs to be proven that the person occupying the land positively knew that the land belongs to somebody else. Recent conflicts like the one between Balaalo and indigenous Bagungu in Buliisa District show that encroachers on land often think or at least claim that they have a right to settle (the Balaalo in Buliisa e.g. claim that they have bought the land)⁶⁹. Thus, the effect of the amendment to Section 92 (4) Land Act to actually prevent land grabbing and reduce land conflicts is likely to be limited.

g) Impact of the proposal on selling and assigning agreements (amendment to Section 35 Land Act)

Similarly, the proposed amendment to Section 35 is unlikely to enhance tenure security. The proposed amendment to Section 35 criminalises occupants who when wishing to assign an occupancy do not give first option to the owner. It also declares void any transaction of interest engaged in by the owner without giving first option to the tenant. Both provisions build on current law and want to secure its better enforcement. Whereas the idea behind them

⁶⁷ See *ibid.*

⁶⁸ See “Behind the scenes at the Museveni - Buganda MPs Entebbe meeting”, Daily Monitor, February 20, 2008 and “Jail land grabbers – Buganda MPs”, Daily Monitor, February 22, 2008.

⁶⁹ See “High Court clears Balaalo eviction”, Daily Monitor, March 26, 2008.

is good, the second provision is especially unlikely to yield any benefit.

Section 35 of the current Land Act stipulates that tenants by occupancy may assign the tenancy with the consent of the owner (or an order of a Land Tribunal replacing this consent), but before assigning it to somebody else must give first option of taking the assignment to the owner. This provision insures that owners get the chance of retrieving full authority over their land and thus helps to abolish conflicting rights. Criminalising tenants for not giving first option to the owner of the land when assigning their tenancy is a good incentive to enforce this provision and can therefore generally be welcomed. However, in view of the general low knowledge about the law among occupants⁷⁰ it is likely that, if occupants currently disregard Section 35, it is not necessarily by deliberation but mainly for not knowing about the law. To have any positive effect, it would thus need to be ensured that tenants are also informed about the law because just locking them up in prison will not help anybody. Also the punishment should be restricted to cases where occupants know who is the owner of the land and have a possibility of actually reaching him which is not always the case⁷¹.

In contrast, the second part of the proposed amendment, instead of solving the conflict of rights is likely to enhance the problems inherent in the current provisions. Currently, Section 35 Land Act stipulates that an owner who wishes to sell his interest in land must give first option of buying that interest to the tenant by occupancy (Section 35 (2) Land Act). Once an option has been offered, a cumbersome procedure starts: the one making an offer has to set out the conditions of the offer in detail, the other side then has three months to refuse the offer or to engage in negotiations for accepting the offer. If negotiations fail after three months, any person can refer the case to the Mediator (an institution provided for in the Land Act, but never implemented). It is only if the Mediator fails to reach an agreement within three months and gives a declaration to that effect that the land may be sold without option. In short this means: As tenants in most cases will lack the financial resources to buy the land at the conditions the owner offers, an owner who wishes to sell his land must by law undergo a procedure which will take up to 9 months until he can sell his land without option. This process might be further prolonged since he might have several tenants living on his land. He would first need to find out who they are and whether they qualify as a lawful and *bona fide* occupant (because only those have to be given first option). Even if he finds out about all this and is willing to undergo the whole procedure, he might not succeed given the poor funding of the land management system. And even if he successfully finishes the whole procedure by this time the person originally interested in buying the land might have bought elsewhere. Thus it is obvious that the current law makes selling extremely cumbersome and that any owner who is really decided to sell his land will try to circumvent the law.

⁷⁰ Cf. Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006), p. 14 and table 5.

⁷¹ For example in Kibaale District most landlords are absentee landlords.

According to the proposed amendment, not following the legal procedure by giving first option to tenants would however mean that the transaction is invalid and that the Commissioner would not make any entry on a certificate in respect to such a transaction. In theory, declaring a transaction invalid is a good incentive to make people follow a procedure. However, given that the procedure is so cumbersome and that the competent institutions are lacking resources, the only effect the proposed amendment can have is to discourage owners from selling their land altogether and to encourage recourse to informal arrangements.

Here again the proposed amendment does not address the actual cause of owners circumventing the law. Declaring selling arrangement illegal for not giving first option to tenants can only have a beneficial impact if it is supplemented by other policies, such as providing funds to enable tenants to buy the land. The original good idea behind stipulating an obligation to give first option to the tenant was to allow tenants to buy themselves out and thus gradually abolish conflicting rights. This can however not be realised as long as tenants lack the resources to buy the land. Thus, in order to benefit them, tenants would need assistance to buy the land, possibly through the Land Fund. As long as this assistance is not provided, the obligation of giving first option and the proposed amendment which only reinforces the current position by criminalising owners can hardly yield any benefit.

h) Does the Land Bill infringe upon the constitutional right to property?

Some have raised constitutional concerns about the Bill. As mentioned above it has been claimed that by requiring a court order for evictions, by limiting the reason for evictions to the non-payment of rent, and by criminalising unlawful evictions, the amendment violates the Constitution, namely Article 26 (1). Whereas the amendment conflicts with the Constitution in some respects as will be shown later, the claim that it violates Article 26 is not convincing.

Article 26 (1) of the Constitution states that “every person has a right to own property either individually or in association with others”. However, this does not mean that it is the registered owner of a piece of land who must have the full authority over his land. Rather, Article 237 (8) and (9) of the Constitution provide that lawful or *bona fide* occupants of *mailo*, freehold or leasehold land shall enjoy security of occupancy and mandate Parliament to pass a law to regulate the relationship between the lawful or *bona fide* occupants and to provide for the acquisition of registrable interests in the land by the occupant. This suggests that there are limitations to owners’ rights. Since the laws shall provide security of occupancy these limitation may also consist in requiring land owners to get court orders for evictions and limiting grounds for eviction.

For the same reason, Article 26 (2) cannot be employed to establish the unconstitutionality of

the proposed amendment. Article 26 (2) of the Constitution states that “no person shall be compulsorily deprived of property or any interest in or right over property of any description” except where certain conditions are satisfied⁷². This is to say, in order to establish an infringement of Article 26 (2) it would need to be explained why the prohibition to evict a tenant without court order is a case of deprivation. It could be argued that not being able to evict tenants at one’s will is effectively depriving the owner of his rights. Given that the rent to be paid by occupants is of non-commercial nature, the prohibition of eviction except for non-payment of rent indeed means depriving the owner of the value of his land. However, an infringement of Article 26 (2) of the Constitution could only be established if the owners’ rights would include the power of full disposal over the land. This is not the case. As pointed out above, the Constitution itself makes the owners’ right subject to encumbrance by guaranteeing security of occupancy in Article 237. These occupants themselves enjoy protection from deprivation under Article 26 (2) since this provision protects all persons having “interest in or right over property *of any description*” – and thus also occupants’ rights. Correspondingly it cannot be considered as a case of deprivation of property under Article 26 (2) of the Constitution when land owners are prevented from evicting tenants even if this significantly restricts their rights⁷³.

There obviously is a contradiction between owners’ and occupants’ rights which is problematic as pointed out before. But it lies with the law as created by the Constitution itself. This conflict cannot be solved by challenging the provisions as unconstitutional but only by amending the Constitution itself and fundamentally rearranging the relationship between owners and occupants.

**i) The problem of powers being conferred to the Minister and to the “courts”
(amendment to Section 31 and new Section 32 A)**

In contrast, the proposals referring to the rearrangement of executive and judicial powers are indeed unconstitutional. As pointed out above, in regard to the tenants-owner relationship, the main change introduced by the proposed amendment is the transferral of power to the Minister to determine the annual nominal rent in case Land Boards fail to do so. Under current law the rent is to be determined by the Land Boards with the approval of the Minister. Both the current and the proposed provision is problematic in view of Article 241 of the Constitution.

Article 241 (1) of the Constitution stipulates that the Land Boards have the task of dealing

⁷² These conditions are: the acquisition must be necessary for public use or in the interest of defence, public safety, public order, public morality or public health and it must be made under a law which makes provision for prior and adequate compensation and for a right of access to a court of law.

⁷³ This view is also shared by the Uganda Law Reform Commission, see “Legal expert okays land amendment bill”, The New Vision, March 12, 2008.

“with all [...] matters connected with land in the district in accordance with laws made by Parliament”. According to paragraph (2), in the performance of these functions, District Land Boards shall be “independent of the Uganda Land Commission and shall not be subject to the direction or control of any person or authority but shall [only] take into account national and district council policy on land”. There are no provisions in the Constitution transferring special rights to the Minister to interfere with these tasks assigned to the Land Boards. Thus, it is not evident on what grounds the power to determine ground rent could be transferred to the Minister. Both the current law and the proposed amendment which allow such interference with the tasks of the Land Board are thus in breach of the Constitution.

Besides, it is to be doubted that the Minister is able to properly handle all cases where rent is contentious. According to data collected during the 2005 National Household Survey, 87.8% of the households in central Uganda are tenants by occupancy⁷⁴. As long as most District Boards are unable to fulfil their tasks of determining rent for lack of funding, the proposed amendment effectively means that it is up to the Minister alone to handle all cases in the country. It is obvious that one minister alone cannot properly handle all cases, especially since determining rent is no routine work, but according to the law requires taking into account the circumstances of each case (see Section 31 (3c) (i) of the Land Act). Further, it is unlikely that any landlord sitting somewhere up-country would travel all the way to Kampala to have a rent determined which in the end is so marginal that it might not even cover the travel costs. The proposed transferral of power to the Minister thus is both unconstitutional and impractical.

More generally, shifting power to the Minister defeats the principle of decentralisation which has been a main principle guiding both the 1995 Constitution and the 1998 Land Act⁷⁵ and is a declared goal of the National Land Policy which is currently drafted by the Ministry for Lands, Housing and Urban Development⁷⁶. Thus, by proposing the Land (Amendment) Bill, the Ministry contravenes its own policy goals and will make it difficult to implement the proposed land policy.

Both the current and proposed provisions are also to be criticised for the fact that they do not allow any judicial review of the decisions of the Minister approving or determining the rent⁷⁷. Whereas the provisions in respect of the District Land Boards allow an appeal to the Land Tribunal whenever a tenant or registered owner is aggrieved, with the rent set by the Land Board (see Section 31(4) Land Act), there are no provisions for appeal in respect of the

⁷⁴ “Land: 87.8% are potential evictees”, The New Vision, Special Report, February 23, 2008.

⁷⁵ Minister Francis, Parliament of Uganda Parliamentary Debates, 20 June 1998, p. 4041-43.

⁷⁶ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3, (January 2007), 3.2.4., 52 (i).

⁷⁷ For this critique see also Ogalo, “Current Land Bill is not our answer”, Daily Monitor, February 2, 2008.

decision of the Minister. Thus there is no authority which could control how the Minister is exercising his power. Given that the Constitution guarantees a “hearing before an independent and impartial court or tribunal established by law” for the determination of any civil rights (see Article 28 of the Constitution), this lack of judicial remedy in both the current and the proposed law is clearly unconstitutional.

Lastly, constitutional concerns are to be raised about the provision empowering “courts” to issue eviction orders. In case the term “court” is read in a way which includes courts other than Land Tribunals, this provision conflicts with Article 243 of the Constitution. This Article provides that jurisdiction of a Land Tribunal shall include the determination of disputes relating to the grant, lease, repossession, transfer, or acquisition of land, and the determination of the amount of compensation to be paid for land acquired. Even though this provision does not explicitly name “evictions” as falling under jurisdiction of the Tribunals, eviction if carried out by the owner, constitutes a case of “repossession”. Thus, cases involving evictions fall under the jurisdiction of the Tribunals and may not be transferred to other courts. If the term “courts” as used in the Land (Amendment) Bill means courts other than Land Tribunals this is in breach of the Constitution. Further, by not funding Land Tribunals, government violates the constitutional Directive Principle number VIII on the “provision of adequate resources for organs of government” which stipulates that the distribution of powers and functions provided for in the Constitution among various organs and institutions of government shall be supported through the provision of adequate resources for their effective functioning at all levels.

One could argue that the term “courts” can also be understood as meaning Land Tribunals. But if that is the case, why not state it clearly? In order to erase any doubt as to which kind of courts could be meant, the Bill would need to be changed so as to clarify that it is the Land Tribunals which have the jurisdiction in eviction cases.

j) The way forward and the suggestions made by the Draft National Land Policy

aa) Redesigning the landlord-occupant relationship

Since the proposed provisions about *bona fide* and lawful occupants do not address the real problem of conflicting rights of landlords and tenants and are partly unconstitutional, the question remains about what should be done to solve the deadlock.

In order to create tenure security, solve the land impasse, and ultimately foster development, it will be necessary to fundamentally redesign the system of *mailo* tenure and *bona fide*/lawful occupancy. Several reports on the land sector, among them the Report of the Odoki Commission of 1992, have recommended that *mailo* land should be transformed into freehold

by compensating *mailo* owners and granting freehold rights to *bibanja* holders⁷⁸. Similarly, the new National Land Policy Draft suggests the transformation of all *mailo* tenure in fully-fledged freehold tenure or into long term leases if located in urban areas and the enfranchisement of those lawful and *bona fide* occupants who can establish long and interrupted residence and use of land⁷⁹. Alternatively and less radical, it has been recommended e.g. by the Commission of Inquiry of 2003 that landlords should be able to charge commercial rent⁸⁰.

In principle, the suggestion made in the Draft Land Policy that *mailo* land shall be transferred into freehold or into long term leases can be welcomed since it would ultimately abolish the conflict of rights between owners and tenants. However, it leaves open the essential question of how this could be effected in practical terms. One possibility which has been suggested from various sides⁸¹ would be to facilitate the Land Fund to help occupants buy out their land as was done in Kibaale and is underway for ranchers in Ankole, Singo and Bunyoro⁸². This would also ban the current danger of tenants being enticed with money, by landlords, to give up their occupancy, which would leave them landless.

Since the fund is already in huge deficit for the compensation of the current schemes, setting up a nationwide compensation scheme might however prove difficult. One way forward might be to use foreign aid to facilitate the land fund as part of the aid given for poverty reduction. The UK government has already signalled support for land reforms geared towards poverty eradication which could possibly include supporting a land fund⁸³. To facilitate the Land Fund and in order to ensure that the freehold land thus created is used productively also a modest tax on land could be levied⁸⁴.

The less radical and less costly alternative as suggested by the Commission of Inquiry of 2003 would be to allow owners to charge commercial rent. By allowing the owners to charge a commercial rent, the risk of evictions would be lowered and occupants would be encouraged to use their land more productively. This solution however bears the risk of tenants not being able to pay the rent and being evicted for that reason. In order to avoid exploitative rents it

⁷⁸ Justice Odoki, Report of the Uganda Constitutional Commission: Analysis and Recommendations (1992), 25.69; see also Makerere Institute of Social Research / Land Tenure Centre of the University of Wisconsin, Land Tenure and Agricultural Development in Uganda Report (1989) question 4.

⁷⁹ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3, (January 2007), 5.2.13., 109 (iii) and (iv).

⁸⁰ The Report of the Commission of Inquiry (December 2003), 16 - 227.

⁸¹ E.g. Rugadya/Ministry of Lands, Housing and Urban Development, Emerging issues for public consultation with policy options (May 2007), A.3.2 (iii); Dokolo MP Okot Ogong, in: "The Land Bill will leave many poor people landless", The New Vision, March 12, 2008 or Musinguzi, "Land reforms will create another Zimbabwe here", Daily Monitor, March 15, 2008.

⁸² Cf. "Land: 87.8% are potential evictees", The New Vision, Special Report, February 23, 2008.

⁸³ "No land fund yet - British representative", The New Vision, 14 March, 2008.

⁸⁴ For this suggestion see Musinguzi, "Land reforms will create another Zimbabwe here", Daily Monitor, March 15, 2008.

would therefore be crucial to facilitate the Land Boards to actually carry out their task of overseeing the setting of rent. Further it might be unjust to charge rent from tenants who have been on the land for decades. It would be necessary to provide such occupants with financial assistance to pay the rent. The costs of such an assistance would however be lower than for setting up a compensation scheme.

In any case, it would be necessary to differentiate between various categories of owners and occupants. It appears unjust to allow land lords to charge commercial rent from descendants of occupiers who had already been protected under the *Busuulu* and *Envujjo Law* and the *Ankole* and *Toro Landlord and Tenant Law* and who had been the original settlers on the land before its assignment to individual chiefs under the 1900 Agreement. These occupants must be considered to have more rights over the land than e.g. those who only came on the land in 1970s or early 1980s and have been there uncontested only because of exile or legal disability of the owner. Correspondingly, the latter should pay more compensation or rent than the former. In addition, for determining the amount of rent or compensation it would need to be taken into account in which way the owners and occupants acquired their land (through purchase or inheritance?) and how much they paid for the acquisition.

In addition, and especially as long as no radical transformation of occupant-owner relationship is effected, it should also be considered redefining the meaning of *bona fide* and lawful occupants⁸⁵. It is hard to understand why occupants who came on the land in 1970s or 1980s as squatters in the absence of the landowners and were not challenged until 1995 due to exile or legal disability should enjoy full security of tenure. At least for these occupants it should be possible for the owners to charge a commercial rent.

bb) Enactment of a land policy and establishment of a working land administration and registration system

As pointed out above, besides the conflict of right, another main reason for disputes and evictions is the lack of a coherent land policy which could guide the administration and registration of land.

Currently, the Land Act gives blanket power to the Land Boards “to allocate land in the district which is not owned by any person or authority” and to “sell, lease, or otherwise deal with the land held by it” (Section 59 (1a) and 60 (2c) Land Act). There are no guidelines as to how these allocations and administration of land are supposed to be carried out. Given the independence of the Land Boards, there is also no (control-)mechanism which could ensure that the Land Boards, before assigning land to somebody, actually inquire about whether the

⁸⁵ For this suggestion see also: The Uganda Land Alliance, *The Land (Amendment) Bill: Transforming Power Relations on Land Equivocally* (March 2008), p. 6/7.

land is occupied.

To prevent the Land Boards from abusing their power and to ensure equal access to land and its productive use, a national land policy which contains guidelines as to the allocation, management, and use of land needs to be drafted and implemented.

As part of the Draft National Land Policy it has been suggested imposing land ceilings to prevent unproductive accumulation of land and to specify terms upon which state agencies exercise trusteeship over land⁸⁶. This is a step into the right direction, however it remains vague. Its success will depend on its further specification. The repealed 1969 Public Lands Act contained concrete guidelines as to the size of grants of land depending on the purpose of the grant. Similar guidelines could e.g. be adopted under the current law⁸⁷.

For any land policy to be effective it will further be crucial to establish a well funded and qualified land administration system. As rightly pointed out in the Draft Land Policy, the land administration system will not function effectively unless it is provided with resources and personnel at all levels of operation⁸⁸. District Land Boards in particular need to be provided with the necessary funding to exercise their functions.

Even though the 2004 Amendment Act has already abolished the sub-county and urban Land Tribunals and the Land Committees at parish level, the current system with one Land Board for each of the 81 districts still requires a great amount of human and physical resources which will hardly be available in the near future. One way to overcome the funding impasse of these Boards as suggested by the Commission of Inquiry of 2003 would be form joint/regional Land Boards for several districts⁸⁹.

In order to avoid abusive land administration and ensure that the policy is actually implemented, accountability of the Land Boards also needs to be enhanced. Taking into account that Land Boards are supposed to be independent in the performance of their functions, one way to increase accountability would be to have all applications for land registration widely published⁹⁰.

Further and as already suggested by the Draft National Land Policy, the mess in the registration system needs to be addressed by *inter alia* updating the *mailo* land registry⁹¹ and

⁸⁶ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007), 4.2.1, 65 (iii) and 3.2.3., 50 (i).

⁸⁷ For this suggestion see: The Report of the Commission of Inquiry (December 2003), 16 - 228.

⁸⁸ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007), 7.1., 133 (ii).

⁸⁹ This has also been the suggestion of the Commission of Inquiry, see The Report of the Commission of Inquiry (December 2003), 16 - 231.

⁹⁰ For this suggestion see *ibid.*, 16 - 228.

⁹¹ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3,

simplifying the registration and demarcation system⁹². Even though there is no evidence that land titling automatically reduces conflict and by itself is beneficial to development or poverty eradication⁹³, it is evident that at least the current mess and slow working of the registration system, which has created false and inaccurate titles and prevents new titling, has contributed to conflict and insecurity, thus hindering productive use of land. To address these problems it is essential that both the National Land Registry and the District Land Boards are staffed with a sufficient number of qualified registrars to properly process demands for registration and are equipped with modern technologies such as GPS (Global Positioning Systems) and GIS (Geographical Information Systems) to establish an accurate information system.

The National Land Draft Policy further suggests that land mapping shall be privatised to enhance efficiency⁹⁴ and that a semi-autonomous state agency shall be established for land registration, survey, valuation and allocation⁹⁵. Whereas outsourcing some surveying tasks to private agencies might be cost- and outcome-efficient, it remains unclear how the establishment of a (central?) agency is coherent with the goal of decentralisation and conferral of power to community boundary making systems which are also declared goals of the policy⁹⁶. Instead of creating a totally new agency which again will require new funds, focus should rather be on enabling the current institutions (Land Boards) to carry out their functions properly.

In order to assure that the registration process is beneficial, it also needs to be accompanied by policy guidelines. Titling generally tends to favour those with privileged access to titling procedures. Correspondingly, the direct benefits of land registration schemes in Africa have often been confined to national elites and external investors⁹⁷. However, there have also been very promising instances of land titling. In Ethiopia, for instance, after land-use certificates were issued to some 5.5 million households under a titling schemes in 2003-2005, in a nation wide survey more than 80 % of respondents indicated that the certification reduces conflict, encourages investment in land and instigates them to rent out the plots⁹⁸. Correspondingly, if it is ensured that the *bona fide* or lawful occupants (as the users of the land) are the primary recipients of titles, positive impacts from titling can be expected.

(January 2007), 5.2.2, 83 (v.) and 52.13, 109 (iii).

⁹² Ibid., 7.2.2.

⁹³ Cf. Fitzpatrick, *Development and Change* 36 (3) (2005), pp. 449-75 (453).

⁹⁴ Ministry of Lands, Housing and Urban Development, *Drafting the National Land Policy, Working Draft 3* (January 2007), 7.2.3, 139 (iii).

⁹⁵ Ibid., 7.2.7, 148 (i).

⁹⁶ Cf. Ibid., 7.2.3., 139 (iv).

⁹⁷ Quan, *The Importance of Land Tenure to Poverty Eradication and Sustainable Development in Africa*, (September 1997), p. 2 and World Bank, *World Development Report 2008: Agriculture for Development* (2007), p. 139.

⁹⁸ Deininger et al., *Rural land certification in Ethiopia: Process, initial impact, and implications for other African countries* (April 2007).

In sum, in order to create security of tenure for *bona fide* and lawful occupants and to enable development, instead of adopting the proposed amendment which only reinforces the current problems, the relationship of registered owners and occupants should be fundamentally redefined and a functioning land administration and registering system established and guided by a land policy. The Draft National Land Policy already points into the right direction, it however remains vague, especially on the crucial issue of how to transform the owner-occupant relationship on *mailo* land. It would require further specification along the lines suggested here to allow any meaningful implementation.

2. The Land (Amendment) Bill and customary tenure

a) The content of the Land Bill and the critique uttered

As for customary tenure, the Bill stipulates in a new Section 32 B that “a person claiming interest in land under customary tenure shall not be evicted except upon an order of eviction issued by the court”. The order shall provide for an adequate compensation and shall only be issued after the interested persons have been heard, after a report of the land committee has been received, and after the *locus in quo* has been visited. Besides, it provides for a seven year jail term for any person who evicts occupants without court order.

The provisions resemble those which are proposed for *bona fide* and lawful occupants of *mailo* land, except that grounds for evictions are not restricted to non-payment of rent. However, other than the provisions on *bona fide* and lawful occupants, these provisions are not just a restatement or alternation of the existing law but are actually new.

The main critique uttered about the provisions on customary tenure comes from the northern regions where customary tenure is predominant. Concerns are about the fact that the amendment by simply referring to “a person claiming interest under customary tenure” is open for abuse. It is especially feared that pastoralists encroaching on land, or squatters who settled on land which has been deserted for years by people living in IDP camps, could not be evicted anymore if the Bill is passed. Further, by reserving authority to issue eviction orders to courts, the Bill is said to undermine customary dispute settlement and will cause conflict and disadvantage the poor⁹⁹.

These fears are founded. I will particularly show that the fact that the Bill empowers courts is very problematic. By doing so, the Bill is likely to increase tenure insecurity and conflict and disadvantage the poor. The proposed provision contravenes widely agreed recommendations and the Draft National Land Policy (point 7.2.4, 141 (iii)) according to which indigenous dispute mechanisms should be strengthened and accorded precedence in disputes involving

⁹⁹ See supra, not 17, 18 and 19.

customary tenure. To provide a proper understanding of this thesis, I will first give a short overview of the current legal situation (a) before analysing the Bill's impact (b).

b) Current legal situation

Customary tenure is one of the four forms of land tenure recognised by Article 237 of the Constitution. Section 3 (1) of the Land Act defines it as a right which is subject to local customary regulations and provides for communal and individual or household ownership.

With the exception of *mailo* land in Buganda and land in urban areas, most land in Uganda (over 80 %¹⁰⁰) is held under customary tenure. The specific terms of the tenure vary according to the ethnic group and region of the country¹⁰¹. In some places, especially the northern regions, ownership of land is mainly communal with usufructs rights for individual persons or families. In other places, mainly in the densely populated southern and eastern area, there is a trend towards individual ownership¹⁰².

Like freehold or *mailo* tenure, customary tenure is a tenure in perpetuity. Any person, family, or community holding land under customary tenure on former public land may acquire a certificate of customary ownership (Section 5 Land Act). Like a freehold or *mailo* title, the certificate of customary ownership theoretically may be transferred, mortgaged, or otherwise pledged and shall be recognised by financial institutions for access to credit (Section 8 Land Act). The main difference between customary and other forms of land tenure is that the former is governed by customary laws – that is to say by rules generally accepted as binding by a particular community – and that ownership is generally a function of community, family or lineage membership. Customary rules apply as long as they are not repugnant to natural justice, equity, good conscience or incompatible either directly or indirectly with written law (see Section 17 (1) Judicature Statute, No. 13 of 1996).

Under current law, Land Boards have the authority to issue a certificate of customary ownership after receiving a recommendation of the Land Committees (Section 4 *et seq.* Land Act). The Land Committee shall give recommendations in accordance with customary law (Section 5 (c) Land Act) and, before making a recommendation, has to follow a detailed procedure, including the placement of a public notice about the claims and conducting a hearing of any person claiming interests in the concerned land. The Committee may also seek advise of customary institutions (Section 5 (2d) Land Act). After receiving a recommendation of the Committee, the Land Board may endorse, alternate or reject it (Section 7 Land Act). If

¹⁰⁰ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007), 5.2.11, 102.

¹⁰¹ Morris/Read, Uganda: The Development of its Laws and Constitution (1966), pp. 353-359.

¹⁰² Obol-Ochola, Customary Land Law and Economic Development in Uganda (1970), pp. 67-116.

the Land Board decides that the certificate is to be granted the Register will issue a certificate of customary ownership (Section 7 (5) Land Act). Any person aggrieved by the decision may appeal to the Land Tribunal (Section 8 (6) Land Act). The certificate shall be conclusive evidence of any customary rights and interests specified in it (Section 8 (1) Land Act) and thus would – at least in theory – also make impossible any evictions.

As is evident from the above, the procedure for applying for a certificate is long and cumbersome. Given the lack of functioning Land Boards and Committees, until 2006 not one certificate of customary ownership had been issued¹⁰³. Under these circumstances, it is currently up to traditional authorities or courts to determine themselves on the basis of the local rules about who is the appropriate owner or user of the land. Under current law, traditional institutions may intervene in conflicts. Article 88 of the Land Act stipulates that traditional authorities shall not be prevented, hindered or limited in their function of determining disputes over customary law or acting as mediators in these matters.

In summary, under current law, a person claiming ownership of the land may apply with the Land Board to be issued a certificate of ownership. Under this procedure, at least theoretically, traditional institutions may be consulted. Further, dispute resolution by traditional institutions supplements or may take precedence over settlement by formal courts. Since customary tenure is a form of tenure which is subject to local customary regulations, there might be several reasons for evictions and their lawfulness must be decided separately in each case.

c) The problems of the Land (Amendment) Bill

Against this background, it is not totally clear what the proposed amendment means when it stipulates that “a person claiming interest in land under customary tenure” shall only be evicted upon a court order. Are “persons claiming interest” only those who are in possession of a certificate of ownership or anybody who simply claims he has an interest without reference to any specific customary rule?

The only exception made by the proposed law concerns those who have been allowed to only temporarily occupy or use land (see Section 32 B (3) of the Land Bill). Since a certificate of ownership is conclusive evidence of ownership – thus in theory obviating the need for any dispute – it must be assumed that the proposed provision is intended to apply to all those persons claiming interest in land under customary law who do not possess a certificate. Further, since customary ownership normally is a function of community or family

¹⁰³ Deininger et.al., Rural land certification in Ethiopia: Process, initial impact, and implications for other African countries (April 2007), p. 4.

membership¹⁰⁴, if properly interpreted, the law should only apply to those claiming that they belong to the respective family or community which has traditionally settled on the land. Since the law does not clearly state this, fears that it might be abused by external squatters are founded. By virtue of simply claiming that they have an interest under customary law they could remain on the land until the former occupants have acquired a court order.

In response to this critique, government has already indicated that it will further define who should claim interest on the customary land in order to avoid squatters claiming ownership. However, given that the salient trait of customary tenure is its diversity, it is not clear how such a definition could be accomplished. What could be done, is to restrict the scope of the provision to persons claiming interest under customary tenure as members of a family or community occupying the area¹⁰⁵. However, as the current conflict between Balaalo and indigenous Bagungu in Buliisa District shows, conflict is often precisely about which community rightfully occupies the area¹⁰⁶. Similarly, in the North where war has displaced the majority of the population it often is unclear who the family or community having rights is. Consequently, a definition which simply requires the claim that one belongs to a community occupying the area will not provide for any enhanced security. What would need to be done is to fundamentally amend the customary tenure legislation by introducing a definition of different instances of customary tenureship and how it can be acquired, which then could be used as reference. However, to avoid distortion of current customary rules this would first require a profound research of the traits of the different existing customary rules which is one of the declared goals of the Draft Land Policy (see 5.2.11, 104 (i) which suggests documentation and codification of customary rules), but has not been carried out yet and would need time and resources. As a consequence, at the current stage, any definition of who can claim an interest under customary law is unlikely to yield benefits. It rather bears the risk of unduly simplifying and distorting customary rules.

Besides, the real and more urgent problem of the proposed provision lies somewhere else: i.e. with the fact that evictions may only be carried out after receiving a court order. By requiring a court order, the amendment reverses the current system where traditional dispute resolution systems are supposed to supplement formal mechanisms and contravenes prevailing recommendations on strengthening traditional conflict management which have been taken up by the Draft National Land Policy¹⁰⁷.

A series of academic studies and reports highlight two important points in legislating on

¹⁰⁴ Ogendo, Principles of a National Land Policy Framework for Uganda (January 2002), p. 23.

¹⁰⁵ This was e.g. suggested by a lawyer at the Uganda Law Society Consultative Forum on the Land Amendment bill No. 27 of 2007 and the Draft Land Policy in Kampala on March 4, 2008.

¹⁰⁶ See "High Court clears Balaalo eviction", Daily Monitor, March 26, 2008.

¹⁰⁷ Ministry of Lands, Housing and Urban Development, Drafting the National Land Policy, Working Draft 3 (January 2007), 5.2.11., 104 (iv) and 7.2.4., 141 (iii).

customary law: First, given the high costs of setting up new institutions and the likelihood of overlapping and new (unfamiliar) jurisdiction, which would enhance conflict and insecurity, focus should be on strengthening traditional institutions instead of creating new ones¹⁰⁸. Second, in case new institutions are introduced, it must be ensured that their jurisdiction and hierarchy is clearly defined to avoid insecurity and conflict¹⁰⁹. The proposed amendment disregards both recommendations by reserving power to courts and by leaving open their relationship vis-à-vis traditional dispute resolution mechanism.

Requiring a court order has many disadvantages compared to traditional dispute settlement mechanisms. It involves costs which customary occupants might not be able to cover, thus disadvantaging the poor. They also may be far away, which adds to the costs and reduces accessibility¹¹⁰. Courts rather than traditional institutions are also more likely to be ignorant of complicated customary rules and local situations¹¹¹. Furthermore, for the specific case of Uganda, empowering courts means empowering institutions which are mal-functioning and lack funds. As pointed out before, the Land Tribunals, which according to the law should deal with land matters, have never been set up, and the magistrate courts which have instead taken over their tasks are overburdened already. Thus, as long as there is no working court system, entrusting the task of authorising evictions exclusively to courts is paramount to denying an easily accessible mechanism for lawful evictions.

In ignorance of the second recommendation regarding a clear definition of jurisdiction, the amendment also leaves open whether Section 88 of the Land Act, which reserves the dispute resolution power to traditional authorities, would still apply in cases of evictions. This would be hard to justify given the wording of the amendment, according to which “a person claiming interest in land under customary tenure shall not be evicted except upon an order of eviction issued by the court”. If Section 88 or at least its paragraph 2 (which provides for delegation of court cases to traditional authorities and mediation) should nevertheless apply, it would need to be clarified at which level customary institutions are supposed to come in. In view of the high penalty of 7 years imprisonment which is imposed for evictions without court order, there is urgent need for such clarification.

¹⁰⁸ See Bruce, *Learning from Comparative Experience with Agrarian Reform* (1998); Fitzpatrick, *Development and Change* (2005) 36 (3), pp. 449-75 (455); Busingye, *Customary Land Tenure Reform in Uganda, Lessons for South Africa* (2002); Land and Equity Movement in Uganda (LEMU), *Policy discussion paper 4 - Does customary tenure have a role in modern economic development? or Mwebaza, Integrating Statutory and Customary Tenure systems in Policy and Legislation: The Uganda Case* (1999);

¹⁰⁹ Cousins, in: Juul/Lund (eds), *Negotiating Property in Africa* (2002), pp. 67-107 (73-76) and Toulmin et al., Introduction in: Toulmin et al. (eds), *The Dynamics of Resource Tenure in the West Africa* (2002), pp. 1-24 (12, 20); Fitzpatrick, *Development and Change* (2005) 36 (3), pp. 449-75 (455).

¹¹⁰ For this critique see also interview with Dokolo MP Felix Okot Ogong, “The Land Bill will leave many poor people landless”, *The New Vision*, March 12, 2008.

¹¹¹ For the general problem of information asymmetry see Fitzpatrick, *Development and Change* (2005) 36 (3), pp. 449-75 (464).

It further remains unclear which role certificates of occupancy shall play under the proposed provisions once they are actually issued. Shall courts simply accept them as conclusive evidence or nonetheless apply the normal procedure of hearing the interested parties, requiring a report from the Land Committee and visiting the *locus in quo*? In case certificates of customary ownership are issued under due process this would be an unnecessary duplication of procedure. However, the proposed provision provides for no exceptions to the normal procedure.

d) Alternative policy suggestions

Given these uncertainties, the current amendment is likely to have a negative impact on security of tenure. In order to achieve the goal of the proposed amendment, i.e. to enhance tenure security, instead of transferring power to courts, the suggestions made in the Draft National Land Policy should be implemented. This means: traditional institutions which have been weakened especially in the war-torn northern regions should be strengthened (7.2.4, 141 (iii)) Draft Land Policy) and the land administration system and especially the Land Boards provided with the necessary resources to carry out the registration process which has been envisaged by the Land Act but never been effected (5.2.11, 104 (ii) and (iii) Draft Land Policy).

While surveys carried out in Apac region have shown that there is a great suspicion about titling, with people fearing that it will favour the rich and allow the government to grab land¹¹², at the same time broader surveys demonstrate that there is an immense demand for border demarcation in Uganda¹¹³. This indicates that a lot of the insecurity of customary tenure is due to the fact that there is no functioning demarcation system. Thus, before creating new provisions, the current provisions for the issuance of certificates of ownership should first be implemented or rather simplified to allow its implementation. The current procedure is complicated and provides for a high degree of documentation. Starting with the application for issuance of a certificate, virtually every stage of verification of rights requires documentation. Acquisition of a certificate thus demands a high level of literacy and ability to handle documents which is often missing, especially in rural areas¹¹⁴. In order to provide better accessibility to registration and to prevent fraud, a more simplified procedure would need to be elaborated.

¹¹² Adoko/Levine, A Land Market for Poverty Eradication? A case study of the impact of Uganda's Land Acts on policy hopes for development and poverty eradication (June 2005), p. 31.

¹¹³ According to a survey carried out by the World Bank in 2004 in collaboration with the Ministry of Water, Land and Environment, Makerere University and FASID, 95 % of households wanted to get a certificate with 89% willing to pay for it, see Deininger et al., Legal knowledge and economic development: The case of land rights in Uganda (2006), p. 12.

¹¹⁴ Mwebaza, Integrating Statutory and Customary Tenure Systems in Policy and Legislation: The Uganda Case (1999), p.7.

Given the negative experience with titling programmes in many African countries – which have focused on individual ownership and often applied simplistic new categories of ownership to complex situations, disadvantaging women and other marginalised groups¹¹⁵ – it needs to be ensured that the registration processes not unduly simplifies the situation and actually secures rights for vulnerable groups like women or children as provided for in the Land Act (see Section 5 (1e) and (1g))¹¹⁶. This requires both sensitisation of the competent authorities and the society as a whole. Further, distortion of communal land use, especially of grazing grounds or water and of community or family ownership must be prevented. In this context, the current provisions which allow application for individual holdings of land created out of communal land (Section 22 Land Act)¹¹⁷ and those which allow conversion into individual freehold (Section 8 to 14) would need reviewing or at least more guidance as to their implementation¹¹⁸. More flexibility in the registration process should be allowed to cater for the need of simple border demarcation in the name of certain communities without the necessity to detail subsidiary or sub-group rights which is often too costly and time consuming. This might be sufficient especially in cases where conflicts arise due to outsider encroachment¹¹⁹.

These are some of the points which would need to be worked on if the government is really interested in enhancing tenure security. Instead of spending time on the proposed amendment which is likely to diminish tenure security, focus should be on elaborating these issues.

IV. Conclusion

In conclusion, it is recommended to reject the proposed new Section 32 B concerning customary tenure and at least parts of the other proposed provisions.

The proposed amendment of Section 31 which empowers the Minister to determine the rent if Land Boards fail to do so and the proposed Section 32 A which mandates “courts” instead of

¹¹⁵ For instance, in Kenya, where individual registration has been carried out for several decades, titling has weakened the position of the poor and dispossessed pastoralists and subsidiary claimants like women, see e.g.: Quan, *The Importance of Land Tenure to Poverty Eradication and Sustainable Development in Africa* (September 1997), p. 2 and Fitzpatrick, *Development and Change* (2005) 36 (3), pp. 449-75 (453).

¹¹⁶ Adoko/Levine, *A Land Market for Poverty Eradication? A case study of the impact of Uganda’s Land Acts on policy hopes for development and poverty eradication* (June 2005), p. 55.

¹¹⁷ Mwebaza, *Integrating Statutory and Customary Tenure Systems in Policy and Legislation: The Uganda Case* (1999), p.7/8.

¹¹⁸ The Land Draft Policy e.g. suggests the total deletion of the provisions relating to the conversion from customary land to freehold land, see 5.2.11, 104 (v). This might be a good idea as long as such transformation is too costly to benefit especially rural occupants. In the long run it may, however, prevent simplification and unification of law.

¹¹⁹ For this suggestion see Fitzpatrick, *Development and Change* (2005) 36 (3), pp. 449-75 (465/466).

Land Tribunals to issue eviction orders is unconstitutional and would therefore first require an amendment of the Constitution. The rest of Section 32 A which stipulates that occupants may only be evicted upon court order and only for non-payment of rent and which criminalises unlawful evictions is neither harmful nor unconstitutional but also offers nothing new as it simply restates the current law. It therefore is unlikely to have much effect on tenure security. The same effect could be reached by informing people about the current law. In order to actually enhance tenure security of *bona fide* and lawful occupants, more fundamental changes of the occupant-owner relationship would be necessary.

Section 32 B of the Land (Amendment) Bill concerning customary tenure is likely to enhance insecurity. It therefore should be rejected altogether.

The amendment to Section 35 which declares void any sale of land by owners who do not give first option to occupants is likely to encourage informal arrangements outside the law as long as occupants are not given any assistance to buy the land. This amendment should therefore only be passed if it is made sure that occupants have an actual possibility to buy the land. In contrast, the part of the amendment to Section 35 which criminalise tenants who assign their tenancy without giving first option to the owner might have a positive impact if it is made sure that occupants are informed about their obligations and if it is restricted to cases where occupants know their owner and have a possibility of actually contacting him.

Finally, the amendment to Section 92 which enhances the punishment for illegal land grabbers is not harmful and thus may be passed. However, given the difficulties involved in proving wilful land grabbing, its effect on enhancing tenure security is likely to be limited.

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