

Focus on Africa Brief

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Uganda



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Lesson 1: *The Compulsory Acquisition of Privately-Held Land by Government*

INTRODUCTION

Uganda's Constitution empowers the government to acquire private land in a compulsory manner for specific public interest purposes. Frequent use of the authority (or the threat of its use) can weaken tenure and reduce incentives to invest in land. Yet, vexcessive restrictions on this authority can jeopardize public interests. This module focuses on four issues-compulsory aquisition uses; procedures for exercising this authority; compensation, and redress - which are central to balancing private land rights and compulsory land acquisition for public purposes.

LAND FOR PUBLIC BENEFIT

The compulsory acquisition of private land for public purposes or public benefits has emerged as a significant threat to the security of land tenure in many parts of Uganda. The involuntary extinguishing of private land rights by government has received insufficient attention by government and development agencies involved in land tenure and natural resource property rights. While attention and resources have focused on documenting property rights (e.g., cadastral surveys, mapping customary land claims), registration and titling, and strengthening the capacity of critical land administration and adjudication institutions, little attention has been paid to limiting the authority of the state to extinguish land rights.

The procedures and powers that facilitate and regulate the compulsory acquisition of private land by government can weaken property rights and reduce incentives to invest in land management. Yet, land acquisition laws that excessively restrict or complicate government efforts to acquire private property can jeopardize public interests. While secure property rights have clear benefits, absolute or near limitless rights to private property can be problematic for pursuing public purposes and achieving public benefits. The need to secure private land rights must be balanced with the need of the state to acquire private property in a compulsory manner for genuine and legitimate public purposes, such as roads, hydropower dams, protected areas and military bases.

Article 26(2) of Uganda's Constitution of 1995 empowers the government to acquire private land in a compulsory manner, provided that the following three 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."

Article 237 of the Constitution vests land in the people and recognizes four land tenure systems: customary, freehold, leasehold and mailo (mailo is a customary form of freehold and covers about 9000 square miles, principally in central and western Uganda). Prior to the 1995 Constitution, all land was vested in the state and people living on land held under customary tenure arrangements were regarded as occupants of state land. If the land was required by the government, people could be evicted after a notice period of just three months, and with compensation limited to improvements to the land. In Uganda, between 70% and 80% of the land is held under undocumented customary tenure arrangements.

ACQUISITION RESTRICTIONS

In Uganda, the government's authority to acquire private property in a compulsory manner is established in the Constitution, but is governed and regulated principally by the Land Acquisition Act of 1965. This Act makes provisions for the procedures and methods of exercising compulsory land acquisition whether for temporary or permanent use. It addresses four issues—the recognized and established uses of compulsory land acquisition; the procedures for exercising this authority; the compensation awarded for expropriated property; and the rights for redress—which are central to balancing private land rights and compulsory land acquisition for public purposes, and to ensure against the abuse or indiscriminate use of this authority by the state.

To adequately protect private property rights and secure tenure, the application of compulsory land acquisition must be disciplined and restricted to genuine public purposes, not including ordinary government business. Laws that clearly and conservatively define "public purpose," "public use," "public benefit" and "public interest" can provide appropriate limits to government discretion in the exercise of the authority of compulsory land acquisition, and can help protect citizens and society from the potential government misuse of this power. Given the often significant and adverse social and economic consequences of involuntary displacement on rural people, the exercise of compulsory land acquisition must have robust and unqualified public purpose requirements, and high justification standards.

Article 26(2)(a) of the Constitution provides that, "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." The Land Acquisition Act (1965) states that land can be acquired for "public purposes and for matters incidental thereto and connected therewith." Uganda's courts have interpreted these provisions narrowly to mean that the property must be used to promote the general interests of the community, not the particular interests of any private individuals or institutions. As a result, private investment and economic growth are not justifiable uses of compulsory land acquisition.

CHANGE IN LEGISLATION

On several occasions, the government of President Yoweri Museveni has sought to amend the Constitution and enabling legislation to expand the authority of compulsory land acquisition for economic development, investment and productive purposes. For example, in 2003, the government argued before the Constitutional Review Commission that extending the authority was necessary to promote the national economy, and that the provisions of Article 26 impede development and, therefore, are not in the national interest. The Commission, however, found



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Agricultural land outside of Bwindi Impenetrable National Park, Uganda

that Article 26 was adequate and threw out the government's proposal. A similar measure to extend the authority was also debated and rejected by Parliament.

More recently, the National Land Policy, Working Draft Four (September 2009) prepared by the Ministry of Lands, Housing and Urban Development calls for expanding the authority of compulsory acquisition. Section 3.2, Policy Statement 87(b) states, "The scope for exercise of the power of compulsory acquisition shall be extended to include resettlement, physical planning, and orderly development." Further, Section 3.2, Strategy 88 calls for, "[t]he Constitution, the Land Act and the Land Acquisition Act will be amended to: (i) expand the scope of the power of compulsory acquisition to include acquisition of land in the interest of resettlement, orderly development and physical planning."

In May 2010, a National Land Conference was convened to discuss the draft National Land Policy. While there is general agreement among government officials and public interest lawyers that resettlement of refugees and internally displaced persons (IDPs) should qualify as a justifiable use of compulsory land acquisition, there is considerable concern among legal scholars and land advocates in Uganda over the use of compulsory acquisition for "physical planning" and "orderly development." The concerns reflect the fact that these terms are subject to broad interpretation by government and courts. The comments and suggestions from the National Land Conference are now being incorporated into a final policy which will be forwarded to the cabinet for consideration.

Broad uses of compulsory land acquisition are reminiscent of the colonial period and early post-independence period in Uganda and other African countries when laws emphasized state powers to promote development over the government's duty to protect private property rights. At the time, many African governments considered the public purpose limitation on expropriation unsuited to development and, as a result, streamlined compulsory land acquisition procedures by restricting opportunities for public participation and recourse, limiting or dispensing entirely with compensation, and allowing for the possession of property before the payment of compensation.

CHECKS AND BALANCES

Compulsory land acquisition in Uganda, as in many other countries, is principally an administrative (i.e., executive branch) matter. In functioning democracies, the exercise of this authority is limited and checked by various institutionalized accountability mechanisms, such as citizen advocacy, civil society monitoring and legislative oversight. Checks-and-balances on government power help guard against the abuse and misuse of this authority, limit arbitrary acquisitions, and ensure that this authority is only used for valid and genuine public purposes. When administrative matters are

not embedded in democratic institutions, measures to implement and enforce fundamental democratic principles (i.e., transparency and participation) may not be available, or may be restricted or compromised and, as a result, ineffective. With little oversight, government officials have the freedom to exercise their authorities at their discretion and with few or no repercussions—a recipe for abuse of office and corruption.

Uganda has a multi-party political system and holds regular elections, but most political scientists do not consider it a consolidated democracy. As a result, it is important to strengthen available accountability measures and institutionalize additional, even redundant, safeguards in the use of compulsory land acquisition. Other accountability mechanisms include: granting communities the rights of free, prior, and informed consent; mandating public hearings and providing other opportunities for citizens to engage in compulsory land acquisition decisions; organizing referendums or other ballot-box initiatives on potential acquisitions; requiring parliamentary approval of expropriations; establishing an ombudsman to hear citizen complaints, mediate conflicts and facilitate compromises; and implementing initiatives designed to make courts more accessible and available to poor, rural people.

In Uganda, the government usually makes the initial determination of whether a proposed land acquisition is in the public interest. Often, the process is informal and unsystematic, and not open to the public or other branches or levels of government. In many cases, the government justifies the acquisition by simply declaring its intent to build a new road or establish a new protected area, and by invoking these developments as established uses of this authority. Legal scholars argue that compulsory land acquisition is justified when the benefits to the public outweigh the costs to the affected individuals. In Uganda, however, the government is not required to justify the proposed acquisition in these terms or to demonstrate that the taking is in the public interest. (In contrast, in neighboring Kenya the government is required to justify the causing of any hardships from a proposed taking.)

The National Environment Act (NEA) of 1995 and Environmental Impact Assessment (EIA) Regulations of 1998 require an EIA to be conducted for many developments that are justified uses of compulsory land acquisition, such as public roads, dams, any "activity out of character with its surrounds" and "major changes in land use" (NEA, Third Schedule). The EIA must be conducted before the land is acquired. The EIA Regulations require public participation in making the study and in commenting on the environmental impact statement. So, while the Land Acquisition Act does not explicitly require public hearings or citizen participation, the National Environment Act mandates both measures, helping to ensure citizen input into certain compulsory land acquisition decisions.

COMPENSATION

Advocates argue that compensation should improve or at least restore in real terms the living conditions of displaced people to pre-resettlement levels. In Uganda, condemned property is valued at open market rates. The Land Act, Section 77 requires that, "(1)(a) in the case of a customary owner, the value of land shall be the open market value of the unimproved land; (b) the value of the buildings on the land, which shall be taken at open market value for urban areas and depreciated replacement cost for the rural areas; (c) the value of standing crops on the land, excluding annual crops which could be harvested during the period of notice given to the tenant." In addition, the government must pay a disturbance allowance of 15% of the compensation or, if less than a six-month notice is given, a 30% disturbance allowance.

In Uganda, the valuation of property and the determination of compensation payable are carried out by government valuers. Under the Land Act, Section 59, District Land Boards must, "(1)(e) compile and maintain a list of rates of compensation payable in respect of crops, buildings of a nonpermanent nature and any other thing that may be prescribed." Rates are reviewed annually and are to be used to determine compensation payments. Compensation can be paid in-kind and may include items such as land, houses and other buildings, building materials, seedlings, agricultural inputs, and financial credits for equipment. In practice, many citizens have claimed that their compensation payments were below the market value of their condemned land, buildings and other condemned properties.

In Uganda, the government cannot by law take possession of expropriated land until it has paid the owner compensation. The Constitution, Article 26, (2) makes it clear that, "(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." The Land Acquisition Act, Section 6(1) also states, "the assessment officer shall take possession of the land as soon as he has made his award." Ugandan advocates have invoked these provisions in their efforts to quash proposed acquisitions or to reclaim land that has been expropriated.

In recent years, the government of Uganda has sought to change the Constitution to allow it to take possession of the expropriated land prior to paying compensation. In 2003, the government requested the Constitutional Review Commission to scrap the requirements for prompt payment, but the proposal was rejected. More recently, Section 3.2, Strategy 88(iii) of the National Land Policy, Working Draft Four (September 2009) calls for the government to, "prescribe a uniform method for the exercise of the power

of compulsory acquisition and the payment of prompt, adequate and fair compensation irrespective of tenure category.” It is unclear whether this provision will be retained in the final policy following concerns raised at the National Land Conference in May 2010.

Some legal scholars argue that the authority of compulsory land acquisition should not be exercised unless government can provide evidence of its capacity to meet all procedural requirements, including the payment of compensation, and can ensure that the expropriated land will deliver the public purpose justification. They argue that high costs and stretched budgets are not valid excuses for flaunting the requirements or for neglecting compensation payments. Rather, the inability—or unwillingness—of government to provide the necessary resources is a sound justification for not expropriating the land.

Uganda’s Land Act establishes a land fund that could help pay some expenses of exercising compulsory land acquisition, including compensation. Section 41(4) of the Act outlines how the fund should be utilized, including “to resettle persons who have been rendered landless by Government action, natural disaster or any other cause.” The fund, however, is undercapitalized and, as a result, has been unable to service compensation payments. In some cases, compensation for private land acquired by the state in a compulsory manner has been paid by the private company that will use the land (e.g., construct a dam, extract oil or mine minerals). The bank or donor agency that is financing the development often mandates that the compensation payments be fair and adequate.

Transparency is central to ensuring that condemned property is properly valued and that compensation payments are fair and adequate. Article 41 of Uganda’s Constitution grants every citizen the right of access to information held by the government, provided the information does not compromise national security or sovereignty, or infringe on personal privacy. Uganda is also one of only six countries in Africa with a comprehensive freedom of information act. Uganda’s Access to Information Act was approved in 2005 and went into effect in 2006. Enabling regulations are currently being prepared for this law. These legal instruments apply to the

exercise of compulsory land acquisition.

Still, few citizens whose land has been expropriated through compulsory land acquisition are aware of the rates government valuers used in the valuation process. For example, people who lost their land in 2001 and 2002 for the Bujagali Hydropower Dam—a 250-megawatt power-generating facility on the Nile River outside Jinja—claim that market values were not paid and that they were not given copies of the valuation reports, survey forms and other related documents. Others claim that the amount of compensation they received was less than the value established by the government assessors. Some people who preferred to be relocated claim that the new land they were given was insufficient and inferior (of lower value than their land that was condemned).

In Uganda, under the Constitution, any person aggrieved by compulsory land acquisition may petition the court of law for redress. A hierarchy of courts is available, from the Local Council II Courts which settle disputes at parish and village levels, and the sub-county Court Committees which handle light civil matters, to the High Court, Court of Appeal and Supreme Court. Land Tribunals were created by the Constitution at the district, sub-county, and gazetted urban area levels. In 2007, however, they were suspended by the Judiciary, citing limited resources and duplication with Magistrates Courts. All pending cases were handed over to the Magistrates Courts.

In Uganda, independent public interest law associations have represented poor, rural people whose land has been taken or targeted for expropriation. Yet, in most cases, only the small minority of people with the knowledge, time and resources to pursue their legal rights has access to the formal courts. Across Africa, the costs and time required for formal courts to operate and make rulings can be considerable. Moreover many courts, especially lower-level courts, including the Magistrates Courts, are not sufficiently independent from the government; many are influenced by politics and bribes. The government and development agencies have supported mediation and other alternative dispute resolution mechanisms to help resolve land conflicts, including those arising from compulsory land acquisition.

Uganda is the home for a large number of diverse ethnic and linguistic groups. Cultural institutions, such as *Rwot kweri*, traditional kings, and chiefs are accepted by group members, and informal legal systems are used by many individuals and communities in mediation and settlement of land disputes. Many traditional institutions are legally recognized by the formal court system as grassroots mediators and their decisions or recommendations may be used to influence decisions by the judiciary courts. In turn, lower-level courts of law also refer matters to the appropriate traditional institutions for resolution. Where such informal legal systems operated fairly and effectively, they should be strengthened.

In summary, compulsory land acquisition by the government has become a significant threat to land tenure and private property rights in Uganda. There is an urgent need for reform to ensure that: 1) this authority is used only for legitimate public purposes and not for ordinary government business; 2) the procedure for exercising compulsory land acquisition is democratized and protected from politics and politicians; 3) affected people are fairly and promptly compensated for their expropriated land and other property; and 4) all persons aggrieved by compulsory land acquisition have access to an independent court of law.

SOURCES

Veit, Peter G., Rugemeleza Nshala, Michael Ochieng’ Odhiambo and Jacob Manyindo. 2008. Protected Areas and Property Rights: Democratizing Eminent Domain in East Africa. Washington, DC: World Resources Institute. Available at: http://pdf.wri.org/protected_areas_and_property_rights.pdf.