

UGANDA LAND ALLIANCE

Did the Constitution Mean to Legalise Customary Tenure or to Lay Foundation for the Demise of Customary Tenure?

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1. Introduction

This paper critically examines the intention of the Constitution and the subsequent draft land bill on Customary tenure. The paper looks at the consultation carried out by the law makers on customary tenure and also the implication of the Constitutional provisions converting customary tenure to a freehold with a title. Subsequent chapters include a comparison of the regulations for customary tenure and that of a titled land. Lastly, the paper gives evidence that the law is not interested in customary tenure and makes recommendations for policy makers.

2. Consultation on Customary Tenure

The move to change the land law in Uganda started in 1989 with a research in Luweero and Masaka. A study done by the Uganda Land Alliance shows that 211 farmers were consulted on their views of the impact of the Land Reform Decree. At that time, the North Northeast and Northwest of Uganda were not consulted because of insecurity. These areas practice mostly customary tenure. These recommendations were used for consulting all over Uganda, except in Kalangala. Even so, only 1509 persons were consulted. In some cases, recommendations were sent but no replies were received. The districts which did not respond were Kotido, Masindi and Mpigi. Based on this limited consultation, the first land bill was drafted in 1990. It is important to note that at this time, the principles underlying land law was that land is vested in the Government, land should be uniform throughout the country and land should be a commodity for sale, with the hope that progressive farmers have access to land.

When the Constitution was promulgated in 1995, two major changes took place, namely that land belongs to the people and not government and that customary tenure is a legal tenure system. Since no government had ever recognised customary tenure before, it should have been assumed that not much understanding of customary tenure practices was known to policy makers. This was the time for the law makers to carry out a massive research into different customary tenure practices and land management. For how can legislation be done with limited knowledge? Instead a workshop was held in Jinja and attended by mainly staff from the Ministry of Lands and Ministry of Justice. From the NGO sector, only Oxfam attended. The purpose of the meeting was to ensure that the draft land bill did not contradict the Constitution. The result is that most of the Constitutional provisions are copied in the Bill. The fundamental principles that land is a commodity for sale and land should be uniform in Uganda remained unchanged.

Either knowingly or unknowingly, the Constitutional provisions on Converting Customary Tenure to a Freehold provides the Constitution and the draft land bill, with the same intention, that is to transform customary tenure into a freehold, thereby ultimately, giving Uganda a uniform tenure system. The fact that the Constitution makes converting a customary tenure to a freehold an option is not relevant for the reason that there is a District Land Board set up to hold and allocate land in the district which is not owned by any person or authority. Without any papers to show ownership, how will a Customary tenure prove that he owns the land? Secondly, how will a Customary tenant know that his land is being considered by the Board as not owned and for re-allocation? In reality therefore, Customary owners will be forced to acquire some sort of certificate if they do not want to risk losing their land. The Constitution has therefore ironically provided the greatest insecurity to the Customary tenants. There shall now be three categories of Customary tenants namely, those who will not apply for a certificate of ownership; those who will have a certificate of ownership and those who will convert these certificates to a freehold title. Since processing these certificates involve time, money and knowledge, it is likely that the majority will fall in the category of no certificates. After all, the Constitution makes them owners of their land, so why bother with a certificate!

3. Converting Customary Tenure into Titled Land

The proponents of a registered title argue that these are needed for bank loans. Why a certificate of ownership is not taken to have equal weight as a title deed is difficult to understand. However, it has been made to appear as if converting a customary certificate of ownership into a freehold is just an exchange of pieces of papers. A deeper analysis brings out the fact that rules which apply under customary tenure and rules applying under titled land are distinctively different, almost conflicting.

In effect, therefore, converting a certificate of ownership into a freehold title tantamounts into a transformation of customary tenure to something else. This transformation is what the people need to be made aware of before the bill is passed. For the reader to appreciate the extent of this transformation, below is the characteristics of the two tenure systems:

4. Rules applying to Customary Tenure and Titled Land

a. Communal ownership

Land is held communally and therefore difficult to sell. Getting consent of many people is difficult and a buyer would be easy to spot when he physically surveys the land. Communal ownership of land offers the greatest protection to women and children who are users and not owners of land. Under Titled land, ownership of land is individualised, making it easy to sell. A person can easily mortgage land. Mortgage is another way of losing land, especially if a person defaults and if the interest rates increase after the loan is taken. Under this system, many women and children run the risk of losing their right to use land. The power will lie with those whose names are on the Title Deeds and the ones who will keep the Titles.

b. Principles: Land not for sale versus land as a commodity for sale

Under customary tenure, the underlying principle is that land is god given land should be used by all and left for the future generation. Land therefore is not for sale. Currently, most sales are distress sales for schools fees, medical bills, repayment of dowry etc. Under titled land, land is a commodity for sale. The progressive farmers should have access to land. The more land is exchanging hands through sale therefore, the happier the law makers will be. It will

not matter that the majority are selling to fewer people and that the ones who are selling are totally dependant on land and those who are purchasing have alternative livelihood.

c. Land tenure to be Uniform

Different districts practice different forms of Customary tenures, with the most common units of ownership being family, clan and community. Community land is usually where women fetch firewood, water and men go hunting. The diversity in Community tenure stretches to Karamoja where the whole district shares resources. Under the Titled land, there is a wish for uniformity, with Uganda working towards titles, and individualised ownership of land. This will lead to fragmentation of land. Communal ownership ensures that land is not fragmented.

d. Customary ownership cheaper than titling

The process of owning Customary land can be as cheap as being born into the system. For titled land, the process is expensive, long and tedious. Besides, it is unreasonable to expect titling when the map and titling registries are centralised in Entebbe and Kampala. Very few people in Uganda today can afford a title. This requirement is therefore a means to dispossess many people in Uganda in favour of the few rich and educated Ugandans.

From the above analysis, it can clearly be seen that the conversion requirement is not simply replacing a certificate with a title, but changing the all the rules of tenure. This tantamounts to destroying customary tenure and replacing it with something else. This contradicts strongly with ‘Land belongs to the citizens of Uganda and shall be owned in accordance with...Customary tenure...’ It is vital that this contradiction is understood, debated and removed before a land law is passed.

5. Evidence of Lack of Interest by the Law Makers in Customary Tenure

It has been very difficult to know exactly what the real intention of the Constitution, vis a vis Customary tenure is. Those who were in the CA, argue that the Constitution meant well for Customary tenure and yet the above analysis defies this. There is also evidence that the law is not interested in Customary tenure. The lack of interest is demonstrated by the following:

- The Constitutional provision to convert customary tenure to a freehold.
- The lack of intensive research into customary practices and ways of land management. Because of this, important land managers such as elders are left out in the Draft Bill.
- Community has been defined broadly, leaving out other interest groups such as family, clan, village etc. ‘Community’ is left big enough to be unworkable in terms of holding land. Details of how a community becomes a legal entity is also vague.
- While with a Title there are provisions for updating transactions such as a transfers, mortgages, leases etc., with a certificate of ownership there is no provision for a registry to handle cases of land transactions. There is no provision of a certificate for ownership registry where a copy of the certificate is kept. The law seems to be issuing these certificates for purposes of them being converted or sold to someone who can then convert. Most importantly, the certificates do not seem to have any legal weight in court of law.

- The provision of the Board acquiring land not owned puts the customary tenure at a particular risk. The poor Customary tenants have to compete for land with a powerful, knowledgeable and educated Board. When land was vested in Government, there was no provision of land not owned. Now that it vests in its citizens, there is supposed to be land not owned? Why is this? Will communally owned land not also be interpreted to mean land not owned?
- The underlying principle of the land Bill for uniformity in tenure in Uganda has remained unchanged.

6. Conclusion

The impact of the contradiction in the Constitution will be to make all customary owners insecure in their ownership and forced to apply for a title. Unfortunately, certificates and titles are expensive and difficult to acquire. The poor therefore run the risk of losing their land. It is vital that the people understand what the impact of the Constitution and the Bill will be on their tenure.

I therefore recommend that:

- The Constitution be re-visited in order to remove this apparent contradiction.
- The Boards functions should first be to assist people identify their land and community land. The Boards should assist people to acquire certificates. These certificates should be of the same weight as a title.
- The Boards should also carry out consultations on the best way Customary tenants want to manage their land and who should be on the Board at District and Parish levels. The most important aspect is for the board to determine ways of informing people what land is not owned and what the people want before land is alienated.
- When all the above is done, and this might take more than 5 years, then the board can have the function to hold and allocate land. If this is not done, then this Government should forget its plan for poverty alleviation. Many people will become landless or remain with less land than they need for feeding their families.

It is my very sincere hope that the MPs, especially those who were also in the CA re-visit their intentions. If the intention was to transform customary tenure by law, the citizens of this country have a right to know this before a land law is passed! At least, the land law principles to transform customary tenure into a uniform titling system has remained constant and unchanged and we are aware of this! The people's understanding is that the Constitution protects their customary tenure. If this is true then the Constitutional provision on conversion should be deleted from the constitution. If this is not true, then the citizens of this country should not be hoodwinked into believing their customary tenure is legally recognised and they have safe tenure. They should be told the stark truth.