



# **LAND INJUSTICE, IMPUNITY AND STATE COLLAPSE IN UGANDA: CAUSES, CONSEQUENCES AND CORRECTIVES<sup>1\*</sup>**

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# CONTENTS

LIST OF FIGURES AND TABLES.....	iv
LIST OF ACRONYMS .....	v
ACKNOWLEDGMENTS .....	vi
ABOUT THE PROJECT .....	vii
EXECUTIVE SUMMARY.....	ix
<b>I. INTRODUCTION.....</b>	<b>1</b>
1.1 Unpacking the Land Question in Uganda .....	1
1.2 Overview of the Report .....	3
1.3 Structure of the Report .....	3
<b>II. LAND (IN)JUSTICE AND THE LAW: HISTORICAL AND CONTEMPORARY DIMENSIONS .....</b>	<b>5</b>
2.1 Colonial Land Tenure .....	5
2.2 Land Legislation in the immediate post-Independence Era (1962-1986).....	7
2.3 The Situation under the National Resistance Movement (NRM) Government.....	8
<b>III. THE PHENOMENON OF CUSTOMARY LANDHOLDING.....</b>	<b>16</b>
3.1 Customary Ownership – An Introduction to the “Lesser” Title .....	16
3.2 A Brief History of Neglect and Marginalisation .....	17
3.3 Customary Tenure in Post-1995 Uganda: From the Shadows into the Light? .....	19
3.4 Rethinking the Existing Approach to Customary Tenure .....	24
<b>IV. UGANDA’S LAND JUSTICE: A CRITICAL ASSESSMENT .....</b>	<b>29</b>
4.1 A cursory Glance at the Glaring Crisis .....	29
4.2 Drawing Comparisons and Patterns from the HURIPPEC Regional Reports .....	30
4.2.1 The role of highly placed individual actors .....	31
4.2.2 The place of cultural institutions .....	32
4.2.3 Security agencies and their agents .....	33
4.2.4 Private corporate entities and investors .....	34
4.2.5 Shifts in land use and their impacts.....	35
4.2.6 Bona fide occupants and customary owners .....	36
4.2.7 Ethnic-based tensions and conflicts .....	37
4.2.8 The place of politics .....	38
4.3 Land Administration and Governance: Law vs. Practice.....	40
4.3.1 The Uganda Land Commission (ULC).....	40
4.3.2 The Land Fund .....	42
4.3.3 Other land governance institutions .....	42
4.4 Courts, tribunals and other dispute-settlement institutions (DSIs) and actors .....	44
4.4.1 Formal structures vs. informal mechanisms .....	44
4.4.2 Judicial collusion in land fraud.....	47
4.5 The Ogre of Predatory Presidentialism and institutionalised Corruption .....	51
4.5.1 Presidentialism and regime survival: How institutional corruption and bad governance facilitate power entrenchment .....	52
<b>V. ADDRESSING IMPUNITY, RESTORING JUSTICE: A TENTATIVE CONCLUSION .....</b>	<b>57</b>
5.1 Main Conclusions of the Study.....	57
5.2 Recommendations for Positive Transformation .....	59
5.2.1 Short-term recommendations .....	59
5.2.2 Medium-term recommendations .....	60
5.2.3 Long-term recommendations .....	61

## LIST OF FIGURES AND TABLES

Figure 1:	Major Land legislation under colonialism
Figure 2:	FAO Principles for Agricultural Investment
Table 1:	Land Legislation and Policy since 1986
Table 2:	Offices and human-power required to operationalize the 1998 Act
Table 3:	The State of Backlog in different high court divisions (2015 and 2016)
Table 4:	Ranking of most bribery-prone institutions in Uganda

## LIST OF ACRONYMS

ACCU	Anti-Corruption Coalition of Uganda
AG	Attorney General
BLB	Buganda Land Board
CCO	Certificate of Customary Ownership
CHOGM	Commonwealth Heads of Government Meeting
CO	Certificate of Occupancy
CRC	Constitutional Review Commission
CSR	Corporate Social Responsibility
DLB	District Land Board(s)
DPP	Director of Public Prosecutions
DSI	Dispute-Settlement Institution(s)
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FHRI	Foundation for Human Rights Initiative
GoU	Government of Uganda
HURIPPEC	Human Rights and Peace Centre
IDP	Internally Displaced Person(s)
IFAD	International Fund for Agricultural Development
IGG	Inspectorate of Government
IGG	Inspector General of Government
IGP	Inspector General of Police
JSI	Judicial Service Commission
KCCA	Kampala Capital City Authority
LC	Local Council
LCV	Local Council Five
LEMU	Land and Equity Movement in Uganda
LPU	Lands Prosecution Unit
LRD	Land Reform Decree
MP	Member of Parliament
NEMA	National Environment Management Agency
NFA	National Forestry Authority
NLP	National Land Policy
NRM	National Resistance Movement
OBB	Obudhingia bwa Bamba
OBR	Obusinga bwa Rwenzururu
PLA	Public Lands Act
RDC	Resident District Commissioner
RTA	Registration of Titles Act
SPNSA	Significantly-Placed Non-State Actors
TPP	Ten-Point Programme
UCA	Uganda Cooperative Alliance
ULC	Uganda Land Commission
UNCTAD	United Nations Conference on Trade and Development
UPC	Uganda People's Congress
UPF	Uganda Police Force
VLA	Village Land Act

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## ABOUT THE PROJECT

The Land Justice and Post-Election Governance in Uganda Project is a one-year project implemented by the Human Rights and Peace Centre (HURIPEC) between 2016 and 2017. In HURIPEC's experience, working on the 2016 elections, with the support of OSIEA, land and natural resources became highly contentious issues. Particularly the 2016 election-related incidents of violence in the western district of Kasese and the eastern region of Kapchorwa were directly associated with the extraction, use and distribution of benefits from the natural resources, including land, in these areas.

In the aftermath of the 18 February 2016 presidential elections, the country witnessed a political crisis characterised by a disagreement which arose between the opposition, a cross section of the public especially the youth, civil society organisations and a number of election observers on the one hand, and the government, the Electoral Commission and the NRM party on the other, who were, respectively, dissatisfied and satisfied with especially the presidential election results. Although one of the presidential contestants challenged the presidential election results before the Supreme Court, which ruled in favour of the same presidential candidate who had been announced winner by the Electoral Commission, the legitimacy of the outcome of the election remains contested by a number of actors. For this reason, the Elders' Forum and the Inter-religious Council of Uganda, together with a number of other actors, proposed a national dialogue process in order to bring about post-election reconciliation and better governance in Uganda.

HURIPEC believes that in order for the national dialogue process to achieve its objective, it must have a strong focus on issues of human rights and governance, including those relating to land and natural resources, which are undeniably critical mobilising and aggregating factors. As a group interest, also, the biggest resource for most Ugandans and with its close nexus to politics and the law, land is a strong galvanising factor that can be used to reach out to many people. Predictably, therefore, land is a central question for Uganda's post-electoral economic recovery.

Accordingly, the Land Justice and Post-Election Governance in Uganda Project brings to the national dialogue process research-based information on land and natural resources governance, including current trends of ownership or access to land and other natural resources as well as the processes through which groups lose these resources while other individuals and groups gain them. This information was generated through the project's interventions, which included four separate studies involving a critical examination of the legal and policy framework relating to land governance in the country and empirical studies which covered the districts of northern Uganda (Agago, Amuru and Otuke), western Uganda/Rwenzori (Bundibugyo, Kabarole and Kasese) and central Uganda (Kampala, Kayunga and Mukono). These studies resulted in four separate reports, namely: The legal jurisprudence analysis report as well as the three reports covering issues in three of the districts surveyed in each region. On 8, 15 and 22 June 2017 HURIPEC organised dialogues in Lira (north),

Fort Portal (west) and Kampala (central) to both disseminate findings and provide a forum for the different stakeholders concerned with land justice to engage each other in order to appreciate and prescribe remedies to the emerging issues in the respective areas.

To bring the discussion forward and to the national level, HURIPPEC organised a National Stakeholders' Convention on 9 November 2017, to both enable the key stakeholders, including senior citizens, religious leaders, cultural leaders, local leaders as well as academia, to critically reflect on issues of governance as they relate to land and other natural resources, as well as to disseminate and launch the combined/national Status Report on Land Justice and Governance in Contemporary Uganda, which is a synthesis of the reports from the four separate studies undertaken under the project.

In all this, the project seeks to generate public consciousness of governance issues and, more widely, of leadership and accountability by state agencies with a focus on land and natural resources.





## EXECUTIVE SUMMARY

This report provides an overview and critical framework for the HURIPEC project on Land Governance, which comprised studies on the Northern, Central and Western regions, plus an analysis of the legal regime governing land in Uganda. The analysis in the report is based on two fundamental points of departure, first, that there is a deep land crisis in the country, and secondly that it is a crisis intricately connected to the structures and methods of governance introduced with the advent to power of the National Resistance Movement (NRM) government led by President Yoweri Kaguta Museveni. As such, land has become an intricate component of the networks of patronage, nepotism and neo-patrimonial governance which have been instituted since 1986. It is also a critical ingredient of the wider socio-political matrix of economic reform predicated on privileging large expatriate capital and international finance. The major conclusion of the report is that unless the governance crisis is resolved, very little can be done to change the conditions of land mis-governance, impunity and institutional collapse which are but manifestations of the wider problem.

While it is clear that colonialism bequeathed severe historical land inequities within the socioeconomic and political conditions that led to the foundation of Uganda as a state, these have been exacerbated by the failure of post-independence governments to comprehensively pursue land reform measures which are: (1) Equitable; (2) Rational, and (3) Sustainable. As a result, Uganda is gripped by an acute case of Land Injustice. While the manifestations of the land crisis are evident in a policy and legal regime which is largely dysfunctional, the roots of the problem lie in the complete lack of transparency around the acquisition of wealth by senior government/public officials, the failure to institute robust mechanisms for ensuring accountability over the acquisition of that wealth and the absence of effective sanctions for those who take advantage of or simply abuse their positions of authority. In sum, the system is rotten, and the rot begins at the top. That rot permeates not only the mechanisms in place governing the acquisition of public land it extends into the arena of the administration of private land, hence the major problems afflicting the system of land registration in the country as a whole.

Against the above background, the three main areas of focus in relation to the HURIPEC research covered Land Administration and Governance; Land Dispute Settlement and Adjudication and Land Impunity, and led to the following broad conclusions:

### **Land Administration and Governance**

There is an almost total break-down of the institutions of land administration and governance in Uganda which is largely the result of: (1) Inadequate oversight and protective mechanisms within the Uganda Land Commission (ULC), the District Land Boards and other state-affiliated land administration and governance institutions; (2) Insufficient resources and personnel to handle an issue of considerable magnitude, and (3) A proliferation of *ad hoc*, and largely incompetent institutions conferred with conflicting mandates over the

acquisition, management and disposal of land. Among the latter are the Police, State House/ Office of the President and significantly-placed non-state actors (SPNSAs) with very strong state affiliations. Absent a comprehensive transformation of the powers, independence and oversight mechanisms of the officially-designated land administration bodies, improvement of the land regime will remain a pipe-dream. Critical attention also needs to be given to the role of cultural institutions as both promoters and inhibitors to widespread reform in the land regime.

### **Land Dispute Settlement and Adjudication**

At the head of the land dispute settlement and adjudication system are the courts of law and the other related institutions which assist in the administration of justice. There is a need for a comprehensive overhaul of the powers and resources of the courts and a strong reaffirmation of their superior position and independence *vis á vis* the whole network of governmental institutions that should assist them to execute their mandate. In the absence of such reform, the settlement of land disputes will not only remain a matter of increasing contention, but also of mounting frustration. While recognizing that there are significant inefficiencies in the administration of the land justice systems, measures that enhance the independence and effectiveness of the courts of law are preferred to those which will undermine them. Regarding the currently contentious issue of the public acquisition of land, at a minimum the government should immediately abandon the attempt to amend Article 26 of the Constitution, and await the comprehensive recommendations of the Justice Catherine Bamugemereire-led Land Inquiry. It is also necessary to radically and immediately increase the resources allocated to the Land adjudication mechanisms in the Judiciary.

### **Ending Land Impunity**

It is quite clear that those involved in land-related criminality are not only highly-connected public officials and significantly-placed non-state actors, their actions of large-scale evictions, Land Office forgery and various acts of bribery and coercion can only be curtailed through a vigorous process of prosecution. However, in order for such a shift to take place, there is need for the inculcation of a new political dispensation with the necessary will to address the situation of impunity. The signaling of such will can only come from the highest office in the land, the Presidency. New laws governing the public disclosure of assets need to be introduced as an immediate measure to begin a process of cleaning up the Public Service. Without a comprehensive disclosure of who owns what land and property, how they acquired it and whether their acquisitions match their earnings, Uganda will continue to be caught up in a situation of growing impunity. With the revelations of the wealth of public servants and those connected to them emerging only accidentally, there is no way of fully comprehending the depth of the crisis. Taking action on this matter nevertheless requires the necessary political will to comprehensively address corruption. Such political will has thus far been lacking. The demonstration of that will is only possible with a full disclosure of all the assets and liabilities of all public officials, commencing with the President.



## RECOMMENDATIONS

### a) Short Term Recommendations

1. There is a need for a broad, national dialogue on the governance predicament in the country, of which the land crisis is simply a component part. Focusing only on land minimizes the co-extensive nature of the crisis, and will amount to piecemeal reform of the peripheral rather than the substantive questions which are affecting the country.
2. Ad hoc and illegal institutions that have assumed a mandate over land governance such as the Police, the Office of the President and State House should be immediately disbanded, or subordinated to the overall supervision of a revamped and reconstituted Uganda Land Commission. Only legitimate institutions fully-mandated by law to govern land matters should have control over the land question.
3. Government should adhere to the laws on compulsory acquisition *vis-à-vis* the prompt and prior payment of adequate compensation to persons who lose their interest(s) in land due to the legitimate exercise of the power of eminent domain. In similar vein, attempts to amend Article 26 of the Constitution and manipulate the protections currently provided for the compensation of persons affected by compulsory acquisition must be abandoned.
4. Private firms and investors must be urged and even compelled to adopt and adhere to minimum requirements of corporate responsibility with regard to their interactions with the victims of the land problem, particularly evictions. Such private actors must be called upon to deal directly with the legitimate occupants and owners of land rather than the individuals who fraudulently acquire such land and proceed to sell or lease it out to them.
5. The Uganda Land Commission should conduct the affairs of Land Fund transparently and remove the mystery surrounding these resources in order for the objectives of the Fund to be attained and to enable the genuinely-marginalized *bona fide* occupants it was designed to help benefit from its existence and proper functioning.
6. The major institutions of accountability such as the Auditor General and the Inspectorate of Government need to be boosted with increased powers of oversight and sanction against errant public officers.
7. Immediate steps need to be taken to establish new mechanisms for the declaration of wealth and for periodic audits to be conducted of high-ranking public servants, security personnel and prominent political actors.
8. Transparency and equity must be applied to all and any public land distribution in order to avoid the conflicts such as those that have been witnessed in the Rwenzori region and in Northern Uganda.

9. Judicial orders and judgments should be respected by the State and all related public and private actors in order to bring an end to the climate of impunity surrounding the settlement of land disputes. By extension, judicial corruption and the intimidation of judicial officers must be urgently addressed in order to keep the avenues of justice from continuing to deteriorate into avenues of injustice.
10. Sensitization of the masses—especially the vulnerable classes such as the disabled, women, poor peasants and the illiterate—on land laws and rights, best uses of land and the workings of land transactions should be vigorously undertaken to solve many of the prevailing problems.

**b) Mid Term Recommendations**

11. The laws governing the institutions of land governance—particularly the Uganda Land Commission and District Land Boards—need to be streamlined and revamped in order to provide enhanced independence, freedom of operation and improved accountability.
12. The Office of the Directorate of Public Prosecutions (DPP) should be revamped through the introduction of a Lands Prosecution Unit, devoted specifically targeted to the investigation and prosecution of those most prominently involved in the land crisis in its various manifestations.
13. Ways of legalizing and incorporating informal land structures into the land dispute resolution matrix especially with regard to land owned customarily must be sought in a bid to address the shortcomings of many of the formal (court) structures.
14. A comprehensive review of the status and nature of Certificates of Customary Ownership (CCO's) must be undertaken as a means of understanding how the registration of customarily-owned land can be promoted and ownership guarantees over such land enhanced without grossly altering the customary conception of land ownership and in a manner that gains the confidence of the people in the system. Central to such a review is the need to elevate the customary ownership of land to the same footing as other forms of title.
15. The comprehensive printing and public distribution of original boundary maps must be undertaken with the aim of solving district boundary disputes all over the country.
16. There is a need for the integration of the cultural and spiritual conceptions of land into the general legal understanding of land and its ownership, conducted in consonance with the expectations and realities of the majority of the people.
17. Ways of making formal justice structures more accessible to the people should be adopted in order to dispel the belief that the formal courts are an avenue only open to the rich, the literate and the powerful. Thus for example, judicial backlogs relating to land cases must be expeditiously handled in order to lessen the legal costs parties incur.

**c) Long Term Recommendations**

18. Dual interests over land in the form of user rights being separate from ownership rights (the landlord-kibanja holder relationship) need to be extinguished in order to enable both parties have exclusive control of the land. To that end, first of all, the Land Fund must be efficiently run to enable *bona fide* occupants gain ownership over the land they reside on. Additionally, legal enactments need to be passed to practically make provision for kibanja holders to obtain ownership over part of their landlords' land in extinguishment of their user rights over other parts of the same land.
19. Where possible—as with the case of the Basongora who once occupied parts of present-day Queen Elizabeth National Park—victims of historical land injustices should be made whole by the government through the payment of compensation or the provision of alternative (preferably unoccupied and unencumbered) public land for settlement .



# I INTRODUCTION

## 1.1 Unpacking the Land Question in Uganda

Over 120 years after Uganda was declared a protectorate of the British Empire, the land question in the country remains largely unresolved (Porter, 2001a). One could quite accurately say that the land crisis in Uganda has reached epidemic proportions. Unfortunately, it has also assumed tragic dimensions. Large-scale evictions,<sup>2</sup> massive Land Office forgery, chronic corruption, judicial inertia and institutionalised incompetence appear as daily fare in the print, broadcast and social media (Kannyo, 2016).<sup>3</sup> While in the heat of the 2016 elections the land question assumed considerable significance;<sup>4</sup> it is a matter that has long been simmering below the surface (Meinert & Kjaer, 2017). Given the problematic issues surrounding the acquisition, ownership and disposal of land – both public and private – the establishment of the Commission of Inquiry into Land Matters in early 2017 was largely welcomed as a necessary and timely intervention. Indeed, the commission could be regarded as a proverbial stitch in time in a bid to save nine.<sup>5</sup>

However, it is questionable whether the findings and recommendations of the Justice Catherine Bamugemereire-led commission will fundamentally alter the existential crisis related to the land question in Uganda. This is because the land question and crisis today are deeply rooted within the wider governance matrix represented by the 30-plus years of the National Resistance Movement (NRM) rule in Uganda. It is also linked to the historical legacy of the colonial era, coupled with the absence of a concerted attempt at land reform by the early post-colonial governments. In sum, the land question is a crisis of governance and needs to be examined as part of the broader socio-economic and political framework within which the state in Uganda is embedded. While the public hearings of the commission

- 2 See, for example, the eviction of over 2,000 bona fide occupants (*bibanja* holders) of land in Kayunga district by Moses Karangwa, the National Resistance Movement (NRM) Kayunga district chairman (Yusuf Serunkuma Kajura & Baker Batte Lule, *Land Injustice in Central Uganda: Select Studies from Kayunga, Mukono and Kampala*, Working Paper No. 40 (2017).); and the forceful eviction (using the military) of residents of Akaa after the government acquired their land for the creation of a game reserve without consultation or the payment of compensation (Dennis Ojok & Max Ameny, *Land Injustice in Northern Uganda*, Select Studies from Amuru, Agago and Otuke, Working Paper No. 41 (2017).)
- 3 See, for example, Chris Kiwawulo, 'City lawyer accused of evicting 4 villages,' *New Vision*, 30 July 2017 at 6; Alex Bukumunhe, 'Minister Gume grabbed 20 acres of gov't land,' *Red Pepper*, 2 July 2017 at 6, and Betty Amamukirori & Luke Kagiri, 'Residents narrate eviction ordeal,' *New Vision*, 14 September 2017 at 8.
- 4 All three HUR�PEC regional studies synthesised in this report (Kajura & Lule, *op.cit.*, Ojok & Ameny, *op.cit.* and Paschal Kabura & Francis Tuhaise, *Land Justice and Governance in Western Uganda: Select Studies from Kasese, Kabarole and Bundibugyo*, Working Paper No. 39 (2017)) attest to the use of the land issue as a political campaign tool by politicians. In particular, the Kajura and Lule report on Central Uganda (*op. cit.*) indicates that the NRM affiliates (such as Abdallah Kitatta, the NRM chairman for Rubaga division) used money dispensed to them for election-related matters in 2016 to finance and propagate land grabbing.
- 5 Although established in February, the commission did not start operations until early May ostensibly on account of a lack of funds, but also a telling reflection of the priority given to the exercise by the NRM government.



have done much to expose the shenanigans of land “sharks” aided by a network of officially-connected and sanctioned individuals and groups, the fact is that it will do little to transform the coextensive system of patronage and the mechanisms of political control and dominance which have led to the crisis in the first instance. This report provides some indications as to the reasons why.

As is the case elsewhere, the issue of land in Uganda has been a highly convoluted and contentious one, steeped in the political struggles of the day, directed by the interests of local and international business and often linked to strategies fostered by ethnic, sectarian and regional calculations (Meinert & Kjaer, 2016: 771). Indeed, the recent sprouting of numerous internal border disputes over district boundaries in places like Apaa, Kasese and Bundibugyo, to mention but a few,<sup>6</sup> are reflective of the manner in which the issue of land has been sadistically and opportunistically deployed alongside the processes of “districtisation” to implement a policy of divide-and-rule (Singiza & De Visser, 2015).<sup>7</sup> The large-scale evictions, inflated project-related compensations to the politically-connected and recourse to vigilantism and brute force<sup>8</sup> in the settlement of land disputes expose an even more disturbing aspect of the crisis.<sup>9</sup>

On the face of it, property relations are a straightforward reflection of the legal framework put in place in order to ensure a degree of certainty and stability to the various transactions on land. These range from tenure to access to distribution. In a predominantly agrarian economy such as Uganda’s, these elements are extremely important not simply to ensure a degree of security within the system, but also as a means of directing the course of socio-economic development. No country in the world – from China to the United States to Mozambique – has achieved development without comprehensively addressing the land question. But there are numerous questions concerning land reform which extend well beyond the economic. To put it differently, we need to look beyond the economics of the presidential pledge to achieve middle-income status by the year 2021, particularly via the mechanism of foreign direct investment (FDI). As Lin Chun points out, “Politically, land reform is also straightforwardly a matter of both eradicating the backward relations that hinder production and unshackling a hitherto oppressed people who otherwise cannot win the fight to secure their constitutionally and legally stipulated entitlements and rights” (Chun, 2015: 113).

6 There are also disputes in Tororo, Budaka and Butaleja; see Paul Watala, ‘Bagwere king agrees to meet MPs over land fights,’ *New Vision*, 28 September 2017 at 15.

7 Kabura & Tuhaise, *op.cit.*, at 25 mention the recent plan (which received presidential agreement) to split Kasese district into four new districts (Bwera, Hima, Kasese and Katwe) – a move apparently meant to end the ‘subjugation’ of ethnic minorities under Bakonzo domination. The president is also reported within the same study to have promised to grant Bughendera county (dominated by the Bakonzo) in Bundibugyo (largely occupied by the Bamba) its own district status (at 27). With all this, ethnic divisions continue to deepen against the background of political considerations.

8 Kabura & Tuhaise, *op.cit.*, at 28 cite the example of violent evictions and threats of eviction perpetrated by the Tooro Queen Mother against squatters on land in Kitumba, Kyogya and Nyanduhi-Harukooto with the aid of armed security personnel.

9 See Betty Amamukirori and Luke Kagiri, ‘IGP helped me in Mubende evictions, says Abid Alam,’ *New Vision*, 14 September 2017 at 10.



At the end of the day, the land question is essentially a product of the political economy of a country. It is a governance issue. Unless the politics of the land question is comprehensively addressed, focusing on the reform of law or policy alone will not resolve the problem.

## 1.2 Overview of the Report

This report represents a synopsis of four separate studies conducted by researchers at the Human Rights and Peace Centre (HURIPEC) on the question of land (in)justice and governance in contemporary Uganda. The title of the report underscores the main cross-cutting point made by all four studies: *land justice is not only lacking for the vast majority of the population of Uganda, but the situation has deteriorated into one of impunity*. And while Uganda may pride itself on the many achievements made over the last three decades of NRM rule, the country is in fact manifesting many of the facets of state collapse. One of the most dramatic is the crisis crystallised in the land question.

The HURIPEC studies were primarily divided between the conceptual and the empirical. Under the former, a critical examination was undertaken of the legal and policy framework relating to land governance in the country.<sup>10</sup> The practical aspects of the research broadly covered the regions of northern (including the districts of Agago, Amuru and Otuke),<sup>11</sup> western/Rwenzori (Bundibugyo, Kabarole and Kasese)<sup>12</sup> and central Uganda (Kampala, Kayunga and Mukono).<sup>13</sup> The sampled districts were chosen in a purposive manner primarily to demonstrate the distinctions occasioned by history, demography, location and the difference in tenure systems that mark the diverse landscapes in the country. These regions also capture many of the similarities attributable to the overarching mechanisms of land governance that are in place under the NRM government. In short, the studies recognise the distinctions attributable to history and culture while ensuring that they are placed against the backdrop of the varied interventions made by the state in contemporary Uganda in a bid to effect socio-economic change at the macro level.

This report offers a synthetic overview that covers those issues of generic concern which are at the heart of the land crisis in the country and which need to be urgently addressed as enumerated within the four studies above. It also discusses the patterns and comparisons deduced from the three regional findings. In a nutshell, these issues revolve about the law/policy, the institutions/actors and the social/economic factors which have most critically affected developments in the land situation in contemporary Uganda.

## 1.3 Structure of the Report

Following the above conceptual overview, the report moves on in Part II to consider the general issues relating to the acquisition, tenure and use of land, placed against the backdrop of a very broad historical overview to the evolution of land policy and legislation in the

<sup>10</sup> Rose Nakayi & Monica Twesiime Kirya, *The Legal, Policy and Institutional Framework of Land Governance in Uganda: A Critical Analysis*, Working Paper No. 38 (2017).

<sup>11</sup> Ojok & Ameny, *op.cit.*

<sup>12</sup> Kabura & Tuhaise, *op.cit.*

<sup>13</sup> Kajura & Lule, *op.cit.*

country. Part III considers the specific issue of customary land, primarily a feature of the northern, eastern and western regions of the country, but which has received inadequate policy attention to date. The story of customary tenure represents an abject failure on the part of the government to comprehensively address the many problems which affect this mode of landholding. This is followed in Part IV with an examination of the operations of the main institutions and actors and overarching aspects within the arena of land justice in Uganda. In particular, a summarised account of the patterns and comparisons deducible from the HURIPPEC regional reports is also provided under this section. The report concludes in Part V by offering some reflections on how best to restore a modicum of justice to the land regime in Uganda.

## II

# LAND (IN)JUSTICE AND THE LAW: HISTORICAL AND CONTEMPORARY DIMENSIONS

From the point of the establishment of the colonial state until the accession to power of the NRM government, the legal benchmarks in the evolution of the regime governing land in Uganda are fairly well demarcated. They were also relatively few, in that each epoch has had fewer than 10 pieces of legislation promulgated to govern the area. This section of the report provides a brief history of the legal regimes under colonialism, in the immediate aftermath of independence and following the assumption to power of the NRM government.

### 2.1 Colonial Land Tenure

Starting with the 1900 Buganda Agreement, the regime on land during the colonial period developed through the following pivotal legislative developments:

**Figure 1: Major land legislation under colonialism**

THE COLONIAL ERA
<b>1900:</b> The (B)Uganda Agreement
<b>1902:</b> Uganda Order-in-Council
<b>1903:</b> Crown Lands Ordinance
<b>1908:</b> Buganda Possession of Land Law
<b>1918:</b> Land Transfer Ordinance
<b>1918:</b> Official Estates Ordinance
<b>1922:</b> The Crown Lands (Declaration) Ordinance
<b>1924:</b> The Registration of Titles Act
<b>1928:</b> <i>Busuulu</i> and <i>Envujjo</i> Law

A number of features can be distilled from this chronology of the legal regime in colonial Uganda. First of all, although colonial land policy was not as blatantly racist as it was in the case of neighbouring Kenya, its essential goal was the same, namely to place a premium on private property rights with a particular focus on individual ownership. This was the blueprint developed in the 1900 Agreement and resulted in the distribution of land in Buganda between some of the previous occupants of the land, the ruling monarch (the *Kabaka*), the three main religio-political factions of the day, i.e. the *Ba-Ingeleza* (Church of Uganda), the *Ba-Faransa* (Catholics) and the *Ba-Islamu* (Muslim adherents), and a select coterie of collaborators who facilitated the process of colonial rule in the protectorate.<sup>14</sup>

<sup>14</sup> But see Peter Mulira, 'Claim that colonialists only gave *mailo* land to cultural leaders is misleading', *Daily Monitor*, 18 September 2017, available at: <http://www.monitor.co.ug/OpEd/Commentary/colonialist-mailo-land-cultural-leaders-Museveni-/689364-4099900-9fx8fuz/index.html>.

At the same time, the law governing land was designed to ensure that the imperial power retained oversight and control of those lands which did not fall under private ownership, hence the Crown Lands Ordinance adopted a few years later in 1903 (Nakayi, 2015: 5). That law also extended the regime of land governance to the rest of the protectorate beyond Buganda, with only slight modifications in relation to those other kingdoms (Toro, Ankole and eventually Bunyoro) which had their own agreements (Morris & Read: 44). It granted indigenous Ugandans the 'right' to occupy 'unalienated' land (i.e. land that had not been granted to someone else through freehold or leasehold) in accordance with their customary law. Needless to say, the rights of customary tenants were subject to those of the British Governor if the latter chose to sell or lease their land to someone else (UN-Habitat, 2007: 7). Two decades later, the Registration of Titles Act Cap. 230 (RTA) introduced the Torrens system as an instrument designed to ensure transparency and accountability with respect to all transactions on registered land.

Needless to say, the 1900 Agreement was both a political settlement as well as a mechanism to promote the exploitative goals of colonialism through the introduction of a cash crop economy. As far as economic production was concerned, however, the arrangement enshrined in the 1900 Agreement was not ideal because, as Lwanga Lunyiigo (2011: 8) observes, "The injustice quickly showed its ugly head as the chiefs expected and demanded rent and tribute from the peasants whom they evicted from their *bibanja* as they wished." This is demonstrative of the fact that the Baganda landlords increasingly came to rely on ground rent (*busuulu*) and cash crop tributes (*envujjo*) as a means of petty accumulation. Over time, these impositions led to an increased oppression of the peasantry thereby considerably reducing their material benefits, and thus affecting the incentive to cultivate cash crops and pay their taxes – the mainstay of the colonial economy. These developments threatened the very foundation of colonial rule in the protectorate and thus had to be adjusted (Mamdani, 1976: 122-123).

The 1928 legislation was a response to the crisis introduced by the over-exploitation of peasant labour by the landlords and a recognition that a significant section of the population of Buganda – particularly the *Bataka* (clan heads) – had been left out or marginalised by the 1900 settlement. What this law did was to place a limit on the amount of taxation that the *mailo* landlords could extract from their increasingly more impoverished tenants. In this way, the British were able to ensure that the goals of economic exploitation were achieved while effectively putting a lid on the expressions of social unrest and resistance which had become a problem by this stage in the colonial experiment. Nevertheless, the law did not address the fundamental question of the rights of the tenants (*bibanja* holders) *vis-à-vis* the landholding gentry (Green, 2006: 6). Despite further uprisings in 1945 and 1949 that were related to the land grievances of the *Bataka*, no further changes of legal significance were effected until the British handed over power to an indigenous government in 1962. Although a 1955 Royal Commission recommended changes to the system of customary tenure,<sup>15</sup> no steps were taken to effect any reforms to this particular mode of landholding. It

15 See East African Royal Commission, 1953-1955: Report, Cmd. 9475, available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/E-A-Royal-Commission-1953-1955.pdf>.

was not until several decades later that the issue of customary land tenure re-emerged as a major question of concern.

In summary, the colonial experience left a marked impact on the land question in Uganda – both through acts of commission and by way of omission. More than a century later, this legacy continues to impact on the efforts to find a durable solution to the land crisis in the country. This is especially the case with respect to the failure to find a permanent solution to the tension between landlords and tenants in Buganda, to address the neglect and marginalisation of customary land tenure elsewhere in the country and to find a balance between the interests of large-scale private and public investment and the protection of smallholdings and the landless, especially in those areas with considerable agricultural, natural resource and mineral potential. And as will be made abundantly clear in the analysis which follows, these failures relate much more to the issue of governance than to that of land tenure *per se*.

## **2.2 Land Legislation in the immediate post-Independence Era (1962-1986)**

Over the 24 years of independence between 1962 and 1986, the governments of the day largely continued with the colonial model of landownership with only semantic modification. This explains why the initial post-independence period witnessed the enactment of only four land-related laws/policies over the 24 years marked by several illegal changes in government, military dictatorship and civil war. The 1962 Independence Constitution devoted only three articles out of 131 to the issue of land, with one of them devoted to land in Buganda. Article 118 created a national land commission and federal state and district land boards, Article 119 dealt with the issue of the acquisition of land in Buganda by the central government, while Article 120 dealt solely with the issue of interpretation. The Public Lands Act of 1962 mainly addressed itself to the management of the land which was previously Crown land and had been vested in the independent state. It confirmed the precarious status of customary law, stipulating that such lands could be taken over by the state (UN-Habitat, 2007: 7). The 1966 “pigeonhole” constitution which abolished kingdoms and monarchies in the country had only two provisions on land (Articles 108 and 109), while the 1967 Constitution simply duplicated the same. Interestingly, despite the allegedly transformative or “revolutionary” goals to which these instruments were directed, they largely left intact the unsatisfactory colonial inheritance.

Two pieces of legislation attempted to introduce a radical change to the mode of land governance in the post-independence era, namely the 1969 Public Lands Act (PLA) and Idi Amin’s Land Reform Decree (LRD) of 1975. Although passed in the aftermath of Milton Obote’s Common Man’s Charter and ostensibly part of the “Move to the Left” measures of the time, the PLA in fact marked only a symbolic transition, although it stopped the issuance of freehold and leasehold grants on any public land occupied by customary tenants without proof of their consent, adding a modicum of improved security to this category of land tenure (Wabineno-Oryema, 2014: 139; Mugambwa, 2007: 43-44).

On the face of it, the LRD represented the most radical post-independence change introduced to Uganda's regime of land governance. The LRD vested all land in the country in the state to be held in trust, converting it (including *mailo* tenure) into leasehold on the payment of ground rent and the fulfilment of certain minimal development conditions. Although the conditions for the acquisition or transfer of customary land were strengthened, the owners of such tenure became tenants at sufferance of the state (Wabineno-Oryema, 2014:140). Nevertheless, on account of the political upheavals and violent turmoil the country experienced under the Amin regime and the governments that followed, the LRD was never fully implemented.

Commenting on these post-independence developments in a major conference on land tenure in 1989<sup>16</sup> – three years after the NRM came to power – Prof. J. Bibangambah of the Uganda Cooperative Alliance (UCA) observed that the problem of land tenure went beyond the question of legal ownership:

The land tenure problem in Uganda was therefore both a development problem and a policy problem. It was a development problem because it involved trends that have emerged over time and it was a policy problem because it involved conflicts among land users or uses. The land tenure system in Uganda was also a product of cultures, customs, history as well as the law. The 1975 Land Reform Decree was not the origin of the conflicts over land. It simply compounded the problem by declaring that all land in Uganda was state owned and that no person other than the state could hold an interest in land greater than leasehold. (Mugambwa, 2002 at 34)

In addressing the land issue once they assumed power, to what extent did the NRM engage the phenomenon beyond its legal permutations? How much transformation was introduced to the fundamental contradictions in the land question in Uganda? Who were the beneficiaries and who has lost as a result of these changes? These are issues to which we turn in the next section of the study.

### **2.3 The Situation under the National Resistance Movement (NRM) Government**

The Ten-Point Programme (TPP)<sup>17</sup> provided the ideological blueprint for the NRA/M during the period spent in the “bush”.<sup>18</sup> While its major focus was the restoration of democracy and the enhancement of security, a lot of it was concerned with the economy and social services. Thus, out of a total of 16 pages, there are 18 references to “land”, some of them to the experience of other countries such as The Netherlands and Belgium. Fifteen of the references directly relate to the issue of land in Uganda; three of them to the landless/landlessness; and two to land grabbers or land grabbing. This demonstrated that even before assuming government,

16 Agriculture Policy Committee Proceedings and Recommendations of the Workshop on Land Tenure Resources Management and Conservation Studies, Jinja, 18-19 May 1989 (prepared by the Ministry of Planning and Economic Development), reproduced in Mugambwa, 2002 at 32-39.

17 Accessed at <http://www.austria-uganda.at/dokumente/Ten-Point%20Programme.pdf>.

18 Ibid.



the NRM was well aware of the importance of the land question to the introduction of what it described as “fundamental change”.

However, much of the language used in the TPP to describe the land problems of the time (early 1980s) was rhetorical. For example, at p.2, the programme makes a disparaging reference to Obote’s (then) “Pearl of Africa” as “... an enclave of pseudomodernisation of night-clubs, neon lights, tourist hotels or shiny office blocks for coffee or a cotton marketing board, surrounded by a sea of backwardness.” The same paragraph goes on to state that the economy “... is also marked in terms of the deterioration of the only means of sustenance our people have been surviving on, namely, land and the climate in some cases – all due to mismanagement.” At p.3, the programme undertakes to settle “... the peasants that have been rendered landless by erroneous ‘development’ projects or outright theft of their land through corruption.”

Point 8 of the programme entitled “Redressing errors that have resulted into the dislocation of sections of the population and improvement of others” points out three groups deserving particular attention, the first of them being “people that have been displaced from their lands by illegal land-grabbers of (*sic!*) erroneously conceived development projects.” Under the same point, the programme laments:

Uganda is a country of approximately 95,000 sq miles and 14 million people. A population of 14 million is not really big for a country almost equal in size to the UK with a population of 50 million people. In spite of the small population there is already a problem of landlessness beginning to emerge.

The programme proceeds to offer an explanation for the phenomenon of landlessness which we quote *in extenso*:

This [landlessness] is caused by largely incredible misuse, and even destruction of the very texture of land. There is hardly any land that is optimally utilised. Hence, on the one hand there is landlessness beginning to emerge and on the other hand, there is insufficiency of food. This is all due to suboptimal use, and even misuse of land. If land was intensively and optimally used, it could support a much bigger population and products. This, however, needs thorough examination of what and how to produce maximally, using the land. Our immediate concern is the tens of thousands of people – or possible hundreds of thousands – that have been displaced by ill-thought-out development projects or sheer illegal land grabbing by businessmen or state officials using corruption. An outstanding example are the 15,000 people with tens of thousands of cattle that have been thrown out of Nshaara by the UPC regime in order to make the area a game reserve. Such people ought to be settled on alternative land by the government. Apparently this practice is quite widespread in many parts of the country.

Besides asking whether the NRM government did anything to redress the land ills of previous governments, it is quite striking that so many of the problems lamented about in this early-1980s document are still a major issue in 21<sup>st</sup> century Uganda. To understand why this is so, one needs to first comprehend President Museveni's damascene conversion from radical nationalist to market-reformed Marxist and supreme preacher of neo-liberal World Bank economic reforms. That about-face was coupled with the political compromises – including the restoration of kingdoms – deemed essential to secure an extension of his tenure in office (Oloka-Onyango, 1997: 215-216). It is also necessary to get a bird's eye view of the major legislative and policy interventions made by the NRM government once it assumed the reins of power. Those interventions are summarised in the table below:

**TABLE 1**  
**LAND LEGISLATION AND POLICY SINCE 1986**

DATE	LAW/POLICY	ISSUE
8 October 1995	The 1995 Constitution	Affirming right to property (Article 26) and institutional framework governing land and environment (Chapter 15)
1998	The Land Act	Implementation of the 1995 Constitution
2004	The Land (Amendment) Act, No. 1	Women and family rights
2010	The Land (Amendment) Act, No. 2	Harmonisation of interest of "bona fide" and customary/ <i>bibanja</i> tenants
2013	National Land Policy	General
2017	Constitution (Amendment) Bill, No. 13	Amendment of Article 26 of the Constitution

The above table encapsulates several dimensions of the contemporary land conundrum, especially in relation to the law. Since the NRM came to power, at least four laws/policies have been adopted, with a fifth (the 2017 proposed constitutional amendment) under discussion as at the time of writing. While some of the provisions encapsulated in the law represent attempts to achieve a progressive reform of the rules governing the area, there are also a number of quite disturbing developments and contradictions in relation to each of them.

Marking a radical departure from its predecessors, the 1995 Constitution declared that land belonged to the citizens of Uganda (not the state), a sharp difference from the LRD. Aside from reasserting the protection of the right to property in Article 26 of the Bill of Rights, a whole chapter consisting of nine articles was devoted to "Land and the Environment". Article 237 is a comprehensive summary of landownership, naming customary, freehold, *mailo* and leasehold as the four recognised and constitutionally-protected modes of tenure. Also covered in Chapter 15 are the Uganda Land Commission, the functions of District Land Boards (DLBs) and matters of a general nature. However, a stalemate was encountered with respect to the issue of so-called 'bona fide occupants of land' which was the euphemism adopted to describe the tenants on *mailo* land (*bibanja* holders) created by the 1900 Agreement who



had rights of occupancy but not of ownership. Hence, the provision stipulated that within two years of its first sitting, Parliament would enact a law addressing the issue.<sup>19</sup>

The Land Act of 1998 was the response to the failure by the Constituent Assembly to comprehensively address the issue of *bibanja* tenants and was mainly directed towards enhancing their security of occupancy (Hunt, 2004). Section 4 of the Act stipulates that the *mailo* landowner holds the land in perpetuity with all the powers of a freeholder, but the land is subject to the customary and statutory rights of the *bibanja* tenants. Quite clearly, this provision did nothing to extinguish the historical problem, and indeed caused considerable tension between the central government and the Buganda government at Mengo, even reflecting an ethnicised element to the tension. According to Eliot Green, “Despite the fact that the Act was partially designed to support Bugandan (*sic!*) tenants against their landlords, the NRM government has nonetheless failed both to acknowledge ethnic attachment to land in Buganda and negate the perception that the central government is ethnically biased towards western Ugandans” (Green, 2006: 11). Of course, this represented a broader pattern of patronage – a point to which we shall return when we consider the phenomenon of presidentialism and its impact on the land question in Uganda today (Carbone, 2008: 64-65).

Another feature of the 1998 legislation was the purported translation of the constitutional recognition and protection of customary tenure into law. However, the provision of the law was couched in such a way as to allow for the conversion of customary tenure to freehold and not the reverse, leading Mugambwa to comment that “the legal recognition of customary land tenure did not necessarily translate into a pro-customary land tenure policy. Indeed, the position is quite the contrary” (Mugambwa, 2007: 52). Among the several other provisions of the law that were highly contested were the issues of the status of land brought into a marriage; the co-ownership of the home and land in a monogamous marriage; and the position of polygamous wives *vis-à-vis* land use and ownership (Tripp, 2004; Asiimwe, 2001). Although narrowly passed during the various stages of debate in Parliament, when the final Act was gazetted, the clause on co-ownership had mysteriously disappeared.<sup>20</sup>

The amendment of 2004 attempted to address some of the anomalies in the systems established by the original legislation. Given the outcry over the loss of the co-ownership clause, the amendment sought a halfway house on the issue, albeit with limited success (Goetz, 2002). Thus, section 38A gives spouses guaranteed security of occupancy on family land, which confers rights of access and use and the right to give or withhold consent in relation to transactions that affect the spouse’s rights on the land. According to Rugadya *et al.*, the amendment was “...a sober attempt to provide ‘veiled co-ownership’ for limited land rights in the manner of consent to the disposal of family land” (Rugadya *et al.*, *op. cit.*, at 13-14). However, while the amendment provided for spousal consent in relation to ‘family land’, it did not provide outright for the right of women to own land: “The right accorded is

19 Article 237(9) of the 1995 Constitution.

20 The main architect of the clause (the Hon. Miria Matembe) gives an interesting account of the ‘disappearance’ of the clause and the stages this went through. See Matembe, 2002.

not explicitly a legal right to own the land but (only) to occupy it" (Ahikire, 2011: 2). The 2004 amendment also sought to correct some of the excessive bureaucratisation put in place by the 1998 Act.

In 2010 Parliament passed a second amendment to the Land Act which took another stab at regulating the relationship between *mailo* landowners and *bibanja* holders, and had the specific objective of

enhancing the security of occupancy of lawful and, bona fide occupants on registered land; regulating and defining the relationship between lawful and bona fide occupants and registered owners of land; and enhancing the protection of lawful and bona fide occupants and occupants on customary land from wide spread evictions from land without due regard to their land rights as conferred by the constitution and the Land Act.<sup>21</sup>

According to the parliamentary committee which reviewed the Bill, it was a "stop gap measure due to public outcry on land grabbing, forceful evictions and grave associated crimes as we wait for the national land policy which the Ministry has started on."<sup>22</sup> Needless to say, the 2010 amendment failed to either clarify the tensions between the two competing interests on *mailo* land or to stop evictions, its two stated objectives. The main cause of evictions was the laws which created two competing interests, the lack of a functioning system of registration and the absence of a coherent policy to guide land administration (MacAuslan, 2013: 92). All of these problems were compounded by the emergence and growth of a politically well-connected and militarily-backed cohort of NRM officials and those close to them.

In response to the long-standing demand by the public and responding to criticisms from Parliament and academics, a National Land Policy (NLP) was finally released in 2014.<sup>23</sup> **The key issues outlined in the policy include:** The creation of a customary register to facilitate the registration of customary rights; the strengthening of women's land rights through the enactment of provisions promoting the regime of marital property law and joint ownership of land and property for married parties; the need to overhaul the existing institutional framework for land administration and land management through the decentralisation of more efficient, cost-effective and accessible land services; the re-institution of administrative Land Tribunals to handle escalating land conflicts and land evictions; and the legal recognition of the dual operation of both the customary and statutory systems in land rights administration, land dispute resolution and land management by empowering customary authorities to perform their functions.<sup>24</sup> While the NLP has several lofty statements of intent,

21 Parliament of Uganda, Report of the joint committees of Physical Infrastructure and Parliamentary Affairs on the Land Amendment Bill, November 2008, available at <https://semuwemba.files.wordpress.com/2010/03/ammendmentstotheLandActamdmntbill2c2007.pdf>.

22 *Ibid.*, at 5.

23 Ministry of Lands, Housing and Urban Development, *The Uganda National Land Policy*, Kampala, available at [http://landportal.info/sites/default/files/the\\_uganda\\_national\\_land\\_policy-february\\_2013.pdf](http://landportal.info/sites/default/files/the_uganda_national_land_policy-february_2013.pdf).

24 Naome Kabanda, *Uganda's National Land Policy: Background, Highlights and Next Steps, Focus on Land*

it also demonstrated a degree of dysfunction in the government. First, it was quite clearly the case of putting the cart before the horse, since policy should have preceded many of the laws on land which are no longer in sync with the stated government elements now enshrined in the NLP (MacAuslan, 2013: 85). Second, the policy carried over many of the historical problems engendered by the colonial experience, coupled with the addiction to neo-liberal market interventions promoted by the World Bank.

Needless to say, the appetite of the public for more enactments on land has been seriously tested. The position of the public with respect to more laws affecting land was amply demonstrated by the latest government intervention, the 2017 Constitution (Amendment) Bill. <sup>25</sup> Designed with the primary goal of amending Article 26 of the 1995 Constitution which covers the right to property and the payment of *adequate* and *prompt* compensation in the event of compulsory acquisition by the state, the Bill seeks to “resolve the current problem of delayed implementation of Government infrastructure and investment projects due to disputes arising out of the compulsory land acquisition process.”<sup>26</sup> The government contends that the amendment will address the problem of delayed projects which have caused significant financial loss. Since its introduction, a plethora of individuals and groups have come out to object to the Bill, with the government responding with an equally concerted attempt to have the same adopted to the extent of President Museveni himself personally taking to the broadcast media in tours around the country. <sup>27</sup>

It is unnecessary to debate the pros and cons of the Bill, except to point out, first, that the Bill encompassed a long-held sentiment on the part of the NRM government in general and President Museveni in particular. At the promulgation of the 1995 Constitution on 8 October of that year, he expressed his discomfort with the provisions on land and the rights of criminal suspects, among others. <sup>28</sup> In its White Paper to the Constitutional Review Commission (CRC) in 2004, the government made the proposal that “to promote development it should be possible to acquire land compulsorily for investment purposes...” (Government of Uganda [GoU], 2004: 79-80). Apart from demonstrating the NRM fixation with the foreign investment model of development, the White Paper was a reflection of more enduring tensions that have long been present in the land debate in Uganda. According to Eliot Green, this position merely confirmed “...the worst fears of the Baganda and others that the NRM was neither interested in recognising ethnic attachment to land in Buganda nor in attempting to allay fears that it wanted to acquire land for itself and hence for western Ugandans” (Green, 2006: 18).

*in Africa*, available at <http://www.focusonland.com/foia/en/resources/ugandas-national-land-policy-background-key-highlights-and-next-steps/>.

25 Bill No. 13 of 2017, available at <http://parliamentwatch.ug/wp-content/uploads/2017/07/Constitutional-amendment-Bill-2017.pdf>.

26 *Ibid.*, para.1.

27 Abdulkarim Ssendendo, John Agaba and Job Namanya, ‘Museveni gets tough on land law’, *New Vision*, 6 September 2017 at 3, and Vision Reporters, ‘Museveni explains proposed land law’, *New Vision*, 14 September 2017 at 5.

28 Halima Abdallah, ‘Museveni says constitution “blocking his way”’, 3 March 2012, available at <http://www.theeastafrican.co.ke/news/Museveni-says-constitution-blocking-his-way/2558-1358472-5e6rq9/index.html>.

Apart from questions arising about whether a constitutional amendment was necessary in order to achieve the stated aims of the government, the timing, presentation and context in which the Bill surfaced were rather awkward. This was especially the case since the Bamugemereire Commission appointed only a few months earlier had the mandate to address precisely this issue. Indeed, the drafting of the Bill raised serious doubts as to whether the government was really committed to the commission and its objectives.<sup>29</sup> President Museveni himself gave short shrift to the commission. At a press conference called to discuss several contemporary issues, including the bid to scrap presidential age limits from the constitution, the president was asked why the government had not waited for the report of the Bamugemreire Commission before taking the Land Amendment Bill to Parliament. His response: "The commission is investigating issues I don't know properly. But this issue [land] we know and we don't need research but a solution and we must not wait for the report."<sup>30</sup> Besides the sheer flippancy of this statement, it is difficult to believe that such a remark could have been made by the very authority which appointed the commission in the first instance.

Second, on several previous occasions the government had promised a complete overhaul of the constitution under the aegis of a Constitutional Review Commission (CRC) appointed specifically for the purpose.<sup>31</sup> While the goals of such a commission need to be critically examined, it is quite clear that there are multiple objectives that the government is attempting to achieve through the continuous shifting of the goal-posts. Needless to say, the general public is quite wary of these overtures. Specifically concerning the land amendment, Reagan Wamajji summarises why there was considerable mistrust and suspicion regarding the move by the government to amend the constitutional provision:

At the bottom of it all are vulnerable people; especially the poor and government institutions like schools and hospitals that have lost land in shady and illegal means.... The legal regime has also failed to protect the vulnerable common people. This suspicion has fanned the many land disputes in central and northern Uganda.<sup>32</sup>

In sum, the citizens of the country have lost faith in the government as the protector of that most precious of commodities identified in Point 8 of the Ten-Point Programme over 35 years ago. They do not trust that after this length of time the NRM has the capacity to deliver on the promise to protect their land, despite a raft of laws, policies and plans produced over the period (Mabikke, 2016). There is a fear that the government will simply use the amendment to further enrich those who have benefitted from the neo-liberal policies pursued by the government which led to the land crisis in the first place. This explains why resistance to the

29 See J. Oloka-Onyango, 'Why the proposed land amendment is patently unconstitutional', *New Vision*, 20 July 2017 at 19.

30 See Baker Batte Lule, 'Museveni: Age removal activists are volunteers', *The Observer*, 15—17 September 2017 at 4.

31 Sadab Kitatta Kaaya, 'Uganda: Otafire - Constitution set for total overhaul', *The Observer*, 22 July 2016, available at <http://allafrica.com/stories/201607220583.html>.

32 Reagan Wamajji, 'Compulsory land acquisition: Constitutional Amendment Bill will solve one problem but make a bigger problem even worse', *The Independent*, 1-7 September 2017 at 31.

Bill has not only come from the expected quarters – the political opposition and civil society actors – but also from within the NRM itself.<sup>33</sup> That skepticism and distrust of the arms of government are linked to the structural failures of those institutions designed to protect and enhance the land rights of all the citizens of the country – the land justice institutions. But before considering the place of these institutions within the land governance framework in detail, we turn to an examination of the phenomenon of customary land and its treatment since the accession to power of the NRM government.

33 [Nixon Segawa](https://www.chimpreports.com/nrm-caucus-rejects-land-amendment-bill/), 'NRM caucus rejects Land Amendment Bill', *Chimp Reports*, 17 August 2017, available at <https://www.chimpreports.com/nrm-caucus-rejects-land-amendment-bill/>.

### III. THE PHENOMENON OF CUSTOMARY LANDHOLDING

#### 3.1 Customary Ownership – An Introduction to the “Lesser” Title

It is rather paradoxical that while the vast majority of Ugandans occupy land under customary tenure,<sup>34</sup> that system has never been accorded the necessary respect or protection enjoyed by the other – essentially private and individual – modes of landowning. The provisions within the Land Act of 1998 for the one-sided conversion of customary tenure into freehold detract from the strength and confidence persons would otherwise have in this form of tenure (Nakayi and Twesiime-Kiryia, 2017: 12). Customary tenure is thereby relegated to a position of apparent inferiority when compared to other modes of landownership. The Ojok and Ameny report (on northern Uganda) also points out that there is an entrenched perception within the population and financial institutions that customary tenure represents a lesser claim over landownership in comparison to other forms of title, particularly freehold (Ojok and Ameny, 2017: 10). The reasons for this attitude are numerous, but lie mainly in the manner in which colonialism determined that the “customary” was essentially a communal mode of ownership. This “communalism” was deemed to be its main characteristic in contrast to capitalist modes of production (including colonialism) which emphasised the place of the individual. According to Martin Chanock,

The summoning into existence of the customary regime was hugely convenient, for to treat indigenous rights as if they were the equivalent of rights recognised in English law would have created a plethora of embarrassing problems. And to treat Africans as people who had not “evolved” the institution of private property in land not only gave vastly greater scope to the state, but it also functioned as a powerful ideological criticism of African societies. (Chanock, 1991: 66)

Taking off from this ideological position (or legal fiction), colonial law and policy was largely negative towards customary tenure, save to the extent that it met the objectives of economic exploitation, i.e. cash crop production, and because the food security of the majority were dependent on the fruits of this form of land tenure. This was necessary in order to create, control and subsidise a certain type of peasantry (Chanock, 1991: 71).<sup>35</sup>

34 The HURIPEC Ojok and Ameny Report on the northern region of Uganda notes that as much as 95% of the land in northern Uganda is customarily owned (Ojok and Ameny, *op cit.*, at 3). In the western/Rwenzori region, that the figure is put at over 80% (Kabura and Tuhaise, *op cit.*, at 11).

35 “The insistence that African landholding remain within a customary legal regime has been as much a relegation as a protection. Not only have people been deprived of full land rights in terms of the dominant, imported legal system, the dominant system has distorted the rights recognisable and assertable in the customary one (Chanock, 1991: 82).



Nevertheless, there was divided opinion as to whether such tenure – together with the other customary legal relations governing social relations in the protectorate (marriage, religion and criminal justice) – should be actively discouraged, allowed to die or simply modified (Oloka-Onyango, 2017: 116-117). Whichever way it is viewed, customary land tenure was an instrument of colonial land policies (Chanock, 1991: 62).

By 1955, the view on customary tenure among the colonialists had evolved into the belief that drastic change was required to transform it:

To go back to the subsistence economy of the past, or even to stand still in the dawn between the old institutions which are dying and the new which are struggling to be born, would be to court economic disaster. To go forward without modifying drastically those features of the tribal system of land tenure which impede progress is impossible. (East African Royal Commission, 1953-1955, at 50, para. 8)

Although the wishes of the Royal Commission were never implemented, the early post-colonial governments nurtured the same view that customary tenure needed to be “drastically modified” in the bid to achieve “progress”.

In light of this history, the following section of the paper revisits the history of customary law and land relations, touching on the manner in which the courts of law treated the phenomenon, especially after independence. It moves on to deal with the period of what may be described as “customary revivalism”, heralded by the formal recognition of the tenure in the 1995 Constitution and the attempt to legislate about it in the 1998 Land Act. Finally, the section offers some views on how the issue of customary land tenure can be better addressed going forward, especially since this form of tenure has basically eluded a comprehensive well-conceptualised approach to its recognition and operation.

### 3.2 A Brief History of Neglect and Marginalisation

On account of political ideology, customary tenure was largely left outside the application of the statutory legal regime created by the colonialists. The Reception Clause of 1902, coupled with the Governor’s power to take over customary land at will under the Crown Lands Ordinance of 1903, essentially meant that the holders of this kind of tenure lived at the mercy of the state and, thus, without any real legal protection.<sup>36</sup> Indeed, even the payment of compensation for eviction from customary lands was done at the discretion of the Governor (Mugambwa, 2007: 40). Following independence, the main issue was whether or not to adopt and pursue the recommendations of the 1955 Royal Commission report to their logical conclusion. According to Mugambwa, this was not done. The main argument for not doing so was that, even though customary land tenure was communal, it recognised individual rights over the land which was occupied by the different communities where this

36 The Royal Commission coated this power in more obscure language: “Under the Crown Lands Ordinance Africans are permitted to occupy Crown land as of right until arrangements have been made for their removal to other areas equally suitable for their occupation, or for the payment to them of compensation” (Royal Commission, *op. cit.*, at 215, para. 51).

form of tenure was in existence. The claim by the report that customary tenure was insecure was dismissed as a Eurocentric misconception of customary land tenure. Furthermore,

Critics of the report asserted that in reality in most customary land tenure systems individuals' rights over a specific piece of land and improvements were secure and virtually permanent. The rights were inheritable and, in some cases, alienable to other group members. Others praised the attributes of customary land tenure as the very foundation of African culture. They warned that changing the land tenure to individual freehold would destroy the very fibres that held the society together. (Mugambwa, 2007: 42)

While this position represented the affirmation of a different viewpoint from the colonialists on the issue of customary tenure, the courts of law retained the colonial approach to the matter. If there was a conflict between statutory law and custom, the tendency on the part of the courts was to rule in favour of the statutory, thereby diminishing the articulation of a regime of legal governance in relation to the customary (Korang, 2015). As a result, much of what developed in relation to the rules governing custom was negative and even punitive. This is because as far back as 1916, in the case of *Angu v. Attah*,<sup>37</sup> the Privy Council had held that customary law must be proved in the first instance by "...calling witnesses acquainted with native customs until the particular customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them." This meant that customary law was regarded as "foreign" and thus to be "...proved as any other fact."<sup>38</sup>

The courts of law maintained this perspective – known as the "traditional approach" – throughout the colonial period and into independence. In the East African Court of Appeal case of *Ernest Kinyanjui Kimani v. Muira Gikanga*<sup>39</sup> decided in the early years of independence, the court held that customary law must be proved by the parties to the dispute.<sup>40</sup> According to Justice Kavuma, "African customary law, under the traditional approach, was regarded as foreign law and apparently inferior to the other law of the land, hence the requirement of strict proof of the same under very strict rules."<sup>41</sup> This position was buttressed under Uganda's Judicature Act, which stipulated that customary law would be subject to written law. Both Kenya and Tanzania eventually moved away from this position – towards the "liberal approach" – in order to give more stability and respect to the judicial treatment of customary

37 (1916) PC '24-'28.

38 *Hughes v. Davies* (1906) Ren 550 at 551.

39 [1965] EA 735.

40 The dissenting opinion in this case by Justice Samuel Azu Crabbe argued that East Africa needed to get over this colonial mentality: "In my view the fact that Parliament has made provisions, such as the summoning of assessors and resorting to appropriate books or documents of reference for the purpose of ascertaining the customary law militates against an inference that the customary law must necessarily be proved" (dissenting judgment, at 742).

41 Judgment of Justice Steven Kavuma in *Mifumi v. Attorney General & Anor.*, at 39-40, available at [http://www.womenslinkworldwide.org/files/gjo\\_Uganda\\_MifumivAttorneyGeneral\\_en.pdf](http://www.womenslinkworldwide.org/files/gjo_Uganda_MifumivAttorneyGeneral_en.pdf). The judge went on to observe: "That positioning was most unfortunate. There was, in my opinion, no other law more legitimately applicable in Uganda than the various indigenous customary laws that were in place in the country before the advent of colonialism. Yet African customary law was not to be taken judicial notice of with the same laxity as was with the other law. The test was stricter for customary law than with any other law, including English common law as applied to Uganda."



law.<sup>42</sup> In comparison, the Ugandan courts retained the basic features of the colonial approach to the matter. Customary land thus remained governed under an atrophied form of law – enjoying neither legal recognition nor considered to be of real economic value except once expropriated and turned into public or private commercial enterprise. Of course, the lack of importance in terms of tenure or *prima facie* value did not reflect the real value of the land or its output since much of these lands were under cash crop production, particularly coffee and cotton. There is also considerable historical, cultural and sentimental value attached to this mode of landholding, a fact which largely eludes those who seek to transform this type of tenure in the name of “development”.

On coming to power, the NRM government set in motion several studies of the land tenure system, culminating in a draft Bill entitled “The Tenure and Control of Land Bill, 1990” that sought to introduce freehold tenure throughout the country, although it was never enacted into law. Aware of this failure, both the Odoki Commission and the Constituent Assembly which followed it urged a different approach to customary tenure (Republic of Uganda, 1993: 684). The result was its elevation into one of the fully-recognised modes of tenure alongside *mailo*, freehold and leasehold in the 1995 Constitution.

### 3.3 Customary Tenure in Post-1995 Uganda: From the Shadows into the Light?

The 1998 Land Act sought to translate into practice the provisions governing land tenure enshrined in the 1995 Constitution of Uganda. According to Rugadya (1999: 5), the Act was guided by three basic principles, *viz.* the support of agricultural development through the creation of a functioning land market permitting those with rights in land to voluntarily sell their land and for progressive framers to gain access to land; secure tenure on the land, particularly for those with no other way of earning a reasonable livelihood or being able to survive; and, finally, a uniformity of tenure throughout the country. Given the context of structural adjustment and poverty eradication by which government policy was informed at the time, it is not hard to discern the World Bank’s hand in the basic ideological orientation of the Act.

With more specific regard to customary tenure, drawing from the provisions of Article 237(4) of the 1995 Constitution, the Land Act specifies that any person, family or community holding land under customary tenure on former public land may acquire a certificate of customary ownership (CCO) for that land. These certificates may be leased, mortgaged and pledged in those communities that permit these practices. In addition, holders of customary ownership who want to use their land as a group can establish a common land association to manage and protect their interests in the communal land. A family or community holding land under customary tenure can immediately register their land as freehold, or if they have a CCO, that certificate can later be converted into freehold tenure. In this way, communities

42 See the Tanganyika Local Courts Ordinance, 1961, the Tanzania Magistrates Courts Act, 1963, the Tanganyika Primary Courts (Evidence) Regulations, 1964 and Section 60(a) of Kenya Evidence Act. For a thorough discussion of the liberal approach, see the decision of Justice Kavuma in *Mifumi, op. cit.*, at 33-36.

that wish to continue to practise customary tenure – including pastoralist communities – are given legal recognition and are provided with the legal mechanism to do so.

While both the constitution and the Land Act recognise customary tenure, it would appear that the objective of policy-makers and legislators was to also facilitate the individualisation of land rights and the functioning of land markets. In this respect, the Land Act provision for the conversion of customary land tenure into freehold, but not the reverse, leads to the conclusion that it was actually intended to destroy it (Adoko, 1997).

How and why did this underlying policy come to be implemented? As Mahmood Mamdani argues, there is a need for both a historical and a comparative perspective on the contemporary Ugandan situation when addressing the issue of customary land rights, posing the question: “Is statutory protection an alternative in contexts where the customary is so corroded or weakened it is no longer capable of providing protection to society?” (Mamdani, 2015: 189). The operating rationale within the statutory protection provided by the Land Act is that of the World Bank emphasis on titling, which enables the creation of a land market. This is an extension of the belief best articulated by Hernando de Soto (2000) that titling improves security of tenure and, thus, acts as a stimulant to increased investment and productivity (Andelman & Vogt 2011). A local variant of the same approach is provided by Ocan (2017). Indeed, in line with this mode of reasoning, a number of scholars have been quick to attribute the levels of underdevelopment to the type of land regime in place and, particularly, to customary tenure, the bulk of which is not titled. Thus, Amone and Lakwo (2014, 121-122) specifically point to the claim that customary tenure in northern Uganda has affected the quest for economic progress and development in five distinct ways, viz. (i) by fostering conflicts leading to insecurity; (ii) through the underutilisation of mineral resources; (iii) through acting as a catalyst in the failure to implement government programmes; (iv) through poor infrastructural development; and (v) by way of low agricultural development.

In an article which otherwise reflects a bias towards the titling of customary land, Harriet Busingye nevertheless points to the essential problem with the prescription contained in the 1998 Land Act which was supposed to represent the translation of the constitutional recognition of customary tenure (Busingye, 2002: 8). The problem is that, even though the law purports to recognise customary tenure, the Land Act has treated it as a transitional and secondary tenure that will one day cease to exist after every community or individual has converted their landholding to freehold. On her part, Rose Mwebaza (1999) acknowledges that the Land Act paves the way for converting customary tenure lands into private property, but whether this will actually happen depends not only on legislation but also on the culture and the practices of the communities where this form of tenure exists. For example, in semi-arid areas where pastureland and water are scarce, communal ownership of land is practised and individual ownership is not permitted. It is felt that allowing individual ownership with its exclusionary rights would result in a relatively few number of persons controlling the fertile and watered areas needed for cattle grazing. This would leave many families without access to these precious resources (Lastarria-Cornheil, 2003: 11-12).

Rose Nakayi goes further to point out that there is “insufficient empirical evidence” to demonstrate that problems in land governance can be solved by converting customary tenure into freehold. Indeed, freehold tenure in Uganda has been characterised by “corruption, forgery of land titles and land grabbing” (Nakayi, 2015: 19). Focusing on the issue of large-scale land acquisitions, she cautions against jumping headlong into the conversion of tenure:

There is potential for the provision to promote land grabbing if no proper mechanisms are put in place to ensure that it is the customary “owners” that convert their land into freehold. If land is grabbed and a freehold certificate is issued to a grabber, the customary owner(s) are destined to lose, due to the overwhelming protection that the Registration of Titles Act Cap. 230 gives to a freehold certificate holder. (Nakayi, 2015: 19)

The inordinate emphasis on titling customary holdings is, thus, highly misplaced. As Kevin Boyle points out, individual titling of customarily held community land is in actuality not a ‘reform’ of communal tenure but, rather, a complete departure from it (Boyle, 2016: 24). Warning that it is folly to think of a title deed as a ‘sacred cow’ as it has been in Kenya, Doyle points out that the individualisation of tenure there has not greatly improved things, especially given the levels of forgery and counterfeiting that land titles have been subjected to. There is also the problem that

...the land registry has been disorganised, making it difficult to trace land records; or that it is commonplace for two or more persons to possess a title deed for the same property; and, perhaps most poignantly, the securing of a title deed has not necessarily amounted to more secure tenure, or economic development, or improved agricultural production. (Boyle, 2016: 19)

Celestine Nyamu-Musembi (2007) gives five shortcomings of de Soto-inspired arguments linking formal land title to productivity in sub-Saharan Africa. First, she points to the narrow construction of legality that equates legal pluralism with extra-legality. Second, is the underlying social evolutionist bias which presumes that individual ownership is inevitable for all social contexts. Third, is the unproven link between formal title and access to credit facilities. Fourth, is the narrow understanding of markets in land to refer only to formal markets. Last, is the failure to acknowledge that formalisation can result in both security and insecurity. Ultimately, such formalisation of property rights systems sidesteps the issue of substantive redistribution and downplays the role of the state in such redistribution. It is a well-known fact that the little security offered by this kind of tenure is easily subverted by the land sharks in collusion with officials in the land management agencies such as the ULC, the DLBs and the different registries. As the *Daily Monitor* recently reported, “Many customary landowners in the oil-rich Albertine Graben claim the rich and politically connected individuals are processing freehold land titles on their land without their knowledge,

consent and approval."<sup>43</sup> In short, converting customary tenure into freehold will not solve the problem. We need to look further for a solution.

The HURIPEC study on this matter by Ojok and Ameny provides a comprehensive analysis of the CCO that has been rolled out in several districts of the northern region of the country. It particularly points to the need for a comprehensive re-appraisal of the pros and cons of this instrument and for a proper placement of its legal status *vis-à-vis* the other forms of tenure recognised by the law – a call that local government and civil society actors in the region have also made. The study reports that there are mixed feelings amongst the people of northern Uganda regarding the grant or acquisition of CCOs, especially because the notion of placing the names of individual persons on a document of ownership of land that is meant to belong to a wide array of people (including future generations) is alien to the customary conception of landownership (Ojok and Ameny, *op cit.*, 9). In other words, the acquisition of a CCO is seen as individualising land that is collectively owned.

There is also a marked fear that the persons whose names appear on the CCOs will proceed to mortgage or otherwise encumber land on that basis, to the detriment of other stakeholders whose names do not appear on the same (Ojok and Ameny, *ibid*). Additionally, the elders in such communities are fearful that the use of CCOs will effectively cut them out of the traditional land governance picture (*ibid*). In comparison, the HURIPEC study on the western region by Kabura and Tuhaise notes that the pilot project of registering customary land in Kasese has met with quite a bit of success (Kabura and Tuhaise, *op cit.*, 11). It would, thus, appear that the population in this part of the country is generally in favour of the move. In comparison to northern Uganda, the western region is marked by an ethnicised competition for land, coupled with growing levels of industrialisation, the overwhelming shift to commercial cash crop farming and a boost in tourism, which have led to a growing belief in the value and necessity of having guaranteed and easily proven individual ownership of land. To that end, most of the populations in the studied parts of the region have welcomed the registration process in terms of the security of tenure that has resulted. On the other hand, the north may be on the same path, albeit affected by the past war, a lower level of development and a more entrenched dependence on custom and tradition that views any forms of 'individualisation' of land suspiciously.

The main point of the authors of the study on the north, however, is that care should be taken not to dismantle or transform customary land tenure, but rather to encourage and protect it. One size cannot be made to fit all circumstances given the differences in history and political economy of the different regimes where this mode of tenure predominates. In this respect Mugambwa argues:

The provision for registration of customary titles under the Land Act is a step forward in this regard. Further steps may need to be taken to change the perception that freehold is superior to customary title. Conversion of customary title to freehold should be actively discouraged. This may entail amending the Land Act, if necessary, to ensure that a certificate

43 Francis Mugerwa, 'Poor landowners caught up in fight for land in oil-rich Buliisa', *Daily Monitor*, 19 December 2016, available at <http://www.monitor.co.ug/SpecialReports/Poor--landowners--fight---land--oil-rich-Buliisa/688342-3489904-sd6ajb/index.html>.

of customary land title is treated on a par with a registered freehold title. More importantly, the people, especially outside the relevant region (including financial institutions), should be made aware of this. (Mugambwa, 1997: 54)

Also implicated in this discussion are the dispute-resolution mechanisms that handle matters to do with land and the conflicts which arise thereon, both traditional/cultural and state, such as the courts of law. In the first instance, it is important to recognise that there is a considerable difference between the manner in which land and its disputes were handled before and after the insurgency in northern Uganda. The post-conflict mechanisms remain wanting as the region is affected by boundary disputes, gender violence and land grabbing.

<sup>44</sup> Ojok and Ameny state:

...disputes in northern Uganda increased dramatically when IDPs began returning home from the camps. Many Acholi and Langi households had been in camps for over a generation and upon returning had difficulty accessing their land, reestablishing their rights to the land, and defining the precise boundaries. A returnee could find that land they previously occupied was inhabited and farmed by people from another family or village. Knowledge of the boundaries has been lost as the elders who traditionally held this knowledge have died. Also, natural landmarks and markers such as trees have changed over time, and people have simply forgotten (Ojok and Ameny, *op cit.*, 13).

Given the trauma of the war not simply in terms of displacement, but also in terms of the impoverished population that it left behind, even transfers done between willing seller, willing buyer could constitute land grabbing because "...it is highly unlikely that the negotiations between the two unequal parties would leave the owners with an option to turn down an offer if they wished" (Nakayi, 2013: 457). According to the Foundation for Human Rights Initiative (FHRI):

After the war, there were no more animals to look after or trade in. Decades in the IDP camps had changed the culture and the ways of life of the people. This is especially true of the young generation. The people had now realised the value of land and thus landownership and acquisition took on a different context. (FHRI, 2016: 35)

The Ojok and Ameny study adds several other types of disputes, including the following: private (often large-scale) investment; displacement-associated conflicts ; the misinterpretation of customary law and the non-enforcement of formal (statutory) law; and the role of both the land-governance institutions as well as of other state agencies, such as the army. They also point to the very significant role of the traditional institutions, especially in terms of accessibility, trust from the community and cost. Most importantly, for a post-conflict context such as that in the northern region, they place considerable emphasis on ensuring a pacific resolution to the land disputes they handle.

<sup>44</sup> In the study report on the northern region, Ojok and Ameny mention the violent inter-clan land conflict in Ocwiko village, Kotomor, Agago district between the Acholi and Langi at the border in which the life of a child was lost, many persons were injured and property was destroyed.



Finally, at the level of legal jurisprudence, the courts of law in Uganda still largely adhere to the *Kimani v. Gikanga* (or traditional) position on the issue of proving custom, with cases like *Kampala City Council v. Odindo*<sup>45</sup> and the more recent decision of *Garuga Properties Ltd v. KCC*<sup>46</sup> stipulating that custom must be proven before it is accepted. The most troubling recent judgment on the issue of customary law is the case of *Hon. Ocula Michael & Ors. v. Amuru Land Board & Ors.*<sup>47</sup> which was a challenge brought by a group of politicians and local leaders contesting the allocation of a large piece of land to a sugar company, Amuru Sugar Works Ltd. The case highlighted the continuing difficulties that claimants under this mode of tenure have in proving their assertions in a mainstream court of law. Its main point of contention was whether the land was customary and thus belonging to the respondents, or public land, in which case the land board was fully within its rights to allocate the same to the “investor”. The court found that the applicants had not proven that the land was customary and dismissed the case.

Of greatest contention in the case was not only the view of the court with respect to the issue of proof (the traditional view), the interpretation of the rules of procedure and the kind of evidence that was used (or the lack of it), but also the neglect of the context, i.e. of armed conflict, displacement and post-conflict realities. Ultimately, it is these factors which failed the applicant’s case, emphasising, as Nakayi pointed out, that “[m]ere mention in the law that customary tenure is recognised, without sufficient investment in the establishment of customary institutions that deal with disputes (and the detail) in those spaces is tantamount to neglect” (Nakayi, 2013: 476). Indeed, the dispute in Amuru has not been resolved despite the matter ending up in the courts of law.<sup>48</sup>

What the decision in the *Ocula* case demonstrates is that once taken into the formal institutions of dispute resolution (the courts), the role of traditional leaders is either minimised or completely eliminated, to the detriment of a peaceful resolution of the conflict. What is at stake is thus not simply the formal (legal) recognition of the tenure, but the active promotion and facilitation of the institutions that govern the customary, or alternatively investing in a revamping of the formal institutions (including law schools, DLBs and courts) which trade in the business of legal training and its implementation, such that they fully appreciate the varied dynamics of the phenomenon. But to do so requires a critical rethink of the manner in which the customary has traditionally been treated in Uganda.

### 3.4 Rethinking the Existing Approach to Customary Tenure

As noted above, both the colonial and the independent governments did little to incorporate customary tenure into the mainstream of the legal regime governing land. That marginalisation was also apparent in the manner in which the tenure was treated in the

45 [1971] H.C.B 32.

46 H.C.C.S No.576 of 1990; [1989-91] KALR 129.

47 HCT-02-CV-MA-NO.126 of 2008.

48 Julius Ocungi, ‘35 jailed over Amuru land riots’, *Daily Monitor*, 13 September 2015, available at <http://www.monitor.co.ug/News/National/35-jailed-over-Amuru-land-riots/-/688334/2867650/-/er141sz/-/index.html>.

courts of law. The position of Uganda's courts has largely followed the Kenyan decision in the case of *Kimani v. Gikanga*, with results such as that in the *Ocula* case reviewed above.

The 1995 Constitution and the Land Act of 1998 declared customary tenure as standing at the same level as freehold, leasehold and *mailo*. However, Rose Nakayi points out that "... there is a gap between the expected implication of such legal inclusion about the customary and practice on the ground" (Nakayi, 2013: 461). Part of the practice is the transition that the courts of law need to make in order to fully accommodate this form of tenure. Quite clearly there is need to revisit the manner in which customary law as a whole is treated both within the legal (evidence) instruments that govern the issue of proof in the courts of law and by the judiciary in their attitude to them. As Rose Nakayi points out, factors other than the rules of evidence need to be taken into account:

Having the constellations of both claims grounded in written/statutory law and those in customary law in the same space of the courtroom, applying written law to both, in the absence of clear proof of ethos of the customary leaves the customary at a disadvantage. (Nakayi, 2013: 477)

In this respect there is need to pay more attention to both the spirit and the letter of Article 126(1) of the 1995 Constitution which stipulates, *inter alia*, that judicial power shall "...be exercised...in the name of the people and in conformity with law and with *the values, norms and aspirations of the people*" (emphasis added).

Although focused on the issue of marriage and "bride wealth", the recent case of *Mifumi v. Attorney General & Anor.* shone some light on the issue of the mode of proving customary law and pointed towards the need for urgent system-wide reform on the matter. Siding with Justice Crabbe's dissenting opinion in *Kimani v. Gikanga*, Justice Steven Kavuma gave a forceful rendition of the constitutional transformation engendered by Article 126 stating:

I am of the strong view that the thinking, the norms, values and aspirations of the progressive people and societies in Uganda dictate that the liberal approach to taking judicial notice of African customary law in general and the custom of giving and refunding bride wealth in particular in Uganda be fully embraced.<sup>49</sup>

With the exception of the concluding aspect of the statement (regarding the "refunding of bride wealth"), Justice Kavuma's view needs to be the guiding framework within which this kind of law is treated by the courts.<sup>50</sup> To borrow from Prof. Chuma Himonga,

We submit that while customary law, like any other law should not be exempt from demands for compliance with human rights, the approaches courts take to align it

49 Judgment of Kavuma, *op. cit.*, at 40.

50 See judgment of Justice Tumwesigye in the *Mifumi* Supreme Court Appeal at 9-10. The judge only passingly referred to the issue of proof, but left intact the idea of "notoriety" that both Crabbe and Kavuma challenged. See *Mifumi (U) Ltd & Anor v. Attorney General & Anor* (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13 (6 August 2015), available at [http://www.womenslinkworldwide.org/files/gjo\\_Uganda\\_MifumivAttorneyGeneral\\_en.pdf](http://www.womenslinkworldwide.org/files/gjo_Uganda_MifumivAttorneyGeneral_en.pdf)

with these rights should not lose sight of the critical role customary law plays as a source of law and justice for the majority of people on the continent.<sup>51</sup>

Given the prominent place that the narratives of “progress”, “investment” and “development” play whenever there is a discussion about customary tenure, it is also necessary to consider this dimension of the issue.

Early on in the decade, the Food and Agriculture Organisation (FAO) sought to find a different mode through which the twin objectives of preserving customary tenure while pursuing economic development could be achieved without necessarily destroying or fundamentally altering its character in the fashion dictated by the World Bank. Thus, in association with several inter-governmental organisations,<sup>52</sup> FAO proposed the following principles for agricultural investment that respect the three related elements of rights, livelihoods and resources:

**Figure 2:**

**FAO Principles for Agricultural Investment**

- 1. Existing rights to land and associated natural resources are recognised and respected.**
- 2. Investments do not jeopardise food security but rather strengthen it.**
- 3. Processes for accessing land and other resources and then making associated investments are transparent, monitored and ensure accountability by all stakeholders, within a proper business, legal and regulatory environment.**
- 4. All those materially affected are consulted, and agreements from consultations are recorded and enforced.**
- 5. Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.**
- 6. Investments generate desirable social and distributional impacts and do not increase vulnerability.**
- 7. Environmental impacts due to a project are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.**

Source: FAO (2010)

Taken together, the above principles combined with a human rights approach to customary tenure ensure that policy interventions do not amount to a zero-sum game. Legally-sanctioned forms of ownership should not necessarily mean absolute rights or the absence

51 **Chuma Himonga**, ‘Mifumi v. Attorney General & Another’, *African Law Service*, 5 September 2016, available at <http://gavel.africanlii.org/node/3>.

52 The groups that came together for this exercise included the International Fund for Agricultural Development (IFAD), the United Nations Conference on Trade and Development (UNCTAD) and the World Bank Group.



of contesting claims. All laws, whether in rich or poor countries, are perennial sites of struggle (Porter, 2001b: 211-212). That is why in Mozambique communities and individuals can offer proof of land rights through oral testimony, eliminating the costly obstacles of surveying, registration and titling that often prevent the poor from securing their rights (Nielsen *et al.*, 2011). Such protection is as good as that which is offered via statute.

Ojok and Ameny (Ojok and Ameny, *op cit.*, 24) argue that cultural institutions ought to be assigned the responsibility of being the main institution overseeing customary land as “courts” or the mediators of first instance owing to their special positions in the realm of custom itself and the deference they enjoy from the population. On the other hand, Kabura and Tuhaise (Kabura and Tuhaise, *op cit.*, 25) point out the potential follies of such a move when they, firstly, point out the fact that Article 246(3)(f) of the constitution states that cultural leaders shall not wield any legislative, administrative or executive powers of government or local government. By extension, this ought to apply to the cultural institution as a whole. Additionally, the western Uganda study report also notes that the cultural institutions there, particularly the Obusinga bwa Rwenzururu (OBR) and the Obudhingia bwa Bamba (OBB), have embarked on systematic acts of carving out geo-cultural spaces or territories of their own in a move that exacerbates land conflicts rather than resolving them (Kabura and Tuhaise, *ibid.*). For that matter, granting such authority to cultural institutions in places where multiple institutions have disputes over their territorial turf would be tantamount to adding fuel to what is a slowly burning fire. It can also be deduced from the actions of the Tooro Queen Mother (an influential figure within the Tooro cultural institution), *to wit* evicting and threatening to evict the bona fide occupants of land registered or formerly registered to her or the Kingdom of Tooro, that cultural institutions may not be so ideal in governing customary land matters, given that their character is not always that of a benevolent and neutral arbiter with nothing but the wellbeing of the people at heart.

In any case, it is possible to successfully place customary land governance in the hands of cultural institutions in areas without the same or similar controversial competition for geo-cultural spaces or territory with other institutions or ethnic communities that exist in the Rwenzori region. A one-size-fits-all approach is not necessary where it is clear that there are clear differences in the manner in which traditional institutions are perceived and operate.

It is also clear that there are varied layers of rights within customary law that need to be recognised. As Mbote and Odote point out, these “...include[d] a layer of rights shared amongst various levels within the community, with the political leadership having the rights of control, the clan having some rights, the family having some other rights, while individuals had another set of rights” (Mbote & Odote, 2016 at 3). It is also important to remember the differentiation of customary rights across communities. It is thus wrong to speak of “customary law” in the same way as one describes the law of contracts or of companies which are uniform from Kabale to Moroto and which are located in the official volumes of the laws of Uganda. Here, the efforts by the Land and Equity Movement in Uganda (LEMU) to document and popularise the actual practices and methodologies of land management by different cultural entities, especially in northern Uganda, need to be given careful study.

Finally, even the embrace of cultural institutions as the mediators of land conflicts needs to be a cautious one; as the Kabura & Tuhaise report on the Western/Rwenzori region demonstrates and as has been stated above, these may not necessarily be free of negative agendas. If pursued with care and particular attention to context, such use of cultural institutions may be more helpful than the existing systems.

Given the above cautions, it is necessary to design an enabling legislation which would facilitate the practical implementation and give real meaning to the idea of “customary tenure”. Such law must be facilitative and not prescriptive in the sense that it must retain both the flexibility of the existing systems of customary tenure, while also ensuring that it protects the vulnerable within the community. In this respect some borrowing could be done, for example from South Africa (in relation to the treatment by the courts of law of customary tenure), and also to the empowerment of traditional/customary institutions of dispute resolution. We could also look to neighbouring Kenya where the attempt has been made to “...marry the concepts of titling a community’s outer boundaries with land tenure systems based on customary norms and values, while infusing the governance with democratisation and a system of checks and balances” (Doyle, 2016: 23). Furthermore, it “respects and preserves customary rules, forms of land governance, property rights, use and access rights by community members and non-members, land management and membership while reminding communities that the rights guaranteed by the Constitution are unalienable” (Doyle, 2016: 23-24).

Lastly, the oldest of the reforms in the region is Tanzania’s 1999 Village Land Act (VLA) which made the village both the primary landholding unit and the centre of local land administration, management, record-keeping and land dispute resolution. The VLA creates legal equality between land held under customary tenure and that which is granted through statute, explicitly protecting vulnerable groups. Thus, the Tanzanian law “creates a hybrid of customary and codified law – allowing the village to dictate how things are done but holding it to strictly-defined legal mandates” (FAO, 2010: x). While the village may not necessarily be the same unit of focus in the case of Uganda, the principles which guide the VLA are transferable to the other forms of customary organisation that we have all over the country. At the end of the day, there is need for a *kacoke madit* or *tabamiruka* (a grand conference) on the status of customary law and land tenure in Uganda in order to chart a new way forward. Such a conference would be preceded by a wide-ranging examination of the existing practices – good and bad – currently in place in those areas where customary tenure holds sway.

At the end of the day, customary tenure remains in a situation of limbo as the provisions of the Land Act and its amendments are yet to be fully implemented. However, even where there has been an operationalisation of the Act with respect to such tenure such as through the introduction of the CCO, questions still remain regarding the wider context within which the changes sought to be made are being introduced. In large part, this is on account of the deficiencies in the country’s land governance institutions and of the influence and impact of a variety of state and state-affiliated actors. The following section of the report comprehensively addresses this issue.

## IV.

# UGANDA'S LAND JUSTICE: A CRITICAL ASSESSMENT

### 4.1 A Cursory Glance at the Glaring Crisis

In a single week in July 2017, the extent of the mess in the various institutions that impact on the land question in Uganda was made apparent by a number of news accounts from various parts of the country. The headline story on a Monday morning was entitled "Remove eucalyptus from wetlands, says Museveni", referring to a steady process of encroachment on protected land which has resulted in drought, famine and the drying up of Mbarara's famed River Rwizi.<sup>53</sup> Here was a stark presidential indictment of the National Forestry Authority (NFA) and the National Environment Management Agency (NEMA) and a telling reminder of the pillage of fragile and scarce land resources gone out of control. Dominating the national news on the next day was the story of Centenary Park and the battle between Nnalongo Estates and the Kampala Capital City Authority (KCCA) over access to and ownership of the prime location.<sup>54</sup> Once again, the issue was only resolved with the intervention of the president, moreover in a manner which clearly violated the law. Finally, at the commission of inquiry into land matters, an aide to Inspector General of Police (IGP), Kale Kayihura, was accused of grabbing land.<sup>55</sup> To compound matters, the evictor was a non-Ugandan protected by armed police personnel.<sup>56</sup>

The story dominating regional news during the same week was that of the halting of a court-ordered eviction by the Resident District Commissioner (RDC) of Ssembabule.<sup>57</sup> In another newspaper, a land case which had not been resolved by the courts over a period of six years was assigned a new judge, yet again.<sup>58</sup> In the meantime, the Commandant of the Land Protection Unit in the Uganda Police Force (UPF) issued a notice/directive suspending the execution of court orders relating to evictions or the possession of land and property.<sup>59</sup> Obviously, such a move is of highly questionable legality.<sup>60</sup> Adding to the mix of land-related issues over the same period was the saga of the Buganda Land Board (BLB) and the

53 See Chris Mugisha, 'Museveni cautions women against land fragmentation', *New Vision*, 10 July 2017, at 3.

54 Mary Karugaba, 'Museveni intervenes in Centenary Park wrangles', *New Vision*, 10 July 2017, at 7. The statement of Minister for Kampala, Beti Kamywa exemplified the problem: "For me, it was a win-win situation. Previously, I had given guidance which KCCA refused to implement. The president always looks at the bigger picture, which considers the interests of all Ugandans." This, in relation to an expired lease, and for which the illegal occupant of the land had already been paid compensation!

55 See Andante Okanya & Edward Anyoli, 'Kayihura's former aide accused of land grabbing', *New Vision*, 10 July 2017, at 3 and 'Kenyan man cited in Luwero land evictions', *New Vision*, 10 July 2017, at 10-11.

56 Ibid.

57 Dismus Buregyeya, 'Church of Uganda to evict 100 families', *New Vision*, 10 July 2017, at 16.

58 Anthony Wesaka, 'New judge appointed to hear Kefa's six-year land case', *Daily Monitor*, 10 July 2017, at 3.

59 See CIID/A62/105 VOL. 3/00042, dated 3 July 2017 by SSP Charles Mutungi.

60 See Francis Gimara, 'ULS position on police's suspension of clearance of court warrants/orders', ULS/330/2017, dated 5 July 2017.

introduction of the *Kyapa mu Ngalo* campaign designed to provide land titles to tenants on the Kabaka's land.<sup>61</sup> Finally, an advert in the back pages of one major daily called on all those with a "claim, interest or petition" on the estate of the late king of Buganda, Sir Daudi Chwa II, to submit them to the Ministry of Lands.<sup>62</sup>

The above account throws some light on the plethora of government institutions which have become engaged in the land crisis in contemporary Uganda. What is interesting about the account is that only one of the institutions mentioned – the Ministry of Lands – actually has the legal or constitutional mandate to resolve matters relating to land in Uganda. Not the president, not the IGP, nor the RDC have such a mandate. And yet in each of the incidents referred to, these offices had a deciding influence on the outcome of the dispute in question. As the HURIPPEC (Kajura and Lule) report on the status of land conflicts in the central region demonstrates, the level of the intervention by these non-mandated state institutions has reached a crisis of tragic dimensions. Hence, to say that the arena of land justice in Uganda is a chaotic one is an understatement. That is quite obvious from the very meagre sampling conducted in the preceding paragraphs. As a matter of fact, the instances of interventions by institutions and individuals who do not have anything to do with land governance in the country abound.

The first part of this section will thus synthesise the key findings of the HURIPPEC regional reports on the factors surrounding land conflicts in Uganda today with an eye to deducing the patterns and comparisons extractable from the findings as a way of providing context for the subsequent discussion.

Second, to fully comprehend just how chaotic, uncoordinated and catastrophic the situation is, we need to take a look at the institutions in charge of land management before turning our attention to the courts of law and the other dispute-settlement mechanisms that operate in the country. The final part of this section of the study demonstrates that it is impossible to comprehend the chaos by looking exclusively at the system of land administration and the mechanisms of dispute resolution *per se*. Instead, the explanation must be sought elsewhere. And part of that explanation will entail an examination of the related phenomena of presidentialism and institutionalised corruption, both of which have reached epidemic proportions in Uganda today.

#### **4.2 Drawing Comparisons and Patterns from the HURIPPEC Regional Reports**

The three regional HURIPPEC reports focus on the growing levels of land conflicts in Uganda with a view to understanding the actors or perpetrators and factors behind land injustice which has manifested itself in the form of land grabs, illegal evictions, territorial squabbles and ethnic-based tensions over land, among other issues. The diversity presented from studying these three distinct and spatially-detached regions enables a reasonable extrapolation of

61 Othman Semakula, 'How KK deal soured Buganda land affairs', *Daily Monitor*, 10 July 2017, at 30-31.

62 See 'Press release: A call for petitions involving the private estate of His Highness the late Sir Daudi Chwa II', *New Vision*, 10 July 2017, at 27.

the overarching observations made onto the wider canvas that is Uganda as a whole. The reports collectively single out illegal evictions and land grabs as the key manifestations of injustice and the major source of land conflict in the country. They also point to glaring decay in the land governance and administrative structures, which facilitates the said injustice and gives free vent to the rise of extralegal actors who capitalise on their wealth and political connections to oppress and defeat the poor and marginalised.

Where the report findings do not establish fully made-out patterns across all three regions, useful comparisons of the findings are nevertheless made.

#### 4.2.1 The role of highly placed individual actors

There is an evident pattern of highly placed individual actors precipitating land conflicts across the regions studied. The shared characteristic amongst such individuals is that they possess both political backing and sufficient funds to pursue their illicit agendas. The report on central Uganda by Kajura and Lule (at 14) documents the case of Nelson Wajja (a *kibanja* holder in Mukono district) who was being irregularly evicted from his land by Abdallah Kitatta, NRM chairperson for Rubaga division and leader of Boda Boda 2010 – a quasi-militia group with links to the police and the state.<sup>63</sup> The same report highlights the actions of the NRM chairperson for Kayunga district, Moses Karangwa, in illegally intimidating, harassing and evicting bona fide occupants in addition to the ‘original’ owners of hundreds of acres of land in Bbaale sub-county, Kayunga district (Kajura and Lule, *op cit.* 16). Such actions exemplify the rampant illegal involvement of highly placed individuals in land conflicts for unjust self-enrichment. Karangwa has extensively used the police to intimidate, harass and physically accost bona fide occupants in an attempt to force them to leave the disputed land (*ibid.*).

In the Rwenzori region, Kabura and Tuhaise’s report relates how the Tooro queen mother has deployed armed security personnel to forcefully evict bona fide occupants on land she alleges to own (although it is believed that the government acquired some of this land through the Land Fund for redistribution to the same bona fide occupants facing eviction). As Kabura and Tuhaise report:

Squatters have often been the victims of extra-legal evictions from the land they have lived on for decades. One notable case confronted during the course of the research was the violent eviction of and threats to evict close to 50 squatters in Kitumba, Kyogya and Nyanduhi-Harukoto by the Tooro queen mother (Kabura and Tuhaise, *op cit.*, 28).

The report from northern Uganda confirms the presence of similar circumstances, particularly in areas like Amuru where the individuals’ interest in amassing land is informed by speculation that the area is rich in oil reserves.

In sum, this state of affairs points to an exacerbating level of impunity and state collapse in

<sup>63</sup> In this regard, see for example, Andrew Balaga, ‘Boda-Boda 2010 vow to fight anti-Age Limit Bill groups’, *Daily Monitor*, 20 October 2017, available at <https://www.monitor.co.ug/News/National/Boda-boda-2010-vow-fight-pro-age-limit-groups/688334-4148554-to19tmz/index.html>.



the land sector as mafia-like powers, such as the Kitattas and Karangwas, deploy the use of state machinery in order to arrogate to themselves resources that rightly belong to powerless persons without fear of any sanction.

#### 4.2.2 The place of cultural institutions

Although varied in their role and effect, there is a discernible pattern of involvement by cultural institutions in land matters, and in some instances in conflicts over the same. Article 246(3) (f) of the constitution bars cultural leaders from wielding any legislative, administrative or political powers. Nevertheless Kabura and Tuhaise's report on the western/Rwenzori region states that cultural institutions in that part of the country, namely the Tooro Kingdom, the OBR and the OBB have assumed a central role in carving out and delineating 'geo-cultural' territories for their own control, leading to the ignition of ethnic tensions over land, creating or aggravating land conflicts.

Related to the phenomenon of ethnicity, the Rwenzori region has three recognised cultural institutions, *viz.* Tooro Kingdom, the OBR and the OBB. Each of these has swiftly moved towards establishing an imaginary and exclusive geo-cultural space. In these exclusive spaces, cultural institutions assume cultural control over land and, by extension, have triggered ethnicised land conflicts. For example, a move by the Basongora to intensify a claim for state recognition in 2012 attracted outright rejection from the OBR on grounds that the Basongora could not create a cultural institution within an existing one (Kabura & Tuhaise, *op cit.*, 7).

It is additionally because of this that the politics of 'districtisation' in the area has arisen, further dividing rather than uniting the masses. The role of the Tooro Kingdom may also be viewed in light of the queen mother's relations with the bona fide occupants on land she claims for herself (or the kingdom). Relations between the two have largely been negative, fuelled by attempts to forcefully evict the tenants.

In northern Uganda, Ojok and Ameny take an alternative view of the involvement of cultural institutions, regarding them as a stabilising factor rather than one which worsens land conflicts. The report does not articulate any instances of cultural institutions precipitating land conflicts. On the contrary, peripheral affiliates of these institutions, such as clan leaders, are effectuating progress by resolving conflicts through informal mechanisms of justice. For that reason, Ojok and Ameny recommend the grant of 'mediator' status to cultural institutions over customary land matters:

Secondly, in order to improve on the handling of land disputes in northern Uganda, the government needs to let all land disputes of a customary nature be handled by the cultural institutions. The mandate of customary institutions should, therefore, be granted by the courts of law such that they become the court of first instance in respect of customary land matters. Effectively, the LC 1 would become the court of appeal. This should, however, apply only to land that is customarily held. (Ojok & Ameny, *op. cit.*, 24)

The above is a positive and practical suggestion. Its applicability appears, however, to be restricted to the northern region of the country which does not have the limiting intricacies and ethnic tensions that are as intense and restrictive as those of the Rwenzori.

In the report on the central region, Kajura and Lule rightly point out that the issue of *Kyapa mu Ngalo* in which bona fide occupants of the Kabaka's land would be granted leases by the Kabaka requires a separate and more in-depth study (Kajura and Lule, *op cit.*, 28).<sup>64</sup> In passing, however, the very existence of the matter, in addition to the debate and passions it has stirred, is demonstrative of the mixed reactions to the involvement of the cultural institution of Buganda in land matters. To this can be added the 2009 Kayunga riots which Nakayi and Twesiime-Kiryia in the HURIPEC legal and policy report affirm to have been indirectly caused by tensions over land with the central government:

Agitations over land between the central government and the Buganda government eventually developed into civil unrest; indeed, it was the indirect cause of the clashes known as the Kabaka riots, when Baganda youth revolted in response to the state's sabotage of the Kabaka's visit to Kayunga in 2009 (Nakayi & Twesiime-Kiryia, *op cit.*, 4).

The Buganda Kingdom's usual expression of opinion on matters of land law, such as its vociferous criticism of the 2007 Land (Amendment) Bill, is equally demonstrative of an intimate involvement and concern of the cultural institution over matters relating to land. By way of conclusion, so long as the fact of customary ownership and the historical effects of the giving away of expansive land to cultural institutions and private figures by colonialists – thereby creating a class of squatters or bona fide occupants – continues to exist, the involvement of such institutions in matters of land is not likely to end. Where feasible, it would be ideal to involve them in the resolution of disputes over customarily owned land subject to certain checks and balances.

#### 4.2.3 Security agencies and their agents

All the reports note an intricate involvement of the army and the police in the occurrence and exacerbation of land conflicts in all the studied regions of the country. In fact, the findings demonstrate that armed security agents have been used as ready tools in the forceful eviction of persons from their land. As already mentioned, Moses Karangwa has been consistent in his use of the police to intimidate, assault and arrest the bona fide occupants on land whose ownership is highly disputed in Kayunga (see Kajura and Lule, *op cit.* 33). Similarly, the western/Rwenzori report points to the Tooro Queen Mother's use of armed security personnel for the same purpose (Kabura and Tuhaise, *op cit.*, 8). To complete the pattern, Ojok and Ameny's report on northern Uganda points to the fact that in its declaration of a game reserve in Apaa, the government used the military to forcefully evict legitimate occupants of the land comprising the reserve without consultation or compensation:

A case in point is the land that was acquired in Apaa village for a game reserve. The landowners were not consulted and compensated; on the contrary, they were simply evicted through the

<sup>64</sup> Basically, the 350 square miles apportioned to the Kabaka by the 1900 Buganda Agreement.



use of military force. Left with no choice, vigilante acts such as the undressing and walking naked of women before the state minister were resorted to by the people of Amuru in order to express their plight. (Ojok & Ameny, *op cit.*, 16)

Such a state of affairs proves that there is a growing level of impunity and corroborates the assertion that Uganda's land problem is fundamentally political in nature.

#### 4.2.4 Private corporate entities and investors

All three regional reports display a pattern of growing, direct involvement of private corporate entities in land conflicts, usually as third parties. The common occurrence is for an individual to effect a land grab and then to sell the land so acquired to a private investor. In that way, the direct confrontation mostly remains between the individual land grabber and the victims, leaving the subsequent investor as a seemingly indirect party. As pointed out by Nakayi and Twesiime-Kiryia in the legal and policy report, such sales to investors also usually heavily encumber the land in dispute to the detriment of the original legitimate owners who are left with little choice than to give up on its recovery rather than fight protracted legal battles on multiple fronts. But this is not to mean that the private investors are free of fault.

Kajura and Lule's report on central Uganda observes that after grabbing land in Kayunga, Moses Karangwa proceeded to sell over 20 square miles in close proximity to the Nile to Kakira Sugar, which embarked on preparations to establish a sugar cane plantation, and in the process grading cemeteries or burial grounds belonging to some of the bona fide occupants:

By the time of the fieldwork conducted for this study, Kakira Sugar graders and trucks were clearing cemeteries in complete disregard of people's cultural connections with the dead. Since these people had lived on these plots for decades, some as far back as 1960 and 1970, the destruction of their burial sites was a cause for great concern as many families did not know where else they would be burying their dead (Kajura & Lule, *op cit.*, 39).

Additionally, the report on central Uganda also articulates the impugned actions of Chinese and Indian investors whose stone quarrying activities in some areas render the surrounding occupants' land unusable without any form of reparation:

In the villages of Kasenene, Kiwumu and Nakumbo, we learnt that there were close to eight different stone quarrying companies of both Chinese and Indian investors. With increased quarrying, the effect is that neighbouring lands are rendered unusable, as also the noise pollution in the area is overwhelming. The problem is even worse when rock miners do not compensate neighbours for this disturbance (Kajura & Lule, *ibid.*, 25).

In the western/Rwenzori report, no distinctly concrete examples of improper conduct on the part of investors is narrated. Mention is made, however, of the growing level of investment in

land, which is leaving many persons landless.<sup>65</sup> It is reported that investors are increasingly obtaining land from the locals, a fact that is increasing land conflicts due to the resulting rise in real estate dealings and, by extension, fraudulent practices aimed at unjust enrichment. The growing level of investment has additionally seen the poor and marginalised being lured into selling their land in exchange for paltry sums that cannot guarantee the acquisition of more land for settlement and subsistence. Kabura and Tuhaise state that “[t]he poor have been rendered landless and more vulnerable having been enticed into selling their land for quick cash to emerging urban entrepreneurs.”<sup>66</sup>

Northern Uganda has been rife with conflicts between the local people and investors since the termination of the two-decade conflict in the region, with the most dramatic cases being in Amuru with the Madhvani Group. In relation to these conflicts, Ojok and Ameny make the following valid proposition in the report on northern Uganda which ought to be adopted as a positive recommendation to alleviate the land conflict problem:

Investors should come and meet the owners of land and get the terms and conditions of use of the land from the owners and should not displace people but respect human rights to hold land; the Madhvani project should be dropped and another project brought with the approval of the people of Amuru for purposes of development; the government should be open and specific on where there are minerals rather than carrying out massive evictions (Ojok & Ameny, *op cit.*, 25).

Generally, it is imperative that investors and corporate entities be subjected to the requirements of corporate social responsibility (CSR) which bind them to dealing with the marginalised occupants of land directly and binding rules which should stop them from hiding behind the cloak of third party buyers with allegedly no notice of past wrongdoing in the land transactions. Also, investors such as those running stone quarrying activities must be obliged to consistently make reparations to affected persons living in the surrounding areas. At the other end of the spectrum, the poor and marginalised who do not sufficiently appreciate the value of land and the magnitude of the decision to sell it ought to be affirmatively protected and sensitised in order to enhance their capacity to properly manage their land in an increasingly “accumulation-based” society or economy.

#### 4.2.5 Shifts in land use and their impacts

The reports under review also observe a growing shift in land use from subsistence to commercialised use. The most common occurrence of this is in the form of abandoning the growing of food crops for cash crop production. This shift has many implications in terms of increasing land conflicts as enrichment and survival are sought through the acquisition of more land, and also in terms of the associated negative effects of these shifts on food security.

<sup>65</sup> Possibly because, as suggested by Kajura and Lule, the proceeds realised from selling land to investors are not always sufficient to buy similar land elsewhere.

<sup>66</sup> Kabura and Tuhaise, *op. cit.*, 30.

Citing the example of palm oil growing on Ssesse Island, the Kajura and Lule report (central region) points out that the commercialisation factor informing most land grabs or acquisitions, such as the Kaweri coffee land grab in Mubende of 2001 where over 2000 persons were violently evicted in favour of the German coffee company, Neumann Gruppe, will have adverse impacts on food security and the “possibility of turning entire populations into beggars”.<sup>67</sup>

Speaking of the western/Rwenzori region, Kabura and Tuhaise make a similar observation, pointing out that from 2005 to 2015, “[the] Rwenzori region has experienced tremendous shifts in land use, affecting food security for marginalised groups.”<sup>68</sup> In particular, there has been a marked shift in the region from food crop growing to extensive cocoa and vanilla growing. Reliance on subsistence food crops has been replaced by the sale of cocoa and vanilla to purchase food grown elsewhere. According to Kabura and Tuhaise, additional shifts in land use are inherent in the growth of Kabarole’s tourism sector and the increasing urbanisation pushed by the government in declaring trading centres as town councils (Kabura and Tuhaise, *op cit.*, 29). These shifts predict the occurrence of more land conflicts as the demand and competition for land grows while the position of the poor and marginalised worsens in the absence of any measures taken to assist them in making informed choices.

In contrast, the report on the northern region by Ojok and Ameny states that the land use shift there is in fact quite positive as households are pursuing a dual approach in which traditional food crops are being grown alongside new food crops and animal husbandry. Whatever cash crop growing is undertaken is done alongside food crop farming. Thus food security, *per se*, has not yet been adversely threatened. The forceful acquisition of land in Apaa coupled with increased demand for land by purchase is, however, making access to land difficult for marginalised groups, with the potential to indirectly impact on food security. In sum, land use shifts are taking place across the nation and it is evident that subsistence food crop growing is being replaced by commercial cash crop growing with its associated effects of rising land conflicts and accompanying negative impacts on food security and the lives of the poor and marginalised in general.<sup>69</sup>

#### 4.2.6 Bona fide occupants and customary owners

All three regional reports point out that the lack of a comprehensive, well-administered and fully functional registration process of all land in the country is a key cause of land conflicts. For that matter, the studies considered the situation of registration, particularly for *bibanja* holders – who, under the 1998 Land Act, may apply for certificates of occupancy (COs) as proof of their user rights – and customary owners of land who may cognately apply for and obtain certificates of customary ownership (CCOs) as proof of their ownership. Given that the central region is mostly inhabited by *bibanja* holders arising from the historical distribution of *mailo* land amounting to over 8,000 square miles to a few private landowners, it is more

67 Kajura and Lule, *op cit.*, 12.

68 Kabura and Tuhaise, *op cit.*, 29.

69 As commercial uses grow, so does the perception of land as an important factor of production and an asset for accumulation. With the rise in demand for land, so, too, does the potential for conflict, fraud and the oppression of the downtrodden.

pertinent to ask whether *bibanja* holders are making use of the COs. According to Nakayi and Twesiime-Kirya, it appears they are not:

In reality, certificates of occupancy exist on the statute books but are neither popular among tenants nor issued at all. The fact remains that the bona fide occupants were made tenants of the state (statutory tenants) on land that was privately owned under *mailo* or other title (Nakayi & Twesiime-Kirya, *op cit.*, 14).

On the other hand, the extensive move to register customary land in the western/Rwenzori region is reported to be largely a success while similar attempts in the north are not as effective. Ojok and Ameny point out that the situation is different in the north because, according to the people, CCOs constitute the individualisation of landownership contrary to traditional, collective conceptions. Also, the people are skeptical about the placement of seemingly 'ultimate' control over customary land into the hands of a few people or a single individual.<sup>70</sup> Most importantly, the practical perception of CCOs as lower in value and quality of proof of ownership when compared to other forms of title such as freehold adds to their unpopularity. For that matter, civil society organisations (CSOs) and local government actors in the north have called for a revision of the CCO so as to elevate its status, in practice, to the same level as that of other forms of title and to make it more amenable to the customary conceptions of ownership.

In sum, the registration of occupancy rights and ownership rights arising from customary ownership remains problematic, save for a few redeeming aspects such as in Kasese.

#### 4.2.7 Ethnic-based tensions and conflicts

Most ethnic-based land conflicts and tensions are prevalent in the western/Rwenzori region as attested to by the findings of Kabura and Tuhaise. While both the central and northern regions do have such conflicts, they are not as intense as those in the western/Rwenzori region. Kabura and Tuhaise document the deep divide between the Bakonzo (predominantly in Kasese), the Bamba (predominantly in Bundibugyo) and even the Batooro (predominantly in Kabarole). In the northern region, there is also tension between the Acholi and the Madi over the district boundaries. Aggravating these rifts in the Rwenzori/Western region are the twin factors of the proximate existence of three different cultural institutions and the desire of those institutions to assume geo-cultural control over territory. Historical factors also contribute to the situation because, as noted in their report:

The colonial leaders gave the Tooro Kingdom control over land in the present-day Kabarole, Kasese and Bundibugyo districts and in other parts of the region. As the controller and owner of such land, the Tooro Kingdom distributed large chunks to several institutions, such as the Anglican and Catholic Churches (Kabura & Tuhaise, *op cit.*, 18).

<sup>70</sup> The person whose name appears on the CCO.

Contemporary tensions and conflicts are related to the discomfort of the OBR with the ownership by the Tooro Kingdom of land within 'its geo-cultural space', i.e. Kasese. Similarly, the OBB has constantly asserted that the Omusinga cannot visit his Kirindi ancestral land in Bundibugyo in his capacity as 'Omusinga' since that is the geo-cultural space of the OBB.

Within the same region, there is also tension between Basongora herdspeople and Bakonzo cultivators over land. Although the government attempted to rectify this conflict by distributing public land in Bigando to both ethnic groups, it did so according to a ratio of 3:1 in favour of the Basongora – a move that has led to considerable bitterness among the Bakonzo to date.<sup>71</sup> Finally, with respect to the Rwenzori region, land purchases and sales are largely based on ethnic considerations, the rule being that one must sell only to their own ethnic brothers and sisters in order to avoid 'infiltration' by other communities. Based on all the above, it is no surprise, as the report on this region goes on to indicate, that there are 'districtisation' drives in which communities are actively seeking separate district status along ethnic lines such as the Bakonzo of Bughendera county in Bundibugyo district who want their own separate district. Finally, the chickens of district creation initiated by the NRM government are coming home to roost.

On the other hand, ethnic tensions in the central region are manifest in the mistrust with which the Buganda Kingdom viewed the 2007 Land Amendment Bill that entrenched the security of occupancy of bona fide occupants on *mailo* land. Nakayi and Twesiime-Kirya note that the Baganda largely felt that these laws were meant to enable 'westerners' squatting on *mailo* land to continue doing so in perpetuity as long as they paid the insignificant ground rent imposed by law.

With regard to the northern region, Ojok and Ameny refer to the violent inter-clan land conflicts between the Acholi and the Langi in Ocwiko village, Kotomor, Agago district.<sup>72</sup> On the whole, however, such ethnic tensions do not appear to be widespread.

By way of conclusion, ethnic-based conflicts do exist, but are more entrenched and debilitating in particular regions compared to others. Where they do exist, however, land conflicts are increasingly becoming aggravated.

#### 4.2.8 The place of politics

There is a pattern of reliance on the emotive issue of landownership as a political tool by politicians across all the regions studied. In some places, such as the western/Rwenzori region, the politicisation of land has sucked in cultural institutions, which sometimes openly endorse politicians contrary to the prohibition against partisanship on their part. Kabura and Tuhaise note:

Cultural leaders have compounded the conflicts by getting involved in partisan politics (CCFU, 2014). Different respondents disclosed how the OBB and OBR cultural

<sup>71</sup> The government's justification for the ratio is that the Basongora are herdsmen and, therefore, require more expansive land for grazing than the Bakonzo cultivators require for crop farming.

<sup>72</sup> Ojok and Ameny, *op cit.*, 20.

leaders openly fronted and/or supported political candidates during the 2016 elections (Kabura & Tuhaise, *op cit.*, 8).

Also, the reports on western and northern Uganda note that politicians use the issue of land to stir up conflict in order to suit their political aims. On this issue, Ojok and Ameny observe thus:

In the view of the LCV chairperson of Agago district, some of the challenges associated with customary law are attributable to political leaders who frame the issues in a way that suits their political interest (Ojok & Ameny, *op cit.*, 14).

In the central region, the situation assumes a slightly different turn. The Kajura and Lule report points to a direct correlation between the electoral season and land conflicts caused by highly placed individual actors. Using Moses Karangwa and Abdallah Kitata as examples, the report notes that highly placed individuals within the NRM made use of state/party-provided election money to finance land grabs, particularly in the form of paying bribes to security agents and perhaps even to the judicial authorities:

The study also noted a close connection between politics and the ongoing wave of land grabbing and related injustices. In Mukono, it was noted that in the aftermath of the 2016 elections, land grabbers were mostly influential NRM politicians and mobilisers. Right after the elections, NRM mobilisers seemed to have saved a lot of money, which had been meant for electioneering but was hoarded and diverted to other selfish projects. This money emboldened them to involve themselves in forceful land evictions of persons they found occupying their lands (Kajura & Lule, *op cit.*, 26).

The politicisation of the land issue is thus a cross-cutting phenomenon that needs to be addressed.

Taken together, substantial similarities are discernible between the three regional reports to warrant the conclusion that the intricacies of land conflict across the country are not fundamentally different from region to region except for a few fine differences. The land problem is, therefore, one that requires nation-wide action, especially with respect to matters which are overtly or impliedly political. The above observations are not fully exhaustive of the patterns or comparisons that can be drawn. To the above factors there is a need to add the historical grievances affecting landownership today and precipitating contemporary land conflicts, such as the Basongora's claim over Queen Elizabeth National Park land and the role of public servants and land officers in exacerbating the tensions. It is, thus, necessary to turn to the phenomenon of land administration and governance.



### 4.3 Land Administration and Governance: Law vs. Practice

#### 4.3.1 The Uganda Land Commission (ULC)

The recent debate about amending the constitution brought into bold relief the deficiencies in the existing institutions, such as the Uganda Land Commission (ULC), the various land registries on Parliamentary Avenue and elsewhere around the country, and the other government/public land administration agencies, such as the Department of Survey and Mapping. Although it is clear that these institutions are suffering from a lack of capacity, the problem goes well beyond logistical issues, such as the lack of funding or limited resources and personnel. The problem is a structural one which is linked to the political economy of governance in the country. At the top of the structural problems is the degree to which the practice of the ULC conforms to the law. Following closely is the problem of human resources and funding. But last and, perhaps most important, is an affliction from which most public institutions in Uganda suffer – the lack of transparency and an absence of institutional accountability. All of these problems are exacerbated by the influence of an omnipotent presidency, and the dire consequences of the phenomenon of presidentialism.

These points are amply demonstrated if we intensify our scrutiny of the ULC. As was the case under the previous constitutions, the ULC retained its constitutional status, with more detail being added to the description of the institution.<sup>73</sup> However, the 1995 Constitution did not reflect the magnitude of the growth in the importance of the land management question in Uganda that had taken place over the previous two decades since the 1967 Constitution. A cursory inspection of the constitutional provisions that govern the ULC will immediately demonstrate where the current problems afflicting the institution lie. In the first instance, its members are appointed by the president, and although approved by Parliament, the vetting process in Uganda has been found wanting. There are also no conditions or qualifications attached to membership of the ULC, except that at least two members should have “qualifications and experience in matters related to land”.<sup>74</sup>

While the members of the commission serve for a fixed term of five years, they do not enjoy security of tenure and can be removed by the president on several grounds, which action cannot be contested. In other words, the chair and members of the ULC serve at the pleasure of the president and do not enjoy the constitutional protection accorded to the Inspector General of Government (IGG), the Auditor General (AG) or the Director of Public Prosecutions (DPP), among several others. While these offices have their independence protected from undue influence and require special tribunals to remove them, this is not the case with the chairman and members of the ULC. Furthermore, the IGG, AG and DPP are constitutionally protected from interference in their work, with provisions which stipulate that they shall not be under “the direction or control of any person or authority”.<sup>75</sup> This is not the case with the ULC. Although questions arise about the actual independence of these bodies from

<sup>73</sup> See articles 238 and 239 of the 1995 Constitution, and Sections 46-55 of the 1998 Land Act (Cap. 227 of the Laws of Uganda, available at <https://www.ulii.org/ug/legislation/consolidated-act/227>.

<sup>74</sup> Section 47 of the Land Act.

<sup>75</sup> See, for example, Article 163(6) on the Auditor General.



executive *diktat*, the absence of such a provision in the law explains why the president can openly direct the ULC to hand out land to a wide range of individuals – local and foreign – in the name of ‘investment’ and little can be done via the law to stop him. To borrow from the Kenyan Supreme court decision in *Re the Matter of the Interim Electoral Commission*,<sup>76</sup>

It is a matter of which we take judicial notice, that the real purpose of the “independence clause” with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue influence with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of all-powerful Presidency.

There is no doubt that the ULC is badly in need of such an antidote. An extensive 2010 audit of the ULC pointed to the lack of independence and several additional problems which face the institution.<sup>77</sup> The report found that the ULC did not have an enabling law or an approved structure for the issuance of public land, that the commissioners worked full-time when they were not meant to, and that some of the land ostensibly under the control of the ULC had not been surveyed and was lacking land titles. This had facilitated land grabbing by those in the know and, even where allocations were made by the ULC, this was in violation of the laws on procurement and the disposal of public assets. The report also pointed out to a confusion between “public land”, “government land” and “local government land”, which had led to considerable misunderstanding and tension between the ULC and other public institutions as well as the DLBs. The result has been multiple allocations of the same plots of land to different beneficiaries. The ULC also lacked the necessary structures to effectively operate at the national level, which was in part the consequence of chronic under-funding.

It is ironical that the very same problems identified nearly a decade ago continue to hound the commission. Reviewing the appearance of ULC chairman, Baguma Isoke, before the Commission, Julius Businge observed that there was a huge problem facing the body:

impunity and disrespect of the law governing land, influence peddling by government agents, abuse of office by top government officials, corruption, incompetence, forgery of important documents, and a disconnect between key government agencies in making decisions on land matters, intimidation, and loss of property and money by government.<sup>78</sup>

To compound it all, the ULC is a paragon of obscurity with respect to an issue that is of considerable concern to the settlement of the land question in the western/Rwenzori and the central regions of the country – the Land Fund.<sup>79</sup>

76 Supreme Court Constitutional Application No. 2 of 2011 [2011]eKLR..

77 Hussein Bogere, ‘Uganda Land Commission is ‘illegal’’, *The Observer*, 4 August 4 2011, available at [http://www.observer.ug/index.php?option=com\\_content&view=article&id=14572:uganda-land-commission-is-illegal-](http://www.observer.ug/index.php?option=com_content&view=article&id=14572:uganda-land-commission-is-illegal-)

78 Julius Businge, ‘Uganda: LAND PROBE: How govt land is stolen’, *The Independent*, 7 August 2017, available at <https://landportal.info/news/2017/08/uganda-land-probe-how-govt-land-stolen>.

79 While the operations of the fund are governed by S.41 of the Land Act, its actual operation is shrouded in mystery.

### 4.3.2 The Land Fund

A telling glimpse into the operations of this fund was recently provided by *Saturday Vision* columnist, John Nagenda, who also doubles as a Senior Presidential Advisor and should have been one of the main beneficiaries of the bounty:

To see him (Baguma Isoke, ULC chairperson) accompanying our President, upon giving away of 250 land titles not yet paid (in my case by hundreds of millions of shillings) was to sell our leader almost stolen goods. At least if Isoke had the decency to tell him the true position, ourselves and others might have been more quickly paid in future.... But Mr. Isoke, where have you put our money which you told us had been put in our Bank Accounts whereas not?! And the Nagendas are not the only ones.<sup>80</sup>

Obviously, if an insider like Nagenda can lament about the obfuscation of the Fund monies and the lack of transparency at the ULC, then what of those with much less access to the chambers and corridors of power? In a context of what the HURIPPEC report on the western/Rwenzori region describes as “calculated secrecy”,<sup>81</sup> the prospects of the fund being used to address the central problem for which it was established are slim. Kabura and Tuhaise note that the government is alleged to have bought land from the Tooro Queen Mother within Kibiito sub-county, Kitumba and Harukooto in Kabarole district for the purposes of distributing it to squatters.<sup>82</sup> However, the information on this purchase is shrouded in mystery and is further complicated by the fact that the squatters on this land continue to pay *busuulu* and suffer threats of eviction.<sup>83</sup> It is, thus, very difficult to find any concrete progress achieved by the Land Fund with regard to its objectives.

In sum, even though a new commission is in place (having replaced the one that was the subject of the 2010 audit), the ULC’s structural problems articulated above remain. As Patricia Twasiima points out, “If we can learn anything from the current Land Commission, it is that the same government officials are majorly (*sic!*) responsible for the current land grabbing, most of it illegal. Why wouldn’t we expect that the same government officials will abuse the power that comes with the proposed amendment?”<sup>84</sup> Obviously, in the absence of structural reform, very little change can be expected in the operation of the ULC.

### 4.3.3 Other land governance institutions

Turning to the other land governance institutions in the country, the problem is even more extensive. In a paper written in 1999, Margaret Rugadya provided the following rough estimate of the number of personnel who would be required to bring into effect the broadly-stated objectives of the 1998 Land Act, which included improved service delivery within a framework of decentralised governance:

80 John Nagenda, ‘At last from London’, *Saturday Vision*, 23 September 2017, at 8.

81 See Kabura and Tuhaise, *op cit.*, 21.

82 *Ibid.*

83 *Ibid.*

84 Patricia Twasiima, ‘Govt is its own enemy on the Land Amendment Bill’, *Daily Monitor*, 14 September 2017, at 15.

**TABLE 2**  
**OFFICES AND PERSONNEL REQUIRED TO OPERATIONALISE**  
**THE 1998 ACT**

Institution	No. of Offices	Officials	Totals
District Land Boards	45	5	225
Land Committees	7,000	4	28,000
Recorders	917	1	917
District Land Offices	45	5	225
District Land Tribunals	45	3	135
Sub-county Land Tribunals	917	3	2,751
			<b>32,253</b>

Source: Rugadya (1999), at 12

We can arrive at a number of conclusions with respect to the data in the above table. First, is the extremely high number of necessary officials – 32,253 in total – required to implement the system. Second, is the fact that this estimate was based on the 45 districts in existence at the time of compiling the data in 1999. As is well known, the number of districts in the country has since expanded to 117, implying that the problems of personnel have multiplied by a factor of nearly 3. The third point is that a number of the institutions listed in the table, among them the Land Committees and the District and Sub-county Land Tribunals, were either disbanded by the ministry, had their functions/mandate transferred to the magistrate’s courts, or simply failed to operate on account of the logistical difficulties encountered (Nyanzi, 2015: 39-43). Needless to say, even while in operation, there were numerous problems of efficiency, accountability, transparency and oversight, which afflicted their performance.<sup>85</sup>

The above account demonstrates a situation of acute institutional collapse. In other words, the infrastructural framework that was put in place by the 1998 Land Act – the most prominent legislation governing the administration of land matters in contemporary Uganda – has irreparably decayed, in part because of a failure of implementation. The implication is that the whole conception of land governance needs to be re-thought, taking into account the reasons why the Land Act model failed and addressing the many complexities that have been added to the land question since. But what is the story with respect to the judiciary?

<sup>85</sup> Taken together, these were compounded by other broader problems faced by the introduction of the 1998 Act, including institutional capacity; public awareness; the institutional framework; legitimacy/acceptance; political pressure, economic policies and the absence of strategic plans; inadequate institutional co-ordination; inconsistency in the laws related to land reform; capacity in local governments; and poor inter-sectoral planning and consultations (Rugadya, 1999: 8-12).

## 4.4 Courts, tribunals and other dispute-settlement institutions (DSIs) and actors

### 4.4.1 Formal structures vs. informal mechanisms

As Nakayi and Twesiime-Kiryia point out, most disputes relating to land are settled in mechanisms other than the courts of law. Among them are the family and clan courts (where they exist), local councils, traditional leaders of various kinds and some of the lower-level judicial mechanisms. Kabura and Tuhaise note that in the western/Rwenzori region there is a preference to settle disputes over land owned customarily before informal structures, which include the *bakulu babulambo/isebulambo* among the Bakonzo; elders, *omugwetwa* (heirs) or clan leaders among the Batooro and Bamba/Babwisi; and Bataka committees amongst the Basongora ethnic group. Additionally, they observe that the majority of the population (who also happen to occupy such customary land)<sup>86</sup> are in favour of informal structures over the formal.

The same trend is deducible from the report on the northern region by Ojok and Ameny where it is stated that:

Formal and informal mechanisms of dispute settlement exist concurrently; however the latter has proven more efficient for the handling of conflict. The formal system is increasingly shunned for being expensive, compounded by intricate bureaucracy and corruption, which favour mainly those with adequate financial resources. (Ojok & Ameny, *op cit*, xi)

The same report also notes that customary owners of land overwhelmingly prefer to settle disputes before an informal structure:

...respondents from the three districts of Agago, Amuru and Otuke postulated that this informal mechanism is commonly used and this is because of its efficiency and effectiveness in resolving land conflicts in the region (Ojok & Ameny, *ibid.*, 7).

This state of affairs is a reflection of many factors regarding the inefficiency of formal structures, There are other problems with them, including the cost of going to court,<sup>87</sup> access to legal services for the relevant advice and the conditioning of culture: Ugandans are generally not a very litigious people. Nevertheless, a growing number of land disputes are referred to the courts of law for resolution, a fact clearly demonstrated from the statistics in the table below:

<sup>86</sup> Keeping in mind the fact that over 80% of the land in the Rwenzori region falls under customary tenure.

<sup>87</sup> A case in point is that of Mr. Mustapha Kigwe, interviewed as part of the Kajura and Lule report on central Uganda. According to Mr. Kigwe, his attempt to litigate in respect of his family's land which was grabbed by Moses Karangwa – the NRM district chairman for Kayunga – met a wall when his legal expenses almost bankrupted him despite his generous wealth from dealing in coffee. On top of all this, the legal action bore no success.

TABLE 3

**THE STATE OF BACKLOG IN DIFFERENT HIGH COURT DIVISIONS  
(2015 and 2016)**

DIVISION	CASES FILED <sup>1</sup>			POTENTIAL BACKLOG <sup>2</sup>			BACKLOG <sup>3</sup>		
	2015	2016	VAR	2015	2016	VAR	2015	2016	VAR
<b>LAND</b>	2,440	3,400	+960	1,289	2,338	+1,049	2,247	2,431	+184
<b>E &amp; B</b>	1,929	2,951	+1,022	1,463	1,881	+418	316	736	+420
<b>COMM.</b>	1,387	1,492	+105	538	634	+96	679	582	-97
<b>CIVIL</b>	4,774	1,272	-3,502	2,389	968	-1,421	3,560	1,145	-2,415
<b>CRIMINAL</b>	3522	448	-3074	2470	108	-2362	2526	119	-2407
<b>FAMILY</b>	2,282	2,036	-246	977	1,247	+270	1,253	963	-290
<b>ANTI-CORR.</b>	132	139	+7	76	80	+4	49	52	+3
<b>INTL. CRIMES</b>	9	11	+2	4	5	+1	2	2	0
<b>TOTAL</b>	<b>16,475</b>	<b>11,749</b>	<b>-4,726</b>	<b>9,206</b>	<b>7,261</b>	<b>-1,945</b>	<b>10,632</b>	<b>6,030</b>	<b>-4,602</b>

Sources: The Judiciary of Uganda, *Report of the Case Backlog Reduction Committee*, at pp.30 and 33, and 2016 Report of the Judiciary National Court Census from December 2015, at p.25

The above data offers an interesting perspective on the arena of judicial dispute resolution in general and on the case of land disputes in particular. In the first instance, the data demonstrates some success on the part of the judiciary to dispose of pending cases and cut down on backlog. As the statistics show in general, the High Court divisions managed to shrink their case backlog by 43.3% from 10,632 cases down to 6,030 cases within a period of 13 months. They also managed to reduce potential backlog (i.e. cases that have been pending for 1-2 years) by 21.1% from 9,206 cases down to 7,261 cases within the same span. Although this is a very progressive trend, case backlog is still a serious issue and efforts must be sustained to contain the phenomenon in the face of growing litigation.

Turning specifically to the case of land issues, the picture is a lot less encouraging. In 2015, the number of land cases filed and still pending disposal by December of that year stood at third highest, comprising 14.8% of the total load behind civil (29%) and criminal (21.4%) cases respectively. In 2016 the number of civil and criminal cases filed within that year and still pending disposal by 31 January 2017 had reduced tremendously by 3,502 (a 73.4 % reduction) and 3,074 (an 87.3% reduction) respectively, pushing them to 5th and 6th positions in terms of outstanding load. By way of comparison, the Land Division's pending cases filed in the same period topped the list in 2016 (comprising 28.9% of the total), growing by 960 cases from 2,440 to 3,400 cases and representing the second highest increase (by 39.3%).

Topping the list of increases (and coming in second overall) were cases under the Executions and Bailiffs Division, which by definition deals with issues relating to property, much of it land and real estate.

Furthermore, the case backlog within the Land and Execution and Bailiffs divisions grew by 184 (an 8.2% growth) and 420 (132.9% growth) cases respectively. In similar vein, the same divisions' potential backlog grew by 1,049 (81.4% growth) and 418 (28.6% growth) cases respectively. It can only be deduced from these facts that while the volume of cases filed in respect of land or property are growing fast, the level of disposal is slowing down.

From the above statistics it is not possible to discern the precise contours and details of where the problem lies; is it a question of insufficient judges, the complexity of the issue at hand or the growing litigiousness of Ugandans in this particular area of social interaction? Even without an in-depth examination of the data, at least two broad conclusions can be made. The first is that disputes over land matters form the most significant segment of all the matters which are currently being heard in the courts of law, with the pending cases for 2016 for the Land and the Executions and Bailiffs divisions accounting for 54% of the total outstanding. The conclusion which follows from this observation is that land matters have become the single most important issue of social concern in the country, which concern has spilt over into significant disputes which are not being solved through the informal mechanisms of dispute resolution, hence the increasing recourse to the courts. Regardless of the causes, there is no doubt that there is a problem. By way of summation, one could say that there is a serious crisis in relation to the dispute-settlement mechanisms provided by the courts of law on the issue of land and related matters.

Unfortunately, the courts of law are ill-equipped to effectively handle the matter. The Principal Judge made this fact abundantly clear in a letter to the president of the Uganda Law Society (ULS) responding to concerns raised about the stalling of cases in the Land Division, ostensibly because lawyers excessively refer cases to the Constitutional Court for the resolution of issues allegedly requiring interpretation:

As the saying goes, it takes two to tango. Those references are most times at the instance of Counsel who thereafter take no active steps to seek timely disposal of the same. This is clearly a timely indictment against the delivery of justice in our Judiciary. I am not accusing anyone but just drawing your attention to the fate of the plaintiffs and the Division being blamed for merely massaging the backlog.<sup>88</sup>

So, what is the cause of this backlog? First, of course, is the complexity of land matters. That complexity arises on account of the nature of the area, the kind of evidence which must be assembled and the problems in those institutions – such as the Land Office – where records relating to these matters are kept. It may also be on account of the disbandment of the DLBs which would have taken up much of the caseload. But there are other problems which afflict the courts, among them the rise in fraudulent transactions relating to land.

<sup>88</sup> See letter Ref. PJ/MISC. 28, dated 17 July 2017 from the Principal Judge to the president of Uganda Law Society, entitled “References to Constitutional Court Holding Up Trials in Land Division”.



#### 4.4.2 Judicial collusion in land fraud

Complexity and bureaucracy aside, it appears that there is another factor at play with the case of matters affecting land. Any number of cases demonstrate that the problem goes well beyond the increasingly disputatious issues that surround the acquisition, ownership and sale of land in Uganda: there is a problem internal to the very heart of the judicial institution, i.e. condoning (and perhaps even participating in) fraud.

Such concern was acutely evident in a case in which Makerere University land in Kololo was fraudulently sold within the space of a day. That might not be so surprising, except that the transaction took place on Christmas Eve! Furthermore, the land was transferred to two different people within the space of five minutes, and the sums of money involved were in excess of US\$3 million, allegedly paid in cash. Responding to the case, Jan Mugerwa pointed out that the judge correctly found that one Janice Amayo (a ghost who disappeared after the transaction had been executed) had committed fraud, and that the Land Registry was negligent in registering the fraudulent lease.<sup>89</sup> But then he focuses on a much more disturbing aspect of the case:

However, she [the judge] found that Nassour, the purchaser of the land who apparently paid \$3.5 million for it, bought it in good faith and as he had no notice of the fraud, he can now keep it. So far, so good but, like so much in this country, the veneer of respectability conceals, and I pull no punches about this, something rotten: The judge is at best grossly incompetent (and the worst is unthinkable), I question whether she is fit to sit as a judge.

Read the judgment and you will see that the judge could not bring herself to apply the label “fraudster” to an advocate, Sharon Tem, who played a key role in the fraud: she falsely witnessed a lease [and] knowingly made a false declaration on a transfer that was designed to defraud this country of millions in revenue.

Unfortunately, the saga of the Makerere land did not end there. As the losing party, Makerere rightly lodged an appeal against the lower court’s decision with the Court of Appeal. However, that appeal was frustrated at the very highest level, first, by the-then minister in charge of the lands portfolio, Ida Nantaba, who urged the university not to frustrate the “investor”.<sup>90</sup> But the *coup de grâce* was issued by President Museveni himself, who wrote in favour of the “investor” constructing a hotel on the same land that had been fraudulently acquired: “The people of Uganda need these projects for job creation, tax revenue [and] service delivery. Investment projects of this nature should not be bogged

89 Jan Mugerwa, ‘No matter what form corruption takes, it’s all greed and dishonesty,’ *Sunday Monitor*, 25 March 2012, available at <http://www.monitor.co.ug/Magazines/PeoplePower/689844-1372746-qxey0kz/index.html>.

90 Nixon Segawa, ‘Nantaba implicated in Makerere University land grabbing scheme’, *Chimp Reports*, 15 February 2017, available at <http://www.chimpreports.com/nantaba-implicated-in-makerere-university-land-grabbing-scheme/>.



down unless there is evidence that the investor colluded in clear ways with the fraudsters.”<sup>91</sup> That evidence was not available since Nantaba had “persuaded” Makerere not to proceed with the appeal. It is thus supremely ironical that only a few years later the president was publicly condemning encroachers on Makerere land and directing the Engineering Unit at State House to “demolish” all constructions and structures built on land “grabbed from the university”.<sup>92</sup> Despite this threat, there is no indication that such demolitions will actually take place, lending credence to the omnipotence of the virus of calculated confusion which afflicts presidential pronouncements on these matters.

As the Makerere case demonstrates, at the end of the day the extent to which the judiciary is able to effectively deliver on its mandate will also depend on the mechanisms of oversight and accountability which have been put in place in order to ensure that it does so. Of these, the Judicial Service Commission (JSC) is the most important, particularly in light of the functions given to the body under Article 147 of the constitution. Perhaps the most significant of these – aside from the advisory powers to the president on the disciplinary control of judicial officers – is “(d) to receive and process people’s recommendations and complaints concerning the judiciary and the administration of justice and, generally, to act as a link between the people and the judiciary, and (e) to advise the Government on improving the administration of justice.” With respect to carrying out these functions, the JSC offers a lukewarm self-criticism:

It has been noted that, over time, the Commission has not been able to effectively carry out its mandate. This has come about due to a number of factors, some of which have already been pointed out. It suffices to say that shortage of human, financial and material resources has been at the centre of this failure. However, around it were issues of lack of focus, improper planning and lack of full appreciation of the uniquely broad nature of mandate of the Commission as an oversight agency.<sup>93</sup>

Having made this observation, none of the solutions that the body offers in terms of improving its functions actually addresses the problem.<sup>94</sup> It is in its oversight role – and particularly in the supervision of the administration of land justice – that the JSC has grossly failed to prove effective. Once again, the problem lies in the relationship between the JSC and the appointing authority, the president.<sup>95</sup> This is the case even when the JSC appears to be finally rising to the challenges of its designated role (ACCU, 2016).<sup>96</sup>

91 Tabu Butagira, ‘Museveni gives away Makerere prime land’, 23 November 2010, *Daily Monitor*, available at <http://mobile.monitor.co.ug/News/TodaysPaper/691252-1058656-format-xhtml-pc2ewvz/index.html>.

92 Davidson Ndyabahika, ‘Museveni orders encroachers off Makerere land’, *Uganda Radio Network*, 23 September 2017, available at <https://ugandaradionetwork.com/story/museveni-orders-encroachers-off-makerere-land>.

93 Judicial Service Commission, *Annual Report: 2015/2016*, at 42, available at [http://www.jsc.go.ug/sites/default/files/Annual\\_Report\\_2015\\_2016\\_0.pdf](http://www.jsc.go.ug/sites/default/files/Annual_Report_2015_2016_0.pdf).

94 *Ibid.*, at 43.

95 Ivan Okuda, ‘Report holds Museveni liable for JSC poor work’, *Daily Monitor*, 12 December 2016, available at <http://mobile.monitor.co.ug/News/Report-holds-Museveni-liable-JSC-poor-work/2466686-3479704-format-xhtml-p128u8/index.html>.

96 Thus, at the time of writing major investigations of several complaints against judicial officers are underway. See Sunday Vision Team, ‘Seven judges, over 100 magistrates under probe’, *Sunday Vision*, 24 September 2017, at 3. The JSC also thwarted Justice Steven Kavuma’s bid to retain his position as Deputy Chief Justice

In light of the above analysis, it is clear that the other state institutions which get involved directly or indirectly in the arena of land management – such as the police, RDCs and even the army<sup>97</sup> – do so without the requisite legal mandate. However, they act primarily on account of the connections one of the parties to the dispute enjoys to these institutions. Such involvement may be through commission or omission, i.e. taking wrongful action in violation of the law, or taking no action even when intervention in a matter has been mandated by the courts.<sup>98</sup> While it is easy to view the involvement of such institutions as the action of a few aberrant officers, as a matter of fact the practice has become very notorious.<sup>99</sup> In sum, a great deal of the impunity over land matters starts in the highest office of the institution – the Inspector General of Police (IGP) – or with those who are close to or protected by this office.<sup>100</sup> Matters have been further complicated by the setting up of the Land Protection Department in the Uganda Police Force (UPF) which lacks any establishing legislation, and has often caused more problems than it sets out to solve, aside from being simply a “scratch on the surface” (Ngabirano, 2012: 11-12 and 14). As Nakayi and Twesiime-Kiryra point out, this means that the department often operates in a populist fashion. The department has also been the subject of allegations about corruption. The inevitable inference which follows is that the police has been a prominently negative institution in exacerbating the varied crises that affect land administration and governance in the country.<sup>101</sup> Last, but by no means least, are the institutions established by State House, including the Land Department and the *ad hoc* Nantaba Committee which wreaked such havoc on the land scene until it was unceremoniously disbanded.<sup>102</sup>

Such action on the part of the police and the other state-created or affiliated agencies explains why in each of the regions examined there are prominent individuals or corporations who seem to be above the law in flouting established procedures, disrespecting court orders, effecting wanton evictions and operating largely above the law. Among those mentioned in the HURIPAC reports are Moses Karangwa, the NRM district chairman for Kayunga, who is accused of using his political and financial strength to evict bona fide occupants of land in Kayunga in addition to the land’s legitimate owners (central region), Toro Kingdom’s Queen Mother (Best Kemigisa), similarly accused of the illegal, forceful eviction of bona fide

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even though he had reached the age of retirement; see, Anthony Wesaka, ‘How judiciary unearthed Justice Kavuma actual age,’ *Daily Monitor*, 27 September 2017, at 6.

97 The UPDF has been prominent in some of the evictions from forest and wildlife reserves.

98 See Misairi Thembo Kahungu, ‘Serere encroachers defy court order’, *Daily Monitor*, 25 September 2017, at 8.

99 Ephraim Kasozi & Jalira Namyalo, ‘Judiciary blames land disputes on inadequate laws, structures’, *Daily Monitor*, 26 September 2017, at 2.

100 Referring to the issue of illegal structures in Kampala, KCCA deputy executive director, Sam Sserunkuma, informed the parliamentary Committee on Commissions, Statutory Authorities and State Enterprises (COSASE) that a number of such structures were under police protection. See Mary Karugaba, ‘Gen. Kayihura, city tycoon summoned’, *Saturday Vision*, 29 July 2017, at 4.

101 Betty Amamukirori & Luke Kagiri, ‘IGP helped me in Mubende evictions, says Abid Alam’, *New Vision*, 14 September 2017, at 10. Alam told the Commission, “Whenever any issue came up, I would go to the permanent secretary, the minister or the president and I would be helped.”

102 Olive Eyotaru, ‘Nantaba suspends Land Committee’, *Daily Monitor*, 31 May 2013, available at <http://www.monitor.co.ug/news/national/nantaba-suspends-land-committee/688334-1867826-bxi5lqz/index.html>.

occupants on land and the royal family in the Rwenzori region in addition to the infamous case of the Madhvani Sugar Company in Amuru (northern region). Ironically, despite the president having personally intervened in some of these cases – as he did with the evictions in Toro – no change has been reported in the status quo.<sup>103</sup> At the same time, the involvement of different government agencies in many of the blatant human rights violations was clear in the testimony of Abid Alam, who was accused of evicting thousands of individuals in Mubende for a paltry compensation.<sup>104</sup> When asked by counsel for the commission whether government officials were involved in his dastardly acts, he retorted, “The government followed everything. There was a price for everything.”<sup>105</sup>

Again this reflects a high degree of mendacity on the part of the president since many of the evictions take place with the aid of state agencies such as the police and the army. Conversely, these same agencies step in to protect those who have either acquired land illegally or disobeyed an order of eviction. When the president declares himself on an issue and takes no action on it, such action not only undermines the integrity of his office, it also points to a much more insidious calculation.<sup>106</sup> At the same time, certain actions which the president takes clearly violate the law. More importantly, with such a myriad range of institutions involved in addressing a social phenomenon which seems to be on the rise, the potential for more confusion and conflict is extremely high. This is especially the case when the different agencies get involved in a blame game, deflecting attention from their misdeeds and finger-pointing at others. Thus, while accepting some blame for failing to act on a case involving the appropriation of government land in Jinja, IGP Kayihura was quick to drag in the ULC and the Privatisation Unit as the main culprits in the saga.<sup>107</sup>

By way of concluding this section of the report, it is apt to return to the Constitution (Amendment) Bill and one of the main rationales given by the government for its urgent adoption, i.e. the failure of courts of law to expeditiously hear and handle cases relating to disputes over government acquisitions of land compulsorily taken. While it is clear that there are many problems with the existing dispute-settlement institutions – particularly the courts as we have demonstrated – the proposed reform to the constitution will not change the position, especially given the record of malpractice in which government institutions have been engaged. There is also a problem of the placement of a very heavy burden on the shoulders of those who do not have the resources to challenge the state. As Patricia Twasiima points out:

103 URN, ‘Museveni warns Tooro queen mother over land evictions’, *DISPATCH: Uganda’s News Monthly*, 7 September 2017, available at <https://dispatch.ug/2017/09/07/museveni-warns-tooro-queen-mother-land-evictions/>.

104 Betty Amamukirori & Luke Kagiri, ‘Govt helped me to evict tenants – Abid Alam’, *New Vision*, 18 September 2017, at 10.

105 Betty Amamukirori & Luke Kagiri, ‘Abid Alam compensated people sh32,000, demolished church’, *New Vision*, 18 September 2017, at 13.

106 Agencies, ‘Tooro Kingdom breaks silence, condemns queen mother’, *Daily Monitor*, 21 September 2012, available at <http://www.monitor.co.ug/News/National/Tooro-Kingdom-Breaks-Silence--Condemns-Queen-Mother/688334-1513514-vol7thz/index.html>.

107 Julius Businge, ‘Kayihura wants land probe to act tough on govt bodies’, *The Independent*, 25 July 2017, available at <https://www.independent.co.ug/kayihura-wants-land-probe-act-tough-govt-bodies/>.

The biggest problem with this amendment is that it places an enormous burden on the citizens, who do not have the same muscle and financial standing as the State.... The majority of citizens can barely afford the cost and timelines that come with court procedures, and should not then have to carry the cross of dealing with inefficient systems.<sup>108</sup>

The proposed amendment is thus clearly unwarranted.<sup>109</sup> Why then was it tabled? Daniel Kalinaki offers some explanations, related both to the concurrent debate about the removal of age limits from the constitution and to the running populism of the NRM government posing as a defender of the “ordinary citizen”.<sup>110</sup> That populism is fuelled by a phenomenon which has been the bane of democratic constitutionalism in Uganda virtually since independence, but which has grown in magnitude since 1986. It is the problem of predatory presidentialism, which in contemporary Uganda has been buttressed by the phenomenon of institutionalised corruption. In order to fully understand the malfunction of the land governance institutions today, it is necessary to directly address these twin evils.

#### 4.5 The Ogre of Predatory Presidentialism and institutionalised Corruption

Typical political science literature contrasts the systems of parliamentary government with that of the presidential in a bid to establish which of the two is most likely to evince characteristics of authoritarianism (Linz, 1990). The preceding analysis has amply demonstrated that there are both endemic and structural problems which plague the overall efficient operation of the land institutions in the country. What is clear is that a prominent cause of the dysfunction is the presidency. Not simply the office, but the man. In other words, it is not simply that it is dominated by him. That dominance has had a deleterious impact on the protection of public land in the country. By extension, it has afflicted the institutions of land governance to such a degree that they are unable to effectively carry out their designated functions. Examples abound to acutely demonstrate the manner in which the presidential imprimatur has been brought to bear on issues affecting public land in a decidedly negative fashion. The Centenary Park issue is a case in point, as has been the case with many of the school land giveaways, starting with Shimoni Primary School that was demolished to pave way for the construction of a CHOGM hotel in 2007 (to date still incomplete) to the case of several plots of land in Jinja.<sup>111</sup>

Several reasons can be offered for this, the first being the neo-liberal context within which the economy is situated that places a premier on foreign investment. Secondly, it is argued that such executive action prompts the more rational use of the land, especially in the face

108 Twasiima, *op. cit.*, at 15.

109 This point was reiterated by the judges from the Land Division when interviewed by the Bamugemereire Commission. See Ephraim Kasozi & Jalira Namyalo, ‘No need to amend land laws – Judges’, *Daily Monitor*, 29 September 2017.

110 Daniel K. Kalinaki, ‘Land is a no-win issue so why is Mr Museveni spending so much of his political capital on it?’ *Daily Monitor*, 14 September 2017, at 15. See also Ronald Musoke, ‘Behind Museveni land confusion’, *The Independent*, 22-28 September 2017, 10-13.

111 Ephraim Kasozi & Jalira Namyalo, ‘Cabinet behind school land giveaway, says ULC chairman’, *Daily Monitor*, 29 July 2017, at 2.

of the inertia and incompetence of the land governance institutions. Given the power of the pulpit that the president possesses, his intervention can thus get things moving. However, it is necessary to juxtapose these claims against the influence of two related phenomena, that of predatory presidentialism and the other institutionalised corruption.

#### **4.5.1 Presidentialism and regime survival: How institutional corruption and bad governance facilitate power entrenchment**

There is no doubt that President Museveni has risen to become the most powerful president that Uganda has ever experienced. Ironically, that power is exercised within a context where the constitutional and institutional checks and balances in place are well beyond anything that existed under the previous constitutional instruments. If there is any success which the post-1995 presidency has succeeded in achieving it is the growth of executive power at the expense of the power and authority of the legislature and the judiciary. In no small measure this has been achieved through the extensive deployment of state resources – of both the coercive kind via the military and the police, but also in terms of patronage. Central to the phenomenon of Uganda’s presidentialism is the instrument of patronage. Although such practices have existed since the establishment of the modern state of Uganda by the British (Gibb, 2013: 185-186), there is no doubt that it has become particularly acute under the NRM, hence we can only describe it as “predatory”. According to Harm and Charap (1999),

A dictator minimises the probability of a palace revolution by creating a system of patronage and loyalty through corrupt bureaucracy. Competitive corruption patterns are associated with anarchy and weak dictators, while strong dictators implement a system of monopolistic corruption. Efforts at public sector reform may meet resistance in countries featuring such systemic corruption.

The problem is all-pervasive and endemic. Arguing that it is no longer possible to deal with the scourge of corruption under the NRM, Charles Onyango Obbo gives the theoretical example of the corruption dynamics that accompany the building of a new road to Fort Portal:

If the road were, one, built on time and on budget and two, built to last 25 years without need of repair, what would happen? After eight years people will take good roads for granted. They become part of the furniture, and soon the government ceases to gain political capital from it.

However, if the same road that was supposed to be built for Shs 3 billion in two years, ends up being built five years late (like the Jinja-Iganga-Tororo-Busia Road to the Kenya border) and costing Shs 36 billion, it means a corrupt contractor can continue to eat money for five years on a road, instead of two years. And the corrupt become vested in the continued stay in power of the government that is feeding them.<sup>112</sup>

<sup>112</sup> Charles Onyango-Obbo, ‘A new look at corruption’, *The Independent*, 9 January 2011, available at <https://www.independent.co.ug/new-look-corruption/>.



Noting that top leaders in Uganda have the kind of relationship that a doctor has with disease, i.e. they heal but they don't want the disease to end because that would mean that they will run out of business, he concludes with the following trite observation:

Therefore, if Uganda developed an efficient government, where roads are fixed and there are still no potholes in them after 10 years, it would lose the absorption capacity for patronage. And the NRM as we know it would have to transform its *modus operandi* or face the spectre of collapse.

William Muhumuza argues that the NRM has built up a fairly impressive legal and institutional framework to enhance accountability and control corrupt tendencies. However, political factors, i.e. exemplary political leadership and support to institutions that enforce compliance, are key. Where reliance is placed on patron-client and neo-patrimonial instruments to consolidate and retain power, curbing public sector corruption will be elusive. Muhumuza argues that the re-introduction of competitive politics in 2006

made it increasingly necessary for the NRM government to reinvent itself for purposes of political survival under the changing political context. The NRM abandoned inclusive politics and focused on strategies of retaining power. It also became less committed to supporting reforms that were likely to undermine its political support. Consequently, the NRM leadership became less committed to fighting corruption because in the context of a patronage-driven and neo-patrimonial political context, it was viewed as suicidal.

Although corruption in the public sector institutions is widespread, two of the most corrupt institutions identified have an intimate relationship to the land question in the country. This position is amply reflected in the most recent East African Bribery Index summarised in the table below:

**TABLE 4**  
**RANKING OF MOST BRIBERY-PRONE INSTITUTIONS IN UGANDA**

Rank	Institution	2017	2014	Variance
1	Police	75.0	84.0	-9.0
2	Judiciary	70.0	30.7	39.3
3	Land Services	30.0	60.0	-30.0
4	Medical and Health Services	21.9	19.8	2.1
5	Tax Services	19.4	14.5	4.9

Source: Transparency International, The East African Bribery Index, 2017, at 32-34, available at <http://tikenya.org/wp-content/uploads/2017/09/East-African-Bribery-Index-EABI-2017-1-1.pdf>

The table above summarises much that is of general interest on the bribery scene in Uganda, and specifically with respect to the judiciary. First, is that the judiciary lies second behind the police, and is followed by the land services sector. What is of greater interest is not just the fact that the judiciary moved up from third place in 2014, but that the variance between



the two years (in the negative direction) exceeds any of the other institutions on the list. Interestingly, although “Land Services” is listed as third in the table, things have actually improved since 2014.

While the judiciary often points to the lack of resources as a central factor in preventing its effective operation, the issue of corruption is given short shrift.<sup>113</sup> However, as Rachel Ellet points out, there is a point to this trend:

The executive uses its control and disbursement of resources to the judiciary and the legislature as a veiled method of exerting influence on the execution of their constitutional mandate; for instance, resources for the judiciary do not come directly from the Consolidated Fund through Parliament, as the constitution stipulates, but through the Ministry of Justice and Constitutional Affairs. This also means that the judiciary is not self-accounting, as anticipated by the constitution. (Ellet, 2015: 15)

The executive branch retains a largely wary and often hostile approach to the judiciary, but through its control over both the appointment process as well as the resource envelope it is able to ensure a precariously-balanced institution. Starved of both institutional and individual resources, it is inevitable that the levels of vice and bribery will be extremely high. The problem of resources is brought into bold relief when one compares the operations of the Land Division with that of the Commercial Division which receives extensive funding from foreign donors. Concerns about vice in the judiciary abound, and many examples of the same can be given. Indeed, those concerns have been growing over time (Ellet, 2015: 14). However, through the mechanism of commissions of inquiry, the executive is able to erect a smokescreen over actions which ultimately exacerbate the problem. As Nicholas Sengoba points out, “When corrupt tendencies serve those in power and the police and the Judiciary are not empowered, facilitated and funded like a commissions of inquiry, we are acting in futility. We can brace ourselves for more of this drama of wasted efforts as we suffer fools gladly.”<sup>114</sup>

The goals of President Museveni with respect to his own stay in office have come to inform virtually all his actions, including – according to some critics – the introduction of the Constitutional Amendment Bill on land in the heat of the debate over the removal of the provision on age limits.<sup>115</sup> Daniel Kalinaki hits the nail on the head regarding the reason for the socio-economic stagnation that Uganda is experiencing and why this data – alongside the numerous problems we have outlined in the arena of land governance and management – is not developing in a positive direction:

113 Asked by the commission of inquiry to explain claims of corruption in the judiciary, Justice Kwesiga retorted that “the public must elaborate and adduce evidence on corruption rather than making baseless allegations.” See Andante Okanya & Edward Anyoli, ‘Judiciary wants expansion of land courts’, *New Vision*, 27 September 2017, at 5.

114 Nicholas Sengoba, ‘Why are commissions of inquiry more empowered than the judiciary?’ 29 September 2015, *Daily Monitor*, available at <http://allafrica.com/stories/201509291501.html>.

115 Sadab Kitatta Kaaya, ‘Mao: Land Bill a trick to remove age limit’, *The Observer*, 20-21 September 2017, at 4.

In Uganda, the same old leadership, despite its best intentions, remains distracted by the politics and patronage necessary to stay in power. And that is the dilemma: Mr. Museveni wants to transform Uganda into a middle-income country, but three decades on, and as the data show, the easiest and fastest way for him to do it is to let some else do it.<sup>116</sup>

It has already been noted that the land question or problem in Uganda is a political one. On that basis one may be led to opine that so long as the NRM government wishes to retain power, it will inevitably look to land as a tool of entrenchment – making it a fact that at the moment regime survival and fundamental reform of the land problem may be mutually exclusive. Perhaps the starkest example of President Museveni’s use of land as a political tool of power entrenchment lies in his constant creation of districts as a form of establishing or strengthening patronage links for the associated electoral benefit he derives thereunder (Green, 2010). As earlier mentioned in this report, the number of districts in Uganda has ballooned from 45 in 1999 to over 117 today. Indeed the study conducted by Green (2010) indicates a clear correlation between the creation of new districts and the occurrence of elections in Uganda:

Indeed, in 2000 and 2005 Museveni’s government created new districts just a matter of months before presidential elections the following year, while in the presidential elections of 1996 and 2006 Museveni promised to create new districts after the election if citizens voted for him, leading to the creation of six new districts in 1997 and eleven new districts in 2006, respectively. (Green, 2010: 15)

In fact as a tool of patronage, district creation appears to be very effective.

Indeed, what is remarkable about district creation in Uganda is that it has arguably been more successful than other types of patronage like new cabinet posts and new parliamentary constituencies in maintaining Museveni’s support, inasmuch as it was only the latter which came in for near-universal criticism as wasteful and inefficient in the public solicitations of the Constitutional Review Commission. (Uganda, 2003: 109; Green, 2010: 21)

The particularly worrying trend is that the president sometimes appears to be prepared to create new districts even when doing so would have disastrous consequences on the grand scale of things, if anything for the temporary appeasement it creates in those he seeks to please. An example of this is the agreement to the Kasese district NRM caucus’ request to have Kasese split into four new districts. An additional one would be his agreement with the request to give Bughendera county in Bundibugyo its own district status.

On top of this, the creation of new districts is fuelling preexisting and creating new land conflicts and can be expected to continue doing so as it deepens ethnic rifts in certain areas

116 Daniel K. Kalinaki, ‘Moi’s unexpected parting gift to Kenya and why Uganda needs to pay attention’, *Daily Monitor*, 28 September 2017, at 15.

and increases the demand for land drastically.<sup>117</sup> It is on the basis of such actions that the seeds of ethnic cleansing are planted. Lastly, because the problem of Uganda is not the issue of land management *per se*, but the wider political context within which such governance is located, there is no doubt that the crisis over land can only get worse before it gets better.

By way of conclusion, the following quote by Albert Hirschman from his 1970 classic book, *Exit, Voice and Loyalty*, offers insightful food for thought on the crisis in which Uganda finds itself:

No matter how well a society's basic institutions are devised, failures of some actors to live up to the behaviour which is expected of them are bound to occur, if only for all kinds of accidental reasons. Each society learns to live with a certain amount of such dysfunction or misbehaviour; but lest the misbehaviour feed on itself and lead to general decay, society must be able to marshal from within itself forces which will make as many of the faltering actors as possible revert to the behaviour required for its proper functioning. (Ndi, 2017)

Where the forces will be marshalled from in contemporary Uganda is still unclear. Nevertheless, there is no doubt that, given the general decay of institutions that is being experienced, it is simply a matter of time before the implosion happens.

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117 Kigambo, Gaaki, 'Uganda: New districts fuelling demand for land', *The East African*, 17 April 2016, available at <https://www.theeastafrican.co.ke/news/Uganda-New-districts-fuelling-demand-for-land-/2558-3162652-14vmf2h/index.html>.

## V.

# ADDRESSING IMPUNITY, RESTORING JUSTICE: A TENTATIVE CONCLUSION

### 5.1 Main Conclusions of the Study

Few social phenomena have greater potential for conflict than that of land, its use, ownership and transfer: everyday stories abound of even minor conflicts over the location of a boundary or the use of an easement ending with disastrous consequences. Indeed, as is clear from Table 3 above, the Land Division in the High Court carries the heaviest load of all eight at this level of the judiciary. That statistic does not include the loads carried by the lower levels of the judicial structure nor of the many other formal and informal mechanisms that exist within the system. At a minimum this reflects an acute crisis with respect to the land question in Uganda. The failure and/or collapse of the land justice institutions has led to the adoption of a variety of self-help mechanisms, including assault, fratricide and homicide, all representing an acute sense of frustration. That sense of frustration – and an appreciation for those who act on it, even if illegally – is aptly captured in Norbert Mao's response to Brigadier Kasirye Gwanga's recent vigilante act of setting alight a tractor that he alleged belonged to a trespasser on his land:

The years of frustration with an unjust judicial system that is non-responsive to the cries of victims, the bias in favour of moneyed and powerful interests, the corruption in law enforcement agencies and the indifference of government generally have finally crystallised into one explosive act of outrage by the colourful Brig. Kasirye Gwanga.

That single action seems to personify the anger felt countrywide over threats to land and the helplessness of the state vis-à-vis land grabbers. What Kasirye Gwanga did is not acceptable in a country where the rule of law reigns. The fact that a retired army general with a sterling record of service who also happens to be a Senior Presidential Adviser can take matters into his hands is very disturbing.<sup>118</sup>

At a minimum the sympathy implicit in the above extract should be cause for a serious and critical reflection on the land crisis. That reflection needs to be at two levels: first of all to inquire into why the institutions of land management have collapsed to such an extent that the only recourse to justice can be pursued through individual "mob" justice by those who have the means to do so; and secondly, to ask what happens to those who have neither access nor enjoy impunity. Hence, even though the legal regime under the 1995 Constitution has made some progress by way of addressing the rights of vulnerable groups

118 Norbert Mao, 'Kasirye Gwanga and the rise of outrage against land grabs', *Daily Monitor*, 20 August 2017, available at <<https://www.facebook.com/umojamusikug/posts/10156180539435839>>, and <<https://twitter.com/norbertmao/status/899611833912438784>>.

and individuals like women and children, considerable loopholes remain. According to Rose Nakayi, the limitations in the law are "...partly due to the perfunctory motivations to imbed some protections for political expediency at any given time, without sufficient efforts to implement them. The situation is further complicated by the conflicting rights arising from the multiple tenure systems" (Nakayi, 2016: 4).

By way of looking for guidance elsewhere, perhaps we could turn to the recommendations of the Tanzanian commission which reviewed the issue of land in the country in the early 1990s (Rwegasira, 2012: 88-89).<sup>119</sup> The commission was set up against the backdrop of problems that reflect those existing in contemporary Uganda, even if there are some distinctions as to the kind of tenure systems that are in place, for example the fact that Tanzanian land is all state-owned. However, the recommendations of the Issa-Shivji-led commission were based on certain underlying principles that are still applicable today, *viz.*: a) to encourage agrarian accumulation from below based on a vision of autonomous national development (albeit capitalist) as opposed to the current practice of incautious opening up of the country to predatory merchant and compradorial capital, both local and domestic; b) to break up the monopoly of radical title in the executive arm of the state and diversify it in a way which would permit control and administration of land from below and to create countervailing forces against abuses by monopolistic state organs; and c) to devise procedures which would be legitimate, accessible, open and transparent. The commission was also concerned to ensure that the values and interests of local communities and vulnerable groups within them were protected and upheld.

Each of these recommendations – perhaps with the exception of point (b) – has relevance to the issue of land justice in Uganda today. We need to move away from an obsession with privatisation and marketisation and return to a vision of land as not just an economic factor of production, but also as an instrument of social cohesion and cultural affirmation. Needless to say, there is great need for the restoration of sobriety to the regime of land governance. According to Ryan Gibb,

Property rights function as institutions when they reduce the uncertainty actors have about the behaviour of others. Land laws fail this criterion when individuals can seize land, bribe value estimators, bypass land offices, alter and forge titles, intimidate local authorities, and pay off judges. Instead of acting within the land law, individuals create informal laws. The informal institutions reflect other political and economic actors who have a greater reason to work in informal networks than within the government-created institutions. These individuals are dissuaded from working within formal markets because they can circumvent cumbersome and expensive government bureaucracy and reduce the cost of their transaction; both landless farmers and wealthy land developers recognise this strategy. (Gibb, 2013: 182)

119 For a summary of the recommendations of the commission, see 'The Land Commission's proposals', in *Tanzanian Affairs*, 1 January 1995, available at <<https://www.tzaffairs.org/1995/01/the-land-commissions-proposals/>>.

Gibb's focus, however, is only on the regime of land governance and management. This report has demonstrated that the problem is much wider. Any solution to the problem can only be successful if it addresses the wider problem of governance, namely the kleptocracy of a regime that has virtually eliminated all checks and balances to the exercise of executive power and which is determined – even against the tide of history – to retain power until its inevitable demise. Within such a context matters relating to land, its ownership, transfer and distribution will continue to be a site for intense conflict for many years to come.

## 5.2 Recommendations for Positive Transformation

Having articulated the major problems that plague the land question in Uganda, it is imperative that we deduce ways of effecting constructive change. This sub-section amalgamates some of the recommendations featured in the four separate HURIPEC studies in addition to others, and categorises them according to an estimated timeline of possible achievement or execution, i.e. short-, medium- or long-term. Needless to say, the following recommendations are by no means exhaustive.

### 5.2.1 Short-term recommendations

Given the extent of institutional decay and the impasse in reform which has been reached, there is a glaring need for a broad, national dialogue on the governance predicament in the country. Such a broad approach is necessary because it is the main conclusion of all the studies reviewed in this report that the land crisis is simply a component part of a larger governance breakdown. Focusing only on land minimises the co-extensive nature of the crisis, and will amount to piecemeal reform of peripheral issues rather than a comprehensive review of the substantive structural questions. To that end, the land problem will continue to worsen and elude us unless we address the governance dilemma. Under this national dialogue, concerted efforts must be made towards uniting all stakeholders in advocacy for political reform and the end of impunity as a means of addressing the governance crisis.

Ad hoc and illegal institutions that have assumed a mandate over land governance such as the police, the Office of the President and State House should be immediately disbanded, or subordinated to the overall supervision of a revamped and reconstituted Uganda Land Commission (ULC). Only legitimate institutions mandated by law to govern land matters should have control over the land question. This also involves cutting down on the plurality of institutions mandated to do so, with many having overlapping and conflicting functions.

The government should adhere to the laws on compulsory acquisition concerning the prompt, prior and sufficient payment of compensation to persons who lose their interests in land due to the legitimate exercise of the power of eminent domain. In similar vein, attempts to amend Article 26 of the constitution and delete the protections relating to the compensation of persons affected by compulsory acquisition must be immediately abandoned.



Private firms and investors must be urged and even compelled to adopt and adhere to the minimum requirements of corporate responsibility with regard to their interactions with the victims of the varied land acquisitions which are taking place in all regions of the country. Such private investors must be called upon to deal directly with the legitimate occupants and owners of land rather than with those individuals who fraudulently acquire such land and proceed to sell or lease it to them. Cognately, firms carrying out activities such as stone quarrying, which have a negative impact on surrounding communities, must deduce ways of reducing this negative impact and making reparations for the losses occasioned to the occupants of the surrounding lands.

Transparency and equity must be the defining characteristics of any public land distribution. In this respect, there is need for a comprehensive restructuring of the ULC with a view to strengthening its independence and autonomy and to insulate it from the nefarious influence of political actors. Such reform will provide a renewed lease for the commission to address the perennial squabbles that can, for example, be seen in the Rwenzori region over the Bigando area. At the same time, the ULC must uplift the Land Fund from the mystery in which it is currently mired in order for its objectives to be attained and to enable the marginalised *bona fide* occupants it was meant to help to actually benefit from its existence and proper functioning.

The major institutions of accountability, such as the Auditor General (AG) and the Inspectorate of Government (IGG) need to be boosted with increased powers of oversight and sanction against errant public officers. Immediate steps need to be taken to establish new mechanisms for the declaration of wealth and for periodical audits to be conducted of high-ranking public servants, security personnel and prominent political actors. In this respect, there is need to revisit the laws governing the public reportage and disclosure of the incomes, assets and liabilities of public officers, starting with the president. In the absence of such transparency, there is no way of establishing in the first instance who owns what, how they acquired it and whether such acquisition matches the officer's resources. That transparency must begin with the highest office in the land, i.e. the presidency.

Judicial orders and findings should be respected by the state and all actors in order to bring an end to the current levels of impunity which plague the arena of land justice. By extension, judicial corruption and the intimidation of judicial officers must be urgently addressed in order to keep the avenues of justice from continuing to deteriorate into avenues of injustice. Finally, there is need for the extensive sensitisation of the masses (especially vulnerable groups and individuals such as the disabled, women and the illiterate) regarding land laws and rights, best uses of land and the workings of land transactions.

### 5.2.2 Medium-term recommendations

The law governing the institutions of land governance – particularly the ULC and DLBs – need to be revamped in order to provide enhanced independence, freedom of operation and improved accountability. Relatedly, the Office of the Directorate of Public Prosecutions (DPP) should be revamped through the introduction of a Lands Prosecution Unit (LPU), devoted

specifically to the investigation and prosecution of those most prominently involved in the land crisis in its various manifestations. There is a need to make the formal justice structures more accessible to the people in order to dispel the fact of courts being an avenue open only to the rich and literate. Thus, for example, the judicial backlog relating to land cases must be expeditiously handled in order to lessen the legal costs that parties incur.

Ways of legalising and incorporating informal land structures into the land dispute resolution matrix, especially with regard to land which is owned customarily, must be sought. This will go a long way in addressing the shortcomings of the formal (court) structures. Accompanying such reform, there is need for the comprehensive review of the status and nature of certificates of customary ownership (CCOs) as a means of understanding how the registration of customarily owned land can be promoted and ownership guarantees over such land enhanced without grossly altering the customary conception of landownership and in a manner that fully secures the confidence of the people. Central to such action is the need to establish and, in practice, to finally elevate the customary ownership of land to be on the same footing as other forms of title. Cultural and spiritual conceptions of land need to be integrated into the general understanding of land and its ownership, which will be in consonance with the expectations and realities of the majority of the people and resolve that aspect of land conflicts. Finally, the printing and distribution of original boundary maps needs to be immediately undertaken with the aim of solving district boundary disputes all over the country.

### 5.2.3 Long-term recommendations

Dual interests over land in the form of user rights being separate from ownership rights (the landlord-*kibanja* holder relationship) need to be extinguished in order to enable both parties to have exclusive control of land. To that end, first of all, the Land Fund must be efficiently run to enable *bona fide* occupants to gain full ownership of the land on which they reside. Legal enactments need to be passed to practically make provision for *bibanja* holders to obtain ownership of that land.

Where possible, such as in the case of the Basongora who once occupied parts of present-day Queen Elizabeth National Park, victims of historical land injustice should be made whole by the government through the payment of compensation or the provision of alternative land for settlement (preferably unoccupied and unencumbered public land). Effective land use must be promoted with the aim of striking a balance between growing people's income and guaranteeing food security. While these measures may go some distance in addressing the manifestations of the land crisis, we reiterate that the underlying structural problems affecting governance and politics in Uganda today must be addressed.

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#### (Footnotes)

- 1 Filed within a year (i.e. filed within 2015 and 2016 respectively) and were still pending by December 2015 (for figures in the 2015 column) and 31 January 2017 (for figures in the 2016 column) respectively. This does not include cases filed and disposed of within a year from those dates.
- 2 Cases that were 1-2 years old (i.e. had been filed in 2014 and 2015 respectively) and were still pending disposal by December 2015 and 31 January 2017 respectively.
- 3 Cases older than two years (i.e. had been filed before 2014 and 2015 respectively) and were still pending disposal by December 2015 and 31 January 2017 respectively.

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