



**TRANSPARENCY
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UGANDA**

“Proposed Ammendment of Article 26 and its implication on land tenure security”

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Article 26 as per the Constitution of the Republic of Uganda

Article 26. Protection from deprivation of property.

- (1) *Every person has a right to own property either individually or in association with others.*
- (2) *No person shall be compulsorily deprived of property or any interest in or right over property or any description except where the following conditions are satisfied—*
 - (a) *the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and*
 - (b) *the compulsory taking of possession or acquisition of property is made under a law which makes provision for—*
 - (i) *prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property; and*
 - (ii) *a right of access to a court of law by any person who has an interest or right over the property.*

Introduction

The promulgation of the 1995 Constitution was one of the greatest milestones in Uganda's democratization process. The new Constitution spearheaded by President Yoweri Museveni and the NRM (National Resistance Movement) government restored the hope of many citizens discouraged by years of mass violence and conflict at the hands of several failed dictatorships. Many citizens hoped that the Constitution would help protect the country from future political instability, tyranny, oppression and conflict and enable citizens irrespective of socioeconomic and political standing to live a life of dignity and freedom based on a strong Constitutional mandate.

To this effect, the Constitution includes a chapter on human rights including the rights to equality and freedom from discrimination, right to life, right to development and right to property. However, despite the strong legal precedent set in the Constitution and other laws providing for the protection of fundamental human rights, rights such as the right to property have been persistently disrespected in the country's recent history.

Since the passing of the Constitution in 1995, there has been a consistent pattern of attempts to weaken the protections afforded to citizens under Article 26 of the Constitution. One of the cases in this pattern are resolutions arising out of the Kyankwanzi Leadership Retreat in July 2016. In these resolutions, it was set that "Government shall propose expeditious amendments to the Constitution, Land Act, and other relevant laws, to enable Government acquire land for the timely implementation of public works."¹

According to the Daily Monitor, the attempted change is being framed as

¹<http://www.statehouse.go.ug/sites/default/files/attachments/press-releases/resolutions-joint-retreat-nrm-ceccabinet-and-pssnali-31st-july-2016.pdf>

merely a logistical, and procedural adjustment that seeks to improve upon the process of land acquisition. “Lands Minister Betty Amongi revealed that the proposed amendments were premised on the bureaucratic tendencies involved in compensation of the project-affected persons, which tend to stall projects.”² According to the newspaper, “The proposed amendments follow refusal by communities, in some cases, to surrender ancestral land to government-sourced investors. The most outstanding was the contested attempt to take land in the northern Uganda Amuru District for sugarcane plantation.”³

Since the meeting, Minister Amongi clarified and expanded on the proposed amendment in multiple press conferences and public meetings. At one meeting hosted by Transparency International Uganda (TIU) and Civic Response On Environment and Development (CRED) in November 2016, the Minister succinctly outlined her proposal.

“Of course, there is the issue of sometimes people rejecting—the major challenges we have now and that is when you are delivering a public good and you have 90% of the people accepting the value from the Chief Government Valuer and then 10% rejecting the value. When the value is rejected, you have to start fresh and go back to restart the process of negotiation, which can take another six months to one year. My proposal is that where the parties are unable to agree on a value of compensation, the government shall pay the owner the value that has been approved by the Chief Government Valuer and proceed with work. Then, we can negotiate and reach a situation where we have come to a value... What we are proposing is that the government will proceed with the work while you negotiate on the balance and that we will be amending Article 26 of the Constitution to insert Clauses 3.a and 4. Clause

²<http://mobile.monitor.co.ug/News/Proposed-new-land-law-sparks-public-outrage/2466686-3356764-format-xhtml-t47ey5/index.html>

³<http://mobile.monitor.co.ug/News/Government-sack-civil-servants/2466686-3324844-format-xhtml-lw1rl3z/index.html>

3.a will address principles of values of compensation and how the government shall pay owners, then Clause 4 will address the principle that the deposit of the amount and receipt from court shall be deemed to be prior compensation.”⁴

The minister has come out in no uncertain terms by proposing the exact language of the new clauses to be added to Article 26, as follows:

“(3) Where the parties are unable to agree on the fair and adequate compensation payable under clause (2) (b) (i), the Government shall deposit in Court or with any other competent authority, the value of the property as evaluated by the Chief Government Valuer and the Government shall take possession of the property pending determination by the Court or other competent authority of the disputed amount of the compensation.”

“(4) Notwithstanding clause (2)(b)(i), Government shall take possession of the property where the Government has deposited the evaluated compensation amount referred to in clause (3), but the owner of the property shall have a right to claim the disputed compensation amount that may be determined by the Court or other competent authority.”⁵

Thus, the Minister has effectively proposed the amendment to allow government to acquire land before compensation has taken place.

Analysis

Property rights and compensation

As it stands now, Article 26 asserts citizens’ rights to own property and also protects citizens from illegitimate compulsory deprivation of property. Compulsory deprivation of property is only lawful when the acquisition is necessary for public use, national security, public safety, public order, public

⁴Speech November 29, 2016

⁵Daily Monitor 4th February 2017 – Article by Dr. KiizaBesigye “Ugandans should resist removal of Constitutional safeguards on land grabbing by the Regime”

morality or public health. According to the current Constitution, such an acquisition can only occur after payment of fair and adequate compensation to the relevant parties so as to ensure that citizens' rights to property are not violated at any point in the process.

Though the proposed changes have been framed as merely procedural in nature, this is not the case. During instances of compulsory acquisition, procedure matters greatly. Changes in procedure do have real impacts on peoples' property rights. As stated in a 2016 brief published by the Advocates Coalition for Development and Environment (ACODE), "...land acquisition and resettlement is a process as much as it is an outcome."⁶Therefore, it is hard to say that something is only a procedural change and will not affect respect for property rights when respect for property rights depends on procedural integrity.

The proposed changes to Article 26, in their latest form, could potentially disrupt citizens' right to own property without adequate compensation since *the proposed changes empower government to take possession of property before fair and adequate compensation occurs* pending the determination by the court of the compensation payable in the event that the parties are unable to agree on the fair and adequate compensation payable. This is not just a procedural change but rather a veiled assault on the right to property. While Minister Amongi did mention that a payment to the contesting individuals will be made based on the debated value and that government may continue the process of acquisition while the "balance" be argued in court, such a situation does not constitute the payment of "fair and adequate compensation."*Therefore, without the assurance of prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of property, citizens are effectively deprived of their right to property for an unspecified and indeterminate amount of time.*

Failure of courts to provide remedy

Such a proposal is particularly egregious given the persistent failure of courts in Uganda to adequately serve marginalised and impoverished communities. Oftentimes, marginalised citizens that do not have the ability to afford litigation to defend their land rights cannot challenge unfair land acquisitions

⁶ACODE, p. 1, 2016.

or dissatisfactory compensation payments. In these cases people lose their land without adequate compensation because they are unable to follow through with full court proceedings to challenge an unlawful acquisition.

In many of these cases, misconduct goes unacknowledged because of the discrepancies of power and wealth that exist between the offender and the victims of injustice. It is far less likely that injustices committed by the state, powerful and wealthy sections of society against relatively marginalized communities with significantly less agency will ever be redressed. This is a simple fact. This is because of the exclusionary nature of the justice systems available to victims of injustice in this country. In so many cases, the cost prohibits aggrieved communities from pursuing justice.

Communities are greatly struggling in their pursuit for justice against unlawful land acquisition in the oil region. For instance, victims in Rwamutonga village who were unlawfully evicted during planning for an oil waste treatment plant have taken refuge in a makeshift camp for over two years. While their case drags on in courts, the community members have lived in refugee-camp like conditions since August 2014. Citizens evicted by a company constructing a sugar factory and plantation have also lived outside in a makeshift IDP camp for one and a half years as they await lengthy court proceedings. Community members in the refinery affected area who opted for resettlement have waited for years to be resettled, while the rest of their lives has been put on pause. In many more cases, communities simply cannot afford to lodge a case in court so injustices go unnoticed. It is safe to say that courts frequently fail to provide effective remedy to disenfranchised communities whose most precious asset has been taken.

Asking those with little to no discretionary spending ability to rely on a formal system that is exclusionary, remote, and cost-prohibitive only serves to further disenfranchise the aggrieved community. Therefore, suggesting litigation as a solution to land acquisition stalemates while government takes over land in the meantime, is neither a just nor a realistic assertion.

Increasingly, different areas of the country are being affected by the growth of the oil and mining industries as well as growing demand for land for other commercial investments like industrial agriculture projects. For instance, Karamoja sub-region is facing a huge challenge in this regard as well as

communities in Northern, Eastern and West Nile region in constant fear of losing their land. In the Kalangala Islands where land has already been converted and cultivated for palm oil production, there are more developments suggesting that additional land may be compulsorily acquired to expand the palm oil production.

Compulsory acquisition in Uganda

During this time, compulsory land acquisition processes have failed to honour citizens' rights on multiple occasions.⁷ If the law is weakened to allow for acquisition prior to compensation, this trend would only increase the risk of marginalised citizens being dispossessed by large-scale investment projects throughout the country.

In the case of land acquisition for the oil refinery in Kabaale Parish, Hoima district a cut-off date was imposed on the project affected persons in 2012. Many project affected persons were not compensated until 2015. To-date, more than 5 years after the cut-off date, a number of people are yet to be resettled. This means that any developments made on the impugned land after the cut-off date will not be considered in the compensation scheme, which paralyzes livelihoods.

Any amendments to the Constitution or land laws should seek to strengthen citizens' land rights, in line with international standards including the UN Declaration on the Rights of Indigenous Peoples and the International Labour Organisation Convention 169, both of which espouse the standards of Free, Prior and Informed Consent (FPIC) as key to protecting community property rights in the process of land acquisition. To meet this international standard, government must invalidate any compulsory acquisition of land which does not provide for; notice to land owners; opportunities for land owners to discuss, inquire, and negotiate freely; free expert (survey and valuation) support to the poor and marginalised; access to independent arbitrators in case of disagreement on the assessed values and easy and affordable access to

⁷See Constitutional petition (No. 40 of 2012) filed by AsumanIumba Peter Magalah and the Advocates for Natural Resources Governance and Development on behalf of the affected people. See also "Implementation of the Oil Refinery Resettlement Action Plan in Uganda: Human Rights Violations and Challenges" published by Africa Institute for Energy Governance.

judicial remedies; timely and prompt compensation; and lastly, compensation prior to the taking over of land in question.

The violation of rights suggested by the proposed amendment to Article 26 is worrisome. Such a change would be in conflict with many international treaties and covenants to which Uganda is a party including the African Charter on Human and Peoples' Rights and the International Convention on the Elimination of All forms of Racial Discrimination⁸ which sanctify the right to property.

The proposed change is also at odds with the country's National Land Policy, which is the product of a national consultative process. The policy does not only maintain the requirement for "payment of prompt, adequate and fair compensation" in exercising the power of compulsory acquisition of land but also provides that the state shall "prescribe a set of regulations and guidelines, the roles and responsibilities of the different state organs and agencies in the exercise of the power".⁹ Furthermore, the people of Uganda unanimously affirmed the provisions of Article 26 of the Constitution, as it is, including the requirement for prompt payment of fair and adequate compensation.

Conclusion

To put it simply, it is difficult to understand how the dispossession of potentially thousands of Ugandans without the payment of adequate compensation could ever be of national interest, in any circumstance. There does not appear to be any justifiable reason for the government to acquire land in the manner suggested by the amendments. The Constitution already provides for a wide series of justifications for the compulsory acquisition of land. The only justification we can see for this amendment is that it will make it easier and quicker for government to make way for large-scale investment projects by acquiring the land before compensation is paid allowing activities to be undertaken on the land before compensation has been resolved. This is

⁸See African Charter on Human and Peoples' Rights Article 14, International Convention on the Elimination of All Forms of Racial Discrimination Article 5(d)(v)

⁹National Land Policy, 2013, See section 3.3

not in the interest of ordinary landowners in Uganda as it will expose poor and marginalised people to the risk of losing their land and could escalate the excesses of impunity on the part of corrupt officials. This is particularly worrying given the current patterns of land acquisition, and the significant investments in the mining and oil sectors that continue to require huge tracts of land.

Rather than suggesting litigation, government should consider alternative solutions for dispute resolution during land acquisition that will provide more timely and effective remedy during stalemates. If such an alternative mechanism were set up, there would be no need for acquisition before compensation, since the process could ostensibly resolve conflicts in a timely manner. If government would like to resolve the issue of lengthy delays in land acquisition due to stalemates with landowners, such a mechanism could potentially solve this problem without requiring acquisition before compensation. Establishing such a mechanism, instead of pushing for an amendment to Article 26, would demonstrate a commitment to protecting citizens' land rights throughout the process of acquisition.

Recommendations:

1. No amendment should be undertaken on Article 26 of the Constitution to provide for any exceptions where government can acquire or possess any citizen's property before payment of prompt, fair, adequate compensation prior to such possession or acquisition.
2. To stop the persistent property rights violations of citizens and strengthen the procedure for clarifying and or ascertaining the meaning of the Constitutional requirements of prompt, fair and adequate compensation prior to possession or acquisition, the government in fulfilment of section 20 of the Land Acquisition Act of 1965, should formulate and operationalize regulations for the assessment and payment of compensation. The regulations should among others provide for the following:
 - a) A requirement that in all cases of compulsory acquisition, compensation must be paid within a period of four months from

- the date of assessment and or the cut-off date.
- b) Any case filed in court regarding compulsory land acquisition must be determined within a period of six months from the date of filing and any appeal must be heard and determined within three months.
 - c) Any affected person who wishes to go to court to challenge compensation processes should have a right to choose a lawyer of his or her choice at the state's expense.
 - d) The regulations should provide for penalties against any government official/s who violate the requirements of Article 26 of the Constitution.
 - e) Further, the regulations should establish a multi-stakeholder monitoring committee comprising of representatives of government, NGOs, religious and culture institutions, respective affected communities with clear terms of reference recognized by law as opposed to adhoc grievance mechanisms under resettlement action plans.
3. The Land Act should be amended to provide that every district land board, every year, must put in place up to date rates of compensation in line with section 59 of the Act by end of April of the current year and all areas of Ugandan must have Area Land Committee members appointed with appointment letters.



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