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Should the Government Expropriate Private Land for Investors in Uganda?

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Abstract

In 2001, the Ugandan Government floated a proposal to amend the Constitution to enable the Government to acquire any land compulsorily required for economic investment. The Constitutional Review Commission, 2003, rejected this proposal. Subsequently, the Government withdrew the proposal when it became clear that Parliament was unlikely to support it. This paper revisits the Government's proposal. It explores a possible argument that the Constitution already makes provision for that power. Regardless, the paper seeks to support the Government's proposal.

Introduction

Uganda is one of the poorest countries in the world. Its economy is largely dependent on agriculture. According to the 2010 – 2015 National Development Plan (Uganda Government, 2010, p 45 "NDP"), the Government envisions transforming the Ugandan society from a peasant to a modern and prosperous country within 30 years. Amongst its strategies to that end is to promote and actively encourage domestic and foreign investment in the country as the "engine of growth and development" (NDP). The recent discovery of oil in the Albertine Region, in Western Uganda, is expected to boost investment and economic development in the country. However, investing in Uganda, as in other developing countries, poses several major challenges. One of the challenges is access to land to conduct business. A survey of investors by the Uganda Investment Authority identified access to "vast industrial and agricultural land" as one of the main constraints to investment in Uganda (Uganda Investment Authority, 2012/2013). To many people this is surprising considering the vast unused and underused land in Uganda. Approximately 42% of the available land is arable land, but only 21% is utilised (NDP, p 407). Since the enactment of the 1995 Ugandan Constitution (the current constitution) most of the land in Uganda is in private ownership and the landowners have a right to decide whether to sell or lease their land to investors. The framers of the 1995 Constitution assumed that privatisation of landownership would create a free land market, whereby landowners would sell or lease their excess land to others who wanted to use it. Unfortunately, this has not eventuated; consequently, the problem of land shortage for would be investors.

Under Article 26 of the Constitution, Parliament may enact a law that gives the Government the power to acquire any private land compulsorily if the land is required for certain specified purposes and subject to payment of fair and adequate compensation. As we shall

discuss below, the scope of this power is not clear. In 2000, frustrated by the reluctance of landowners to sell or lease their land to investors, the Government submitted a proposal to the Constitutional Review Commission to amend Article 26 to expressly include "economic development" as amongst the purposes for which the Government could compulsorily acquire land. However, the Constitutional Review Commission overwhelmingly rejected the Government's proposal (Constitutional Review Commission, 2003). During the Parliamentary debate of the Commission's Report, several Members of Parliament spoke against the Government's proposal. Sensing possible defeat of the proposal, the then Prime Minister, Professor Apollo Nsibambi, informed Parliament that the Government had decided to drop the proposal (to the applause of the members). Interestingly, in response to a Member's question the Prime Minister refused to rule out that the Government would never raise the matter in the future because, "We may arrive at a level of development when it may be necessary". (Parliament of the Republic of Uganda Hansards, 2005, February 10).

This paper revisits the Government's proposal. Firstly, the paper investigates the argument that the Parliament in fact already has the power to enact the necessary legislation without the need to amend the Constitution. Secondly, it considers whether the Government *should* have the power to compulsorily acquire land for economic investment. The paper answers the first issue in the negative and supports the proposal to give the Government power to acquire land compulsorily for private investment, where there is significant public benefit.

Land Ownership

A brief background of landownership in Uganda is necessary to give perspective to the ensuing discussion. Prior to the promulgation of the current Ugandan Constitution, 1995, all land in Uganda was "public land" centrally vested and administered by the Uganda Land Commission (Mugambwa, 2002, p 7). No one could hold any interest in land greater than leasehold. People occupying public land under customary land tenure system were by law "tenants at sufferance" of the Government, which meant that the Government could grant the land they occupied to any other person. Since they did not have legal title to land, the Government would only compensate them for the improvements, if any, they had made on the land, (Mugambwa, 2002, p 5).

The 1995 Constitution and the *Land Act of* 1998 ("Land Act"), reformed the land tenure law by vesting most of the land in private ownership. Article 237 of the Constitution states that land in Uganda belongs to the citizens of Uganda, and they own it in freehold, *mailo* (quasi-freehold), leasehold and customary tenure. With the exception of Buganda (Central region) and urban areas, the vast majority of the land is owned in perpetuity under various systems of customary tenure (Ministry of Lands, Housing and Urban Development, 2010).

"Government land" comprises of land vested in or acquired by the Government in accordance with the law (Constitution, Article 239). However, neither the Constitution nor the *Land Act,* defines what constitutes "government land," how to identify it or where it is located. By process of elimination, it is assumed that "government land" includes any land that was held, occupied, and or used by the Government and its agencies before the Constitution came into effect (Mugambwa, 2002, p 7). Examples would include public roads, road reserves, land on which there were government buildings, schools, hospitals, police and military barracks (Ministry of Lands, Housing and Urban Development, 2007). In addition to government land, under the Constitution, (Article 237(2)(b)), the Government holds gazetted forests, game reserves, natural lakes and rivers in trust for the people of Uganda.

Landowners enjoy almost total freedom to deal with their land as they wish. There are no statutorily imposed conditions on landowners to use or develop their land. Moreover, apart from restrictions on the disposal of land on which "family members ordinarily reside and from which they derive sustenance" (*Land Act*, s 39) landowners are free to dispose of all or part of their land to whomever they want. Nor are there restrictions on who can acquire land in Uganda, except that non-citizens of Uganda may not acquire or own land in mailo or freehold. They may acquire leaseholds for a maximum period of 99 years (Constitution, Article 237(2)(c); *Land Act*, s 40(3)). The duration of the lease is a matter for negotiation between the parties.

The 1995 Constitution land tenure reforms, which the *Land Act 1998* implemented, were part of the Government's strategic plan to liberalise the country's economy and open it up for domestic and foreign investment. As stated above, the framers of the Constitution, and the *Land Act*, assumed that privatisation of landownership and the freedom to deal with their land would create a land market in Uganda, whereby landowners would sell or lease their unused or underused land on a willing seller and buyer basis (Adoko and Levine, 2005). They believed that a free land market was a sure way of providing access to land for investment and other economic use, for the socio-economic development of the country. Unfortunately, to date, the land market has not developed as expected. Landowners are reluctant or unwilling to dispose of their land. The reasons for this are many and varied. For some it is because their customary rules preclude disposal of land outside the family or clan (NDP, p 173); others are reluctant because land is their major source of livelihood or security of last resort; others want to keep their land for the future generation. Whatever the reasons, this has created a problem of access to land for would be domestic and foreign investors alike. Multiple tenure rights on most land exacerbate this problem (Constitutional Review Commission, 2003).

Attempts by the Government to persuade landowners to sell or lease land to investors, are usually met with opposing arguments from local political leaders urging them not to do so.

The Government has tried to meet the demand for land for investors by granting them part of the little land that is still under its control, such as school land, hospitals, prisons reserve, and forest reserves. This in turn generates a lot of controversy in the country. Some criticise the Government for depleting land required by the institutions concerned or for its future use. The giving of part of the forest reserve land to investors, in particular, has led to demonstrations and, in some cases, riots (Ministry of Lands, Housing and Urban Development, 2013) and court action against the Government (*Advocates for Natural Resources v Attorney General,* 2013). The question is whether compulsory acquisition of land is the answer.

Compulsory acquisition of land for "public use"

The sovereign power to acquire privately owned land by compulsory means for public good, also variously known as "eminent domain" or "condemnation" or "expropriation", is well known and universal (Reynolds, 2010; Brown, 2004). It is based on the philosophy that in certain circumstances individual proprietary rights may be sacrificed for public good subject to compensation to the person concerned. In Uganda, the power to compulsorily acquire land is enshrined in the Constitution. Article 237(1)(a) states that notwithstanding clause 1 of this article (which declares that land in Uganda belongs to its citizens and is vested in them in accordance with the various land tenure systems) the Government or local government may, subject to Article 26, acquire any land in the "public interest" subject to laws prescribed by Parliament. Article 26(1) declares that every person has a right to own property either individually or in association with others. Article 26(2) prohibits the Government from compulsory taking or acquiring any person's property unless three conditions are satisfied. Firstly, the acquisition must be necessary for public use or in the interest of defence, public safety, public order, public morality or public health. Secondly, the acquisition must be under a law that provides for prompt payment of fair and adequate compensation prior to the taking of possession. Thirdly, the law must provide for a right of access to the courts to interested persons aggrieved by the decision.

Our present concern is with the requirement in Article 26(2)(a) that the acquisition of the land in question is necessary for "public use". There is no definition of the term "public use" in the Constitution or in any other legislation. Certain uses, for example, land required for construction of public roads, public hospitals, public schools, and government offices, clearly would satisfy the requirement of "public use" because not only does the government become the ultimate owner of the land, but also the land is open for use by members of the public. The difficult question is whether the power to acquire land for "public use" includes acquisition of land for private use and ownership, if the use would promote significant public benefit. For example, suppose Kampala City Council Authority (KCCA) seeks to compulsorily acquire certain land in Kisenyi (one of the City slums) for a private investor to develop the land into a modern commercial and industrial zone. Suppose further that the

project is expected not only to benefit the investor but also the public, by for example, directly and indirectly creating hundreds of jobs; injecting billions of shillings into the economy; increasing tax revenue for the council and, of course, clear that part of the slum. The question is whether the KCCA's purpose for acquisition of the land would satisfy the "public use" test within the meaning of Article 26 of the Constitution. To date no Ugandan court case has interpreted the term "*public use*". There are precedents of interpretation of a similar term in other jurisdictions, especially, in the United States of America. We shall refer to some of these cases for guidance of possible interpretation.

The Fifth Amendment of the US Constitution prohibits the Government from compulsorily acquiring private land unless the land is required for "*public use*" and subject to payment of fair compensation. For over a century, the American courts have grappled with the meaning of this phrase. Earlier nineteenth century cases narrowly construed the term "*public use*" to mean land required for *actual* use by the public at large, such as public roads (Freilich and Dierker, 1975). By the twentieth century, the courts had gradually started to move away from the narrow interpretation to a wider interpretation that equated "*public use*" to public "*benefit*" or "*advantage*" (Freilich and Dierker; Nichol JR, 1940; Fishman and Growth, 1972). Then, the courts were more concerned with the overall benefit of the use of the land to the community rather than eventual ownership and use of the land by members of the public (Freilich and Dierker). Part of the reason for this was that the wider interpretation was "better attuned to the social needs of an increasingly industrialized society" and urban re-development (Fishman and Growth, p. 619).

The US Supreme Court judgment in *Berman v. Parker* (1954) illustrates this wide interpretation of the term "public use". In that case, the government sought to compulsorily acquire certain land in Washington DC, pursuant to a statute that authorised the re-development of housing in run-down areas, with the view to transfer it to private developers. Some of the landowners challenged the acquisition as unconstitutional on the ground that acquisition for private investment did not qualify as "public use" within the meaning of the Fifth Amendment. The Supreme Court dismissed the objection in a unanimous decision. It held that the public purpose requirement was satisfied because the entire community would benefit from the improvement of the low-income housing supply. The fact that private investors would conduct the re-development and stood to benefit from the acquisition did not detract from the public purpose of the acquisition (1954, p 24):

> "The public end may be as well or better served through an agency of private enterprise than through a department of government… We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

The decision of the US Supreme Court in *Kelo v. City of New London* (2005) reinforced the wide interpretation of the term "public use" in the US Constitution. In that case, the City of New London (respondents) approved a plan submitted by a private developer to re-develop certain land into offices, restaurants, residences, marinas and parking facilities. The scheme was projected to create in excess of 1000 new jobs in an area where unemployment was trice the national average, to increase significantly tax and other revenues and revitalise an economically distressed city. The developers purchased most of the required land from willing sellers, but nine owners (the petitioners) refused to sell. The respondents sought to compulsorily acquire the petitioners' land (mainly single-family homes) for the developer in exchange for just compensation. The petitioners challenged the acquisition arguing that acquisition for private development did not qualify as a "public use" within the meaning of the *Taking Clause* of the Fifth Amendment to the US Constitution. The Supreme Court, by the narrowest of majority decision, rejected the petitioners' argument. The Court found that the scheme "unquestionably" served a "public purpose" even though it was through a private enterprise. The Court also rejected the petitioners' argument that compulsory acquisition of land for economic development did not qualify as a public use because it "impermissibly" blurs the boundary between public and private takings (2005, p 484):

> "Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes [the courts] have recognized [such as] takings that facilitated agriculture and mining…"

The Court observed that the fact that some private individuals stood to benefit from compulsory purchase of land, as inevitably is often the case, did not necessarily mean that the acquisition was not for a public use or purpose. Hence, in this case although the developers stood to benefit from the re-development the acquisition qualified as a "public use" because of the projected enormous advantage to the community. However, the Court made it clear that this did not mean that in all cases where there was public benefit the acquisition would necessarily satisfy the requirements of public use or benefit; the benefit to the public must be significant. The Court was satisfied that in the instant case the respondents demonstrated significant expected benefit to the public.

Not surprisingly, the Supreme Court's judgment in *Kelo* generated diverse views in the USA. Some writers supported the majority judgment others strongly criticized it (Malloy; Wolf; Claeys, 2008).

Whether a similar interpretation would apply to the term "*public use*" in Article 26(2)(a) of the Ugandan Constitution, is for the Ugandan courts to determine. The US and other foreign judgments, of course, do not bind the Ugandan courts; but they may be of persuasive authority. As we have seen, the US interpretation evolved from a narrow to a wide

interpretation because of the changing social economic circumstances, including increasing reliance on private investors to undertake projects, which earlier were conducted by the government or government bodies. The Ugandan courts may use a similar argument to support a wide interpretation of the term "*public use*" to include use that has significant public benefit even though achieved by private investment. The courts would be aware that increasingly – inevitably - the Ugandan Government has to rely on private investors or public private partnerships to carry out economic activities, including those which traditionally were conducted by the government or state corporations, such as provision of electricity, road construction, hospitals, schools and public housing. A current example of government and private investment is in the oil exploration and production industry. As we shall demonstrate below, a narrow interpretation of the term "public use" may constrain the development of the oil and related industry in the oil-rich Albertine Region in Western Uganda.

On the other hand, the courts, when deciding what weight to attach to the US Supreme Court's interpretation of the term "public use" in *Kelo* would be mindful that the judgment was by a narrow majority and that several American writers have criticised the case. It is possible that on another day the decision could have gone the opposite way. These factors may weaken the significance the courts may otherwise attach to the case.

Secondly, and perhaps the most important argument against a wide interpretation, is the difference in wording between Article 26(2)(a) of the current Constitution and the corresponding provisions in the earlier (abrogated) 1962 and 1966 Constitutions, respectively. Article 22(1)(a) of the 1962 and 1966 Constitutions, respectively, expressly empowered the Government to acquire any land compulsorily, inter alia, in the interest of "the development or utilisation of property in such a manner as to promote the *public benefit*" (my emphasis). Curiously, the current Constitution omits this provision. There is no official explanation for the omission in the *Constitutional Commission of Inquiry Report* (Uganda Constitutional Commission, 1992), which laid the foundation for the 1995 Constitution. Normally, where the legislature changes the wording in a statutory provision the courts assume that the change was deliberate in order to reflect a different meaning. In this case, it is plausible the intention was to limit the scope of the Government's power of compulsory acquisition of land. It is also significant to note that during the drafting stages of the 1995 Constitution, initially the drafter used the term land required in "*public interest*" (my emphasis) but in the final version, Article 26(2)(a), changed the term to "*public use"* (Uganda Constitutional Commission, undated). There is no explanation in the constitutional documents for the substitution. This reinforces the view that the change was deliberate in order to limit the power of compulsory acquisition of land to situations where the Government required the land for "*public use*" in the narrow sense.

The fact that the Government sought to amend the Constitution in order to incorporate in Article 26 the power to acquire land for economic investment, suggest that it was of the view that the term "public use" did not include such powers. It is still open for the Government, if it so wishes, to take a test case to the Constitutional Court to determine whether the term "public use" embraces use that promote public benefit, as was held by the US Supreme Court in *Kelo*'s case. In our view, the chances of the Constitutional Court following the US precedent are minimal. A narrow interpretation of the term seems to be the more likely outcome.

Should the Government have the power?

Regardless of the current legal status, the question remains whether the Government *should* have the power to acquire land compulsorily if required for economic investment. As earlier stated, in 2001 the Government submitted a proposal to the Constitutional Review Commission of Inquiry (the Commission) that "economic investment" be added to Article 26(1)(a) of the Constitution to permit compulsory acquisition of land for purposes of economic investment. The Government argued that compulsory acquisition of land for economic investment was in the public interest because it would promote economic development (Constitutional Review, 2003). In response, the Commission sought to differentiate compulsory acquisitions of land required for investment in a public purpose, such as infrastructure, from land required for economic investment. It agreed that both purposes promote the national economy. However, in its view, compulsory acquisition of land for investment in infrastructure, for example, public roads, power and communication was justified because "all individuals weigh equally on the scale" (Constitutional Review, p 143). In other words, such acquisition was acceptable because regardless of whether the Government or a private person was the investor, equally benefits all investors and members of the public who wish to use the facility (Constitutional Review, p 230). Whereas compulsory acquisition for economic investment:

> "[I]mplies that the State either indulges in private investment directly or facilitates private investors to invest in expropriated property. It has an element of discrimination as between one investor, the one who has invested in the property, and the other investor who is facilitated to acquire and use the property. Justice demands that either the State or the investor buy the property from the owner at an agreed value" (Constitutional Review, p 143).

The Commission also played down the Government's claims of shortage of land for investors. It denied that there was a scarcity of land for investment. If there was such a shortage of land, it attributed the problem to speculators and hoarders and to the country's complex and diverse land tenure system, which was incomprehensible, particularly to foreign investors who preferred freehold title (Constitutional Review, p 230).

We would like to take issue with some of the Commission's reasons for rejecting the proposal. Admittedly, it would be discriminatory, unfair and unacceptable for the Government to force landowners, most likely the poor, to sell or lease their land to investors merely because the investors have the resources to make the land more productive. Likewise, arguably, it would be discriminatory for the Government to facilitate some investors to acquire land by compulsory purchase whilst other investors have to purchase or lease the land from the open market. However, it is submitted that there may well be circumstances where the national interest justifies compulsory acquisition of land for investment whether by the Government or by a private person, in the same way as compulsory acquisition of land for infrastructure, such as construction of public roads, is justified. For example, consider our earlier hypothetical example where the KCCA seeks to compulsorily acquire certain land in Kisenyi slums of Kampala, for re-development by a private investor. In our opinion, to preclude the use of the powers of compulsory acquisition in such circumstances merely because the land is for private investment and/or that it is discriminatory amongst investors unduly impedes the country's social-economic development. It is submitted that all factors must be taken into consideration and determine whether the expected public benefit from the investors' use of the land outweighs other considerations. For instance, in our Kisenyi slum hypothetical, the slum is an eye sore with high criminal rate and mass unemployment. It is most unlikely, if not impossible that the landowners/occupiers of the land will ever be in a position to redevelop the land. It is equally improbable that the KCCA or the Government has the resources to develop the land in the near future. The choice would be either to leave the slum as it is and let it escalate or expropriate the land for investment. Taking into account the expected benefits of the project (jobs, injection of billions of shillings in the economy, increase in tax revenue) public interest in favour of acquiring the land for private investment probably would prevail over other considerations. As the US Supreme Court stated in *Berman* v *Parker* (348 US 26, p 34), private investment may serve public interest as well or better than the Government.

The Constitutional Review Commission also felt that it was unnecessary to amend the Constitution as the Government proposed because the current provisions give the Government latitude to acquire land compulsorily in "every conceivable areas" including urban and country planning, and mineral exploitation. In our opinion, the Government has less power to acquire land compulsorily than the Commission assumed. For example, with reference to land planning, Article 237(7) of the Constitution provides that Parliament may enact laws to enable urban authorities to enforce and implement planning and development. Some may argue that under these provisions Parliament may enact laws, for example, to enable the KCCA to acquire land compulsorily for a private investor to re-develop a Kampala City slum as in our hypothetical example. However, in our view, it is questionable whether the Parliament has the power to enact such legislation. The reason is

Article 237 does not expressly state that legislation to implement planning and development may include compulsory acquisition of land required to implement a scheme. It is submitted that if the framers of the Constitution intended to give the legislature such powers this would have been expressly stated in the Article or included in Article 26(1)(a) as amongst the purposes the Government could acquire land compulsorily. The fact that neither provision mentions it, suggests that it was not their intention. It is also noteworthy that Article 22(1)(a) of the 1962 Constitution, which corresponds with Article 26(1)(a) of the current Constitution, expressly empowered Parliament to enact laws for the compulsory taking of land required for town and country planning. If the framers of the Constitution intended Parliament to have this power, why did they omit it from Article 26(1)(a)? We shall also argue below that Article 244 of the Constitution, as amended, which gives the Parliament power to make legislation for mineral exploitation and production, does not authorise it to enact legislation for compulsory acquisition of land required for the exploitation of minerals.

Examples from other jurisdictions

Apart from the US, in a number of countries the Government has power to acquire land compulsorily required for investment. For example, in Malaysia, under s 3(1)(b) of the *Land Acquisition Act* 1966 (as amended in 1991) the Government has power to acquire compulsorily any land required for the use of a private person or corporation if it considers the intended use beneficial to the economic development of the country or to the public or a section thereof. The Act does not define the term "economic development". Its meaning and scope was raised in the case of *Honan Plantations Sdn Bhd v Karajaan Negeri Johor and others* (1996). The Government compulsorily acquired the disputed land, inter alia, for the development of a new township in a certain region. The opponents to the acquisition sought to argue that that the purpose of the acquisition was not "beneficial to the economic development" of Malaysia. Although the Court avoided interpreting the term "economic development", it remarked that it was a broad term and seemed to include a host of activities and not merely public utilities. On the facts of the case at hand, in its view, the development of a new town was expected to generate new jobs and to boost commercial activities in the region, therefore the acquisition was beneficial to the region's economic development.

The Singaporean *Land Acquisition Act, 1966*, provides another example of legislation giving the Government extensive powers to acquire land compulsorily for a myriad of purposes. Section 5(1) of the Act, gives the Government power to acquire any land if required for any public purpose or by any person, corporation or statutory body for any work or undertaking which, in the opinion of the Minister, is of public benefit, public utility or in the public interest or required for any residential, commercial or industrial purposes. Pursuant to these powers the Government may, for example, acquire private land not only where the

government itself wishes to use the land for any of the specified purposes, but also for a private user provided in view of the Minister the intended use is to the benefit of the public or is in public interest. A declaration by the President that the land is required for the specified purpose is conclusive evidence that the land is needed for that purpose. The conclusiveness of the President's declaration is justified on the ground that the government is in the best position to determine the purpose for which the land is acquired. However, in *Teng Fuh Holdings Pty Ltd v Collector of Land Revenue* (2006), the High Court of Singapore held that, notwithstanding the provision, the courts retain the jurisdiction to intervene if the Government exercises the power in bad faith.

Singapore's Parliament enacted the foregoing provisions a few years after the country attained its political independence. The then Prime Minister justified the extensive powers to acquire land compulsorily as, "desirable in view of the increasing tempo of public development and the need to acquire land for a variety of public purposes, including residential development … industrial development … as well as urban renewal of the City as envisaged in the next few years (Singapore Legislative Assembly Debates, 1964). Since then the Government of Singapore has used its powers to acquire land for various development projects. Some writers attribute Singapore's rapid development to its present status as a "first world", in part to "the bold steps which the State had taken to acquire land for public purposes in the past" (Chew, Hoong, Koon and Manimegalai, 2010, p 167).

India is another example. Until recently, under the Indian *Land Acquisition Act 1894*, as amended, the Government had the power to acquire land compulsorily, inter alia, with the ultimate purpose to transfer the land for the use of private companies for commercial/industrial investment. The Government used this power, for example, to acquire land for setting up industrial zones and lease the land to investors. This Act has been repealed and replaced by the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* (The Gazette of India, 2013). The new Act retains provisions giving the Government the power to acquire land compulsorily, including for private investment, but its scope is limited and subject to stringent conditions (Ramanathan, 2011; Haq, 2013; NAPM, 2013; Vij, 2013).

Of course, not everyone in these countries supports compulsory acquisition of land for economic development. In the USA, for example, some argue that it usually entails taking land from the poor and granting it to the rich. They see it as exploitation of the poor to benefit the rich in the name of economic development (Malloy and Smith). Others criticise it on ideological grounds as an attack on fundamental human rights of private ownership of property (Singer, 2006; Kerekes). In Malaysia, in the debate leading to the amendment of the *Land Acquisition Act*, the leader of the opposition painted a pessimistic picture of the legislation. He described compulsory acquisition of land for economic development as the

"mother of all corruption, abuses of power, conflict of interest and unethical malpractices" (Bibliotheca, 1991). He predicted that it would "open the floodgates for wholesale acquisition of urban areas for 'development' and profiteering by individuals and politically favoured … companies" (Bibliotheca). Others critics predicted that the provision would render the poor landless, as the Government would convert their land into golf courses under the pretext of development (Bibliotheca). Similar criticisms are also made in India (Ramanathan; Haq, NAPM; 2013; Vij). We will revert to some of these criticisms below in Uganda's context.

Support of the proposal

We support the proposal to empower the Government to compulsorily acquire any land if required by the Government and or private investor for economic investment, provided the expected public benefit significantly outweighs other considerations. Our earlier hypothetical in relation to the "re-development of Kisenyi slums" illustrates, possible such circumstances.

Another scenario, will further demonstrate why it is necessary for the Government to have this power. This deals with a topical national issue: the exploitation of the oil recently found in the Albertine Graben region, Western Uganda. Suppose that the Government grants a company licence to produce petroleum. The company, of course, will require land in a particular area to construct a refinery, office buildings, and residential houses for its employees. The land in question is in private ownership. The company tries to negotiate with the landowners to purchase or lease the land it requires, but the landowners or some of them refuse to sell or lease their land to the company under any circumstances or only on terms, which, for present purposes we shall describes as "unreasonable". Attempts by the Government to persuade the landowners to sell or lease their land to the company are unsuccessful. The question is whether under the current law the Government has the power to acquire the land compulsorily for the company.

A bit of background is necessary to give perspective to our example. Article 244(1) of the Ugandan Constitution, as amended, provides that:

> "Subject to article 26 of this Constitution, the entire property in, and the control of, all minerals and petroleum in, on or under, any land … are vested in the Government on behalf of the Republic of Uganda".

The Article gives Parliament power to enact legislation, inter alia, to regulate the exploitation of minerals and petroleum. Pursuant to this Article, Parliament enacted the *Petroleum Exploration, Development and Production) Act, 2013*. The Act, amongst other things, gives the Government power to grant petroleum exploration and production licences (sections 58 and 75). To date the Government has issued a few exploration licences

to giant international oil companies, such as Britain's Tullow Oil Ltd and China's state-owned China National Offshore Oil Corporation (Reuters, 2014). The Government is yet to issue production licences, though, reportedly, it has shortlisted several companies bidding for production licences. Inevitably, oil production will attract other investors to the region to exploit business opportunities directly or indirectly created by the oil industry. Consequently, access to land for investors is bound to be a critical issue. The Government is already involved in compulsory acquisition of land in the region for infrastructure and for construction of a refinery (Daily Monitor, 2014). We stated earlier that compulsory acquisition of land for infrastructure clearly satisfies the Constitutional requirement of "public use"; hence, it is unlikely to cause serious legal controversy. So far, the only controversy is over the assessment and delays in payment of compensation (Tumusiime, 2012). However, we shall argue below that compulsory acquisition of land required for construction of the refinery contravenes the Constitution.

In our hypothetical example, because under Article 244(1) of the Constitution the Government owns all minerals and oil wherever found in Uganda some may argue that "of course" the Government has the power to acquire any land required in connection with the oil development. This, indeed, seems to be the present thinking of the Government as demonstrated by President Museveni's recent statement during a conference on mineral wealth, in Kampala (Wesonga, 2014). The President announced that the Government was planning to amend the Mining Act, 2001, so that intending investors in the mining industry, instead of negotiating with the landowners for access to land that contains minerals, they would negotiate directly with the Government. Apparently, this is in reaction to reports of frustration of investors in negotiating with some landowners who, for various reasons, were refusing to lease their land. The President reasoned that, "The people who have to give you consent are the people who own the minerals, and that is the government. The other man [landowner] has no consent to give because the property is not his. … [They] cannot stop the State from accessing its assets" (Wesonga).

It is submitted, however, that the legal position is not that straight forward. Article 244(1) does not state that the land on or in which minerals and petroleum are found become the property of the State. The implication is that the land minus the minerals remains the property of the respective landowners. (This is the same legal position in England and in most countries, which adopted English law, such as Australia.) If the framers of the Constitution intended to give the Government the power to compulsorily acquire any such land this would have been stated in the Article. The Article starts with the proviso, "*Subject to article 26*". In legislative drafting, the term "subject to" is the standard way for making it clear which provision is to govern in the event of a conflict between provisions (*C & J Clark Ltd v Inland Revenue Commissioners,* p 911*).* In this context, it is submitted that the proviso

in Article 244(1) precludes Parliament from enacting legislation that contravenes the requirements of Article 26. Therefore, legislation that purports to give the Government power to acquire compulsorily land in the oil-rich area must comply with the requirements of Article 26. So far, for present purposes, the *Petroleum Exploration, Development and Production Act, 2013*, is the only legislation Parliament has enacted under Article 244 of the Constitution. The legislation, inter alia, gives the Government power to grant exploration licences to investors with a right to enter any land with or without the landowner's consent to explore for petroleum. It is submitted that this power does not violate Article 26 of the Constitution. The reason is the licence to enter does not *deprive* landowners of possession of their land nor constitute acquisition of the land. Section 138 of the Act, rightly, provides that if holders of exploration licences require exclusive use of the land they may negotiate with the landowners to grant them a lease. There is no provision in the Act (*Petroleum Exploration, Development and Production Act*) giving the Government power to compulsorily acquire land required, for example, for construction of the oil refinery and other purposes mentioned in our hypothetical. In our view, such provision would be void under the Constitution. The same would be the case if the President's proposed amendment to the Mining Act 2001, purport to give the Government power to lease to investors land, where minerals deposits exist, without the consent of the landowners.

To date the *Land Acquisition Act* (chapter 226, Laws of Uganda) is the only legislation, which gives the Government general power to acquire any land compulsorily. Section 2 of the Act states, inter alia, that the Government may acquire any land it requires for a "*public purpose*". As readers may recall, Article 26 states that the Government may acquire land it requires for "*public use*". The Act came into effect before the Constitution. The Constitution is, of course, the supreme law of the land and any law that is inconsistent with its provisions is void to the extent of inconsistency (Article 2). As discussed above, whether s 2 of the *Land Acquisition Act* is inconsistent with the Constitution in this regard, will depend on how the courts interpret the term "public use" in Article 26 of the Constitution. If the courts interpret the term widely as including any purpose in the "public interest", then, arguably acquisition of the land for our hypothetical oil company would satisfy the public interest threshold. However, as we suggested, the courts are more likely to adopt a narrow construction of the term "*public use*" to refer to land actually required for the Government's own use or for investment in infrastructure. Accordingly, in our scenario, the acquisition of land for the oil production company would not satisfy the requirements of Article 26 as the land is required not for infrastructure but for economic investment by a private investor. Moreover, if the courts adopt the views expressed by the Constitutional Review Commission that land required for economic development, including by the Government, must only be acquired from willing sellers, it would not make a difference that the purpose of acquisition is for a public-private partnership investment with the oil company. It follows from our analysis that the reported acquisition of land for the construction of the oil refinery is

unlawful. The fact that the Government expects oil development to be the main driver of the country's social-economic development is irrelevant to the interpretation of Article 26. It is submitted that the proviso *"Subject to Article 26*" in Article 244(1), reinforces this proposition.

Many Ugandans, including President Museveni, rightly, would be amazed that although the Government owns all minerals and petroleum wherever found in the country it has no power to compulsorily acquire the land that contains these resources. Yet, that seems to be the current legal position. The hypothetical, in our view, demonstrates why the Government must have the power to acquire any land required for the production of oil. The oil industry will of course attract numerous other related and unrelated industries and businesses, especially, in the oil rich region. Some of the industries might be of such significant benefit to the country as to justify the Government to acquire compulsorily the land required to establish the industry in question. Moreover, in many cases it would be extremely difficult to determine whether a particular industry relates to oil production. Therefore, the proposed amendment to the Constitution should not be limited to acquisition of land required for mineral or oil production but for "economic development".

There is no doubt that the proposal to amend the Constitution to provide for compulsory acquisition of land required for economic development, will meet a lot of resistance and scepticism within and without Parliament as was the case when the Government floated it fifteen years ago. The criticism will include, for example, that the Government will use "economic development" as pretext for land grabbing from the poor to facilitate the rich and the well connected to become even richer. Others may criticise the proposal because, it will potentially promote discrimination between the investors whom the Government facilitates to acquire land and other investors, including the landowners it forces to give up their land (Constitutional Review Commission, p 142). Some may argue that forcing landowners to give up their land to investors would constitute violation of the landowners' human rights to own and enjoy their ancestry land. Others may argue that forced land sale will lead to landlessness and more poverty, especially, because to most Ugandans land is their sustenance and security of last resort. Peasant landowners are likely to use the compensation money to purchase consumable rather than investing it. Once the money is gone, they will have nothing to fall back on. Potential for corruption is another likely major criticism of the proposal. Already the media is awash with stories of alleged corruption involving allocation of government land to private investors. Giving the Government power to expropriate land required for private investment will exacerbate corruption in the name of investment. Others may point to the risk of social disorder, especially, if the Government acquires the land for foreign investors.

We agree that the proposal to give the Government the power to compulsorily acquire land required for economic investment has many potential downsides. Notwithstanding, in our

view, the way forward is not to reject the proposal, but rather to put in place measures necessary to eliminate some of the potential problems identified above. These must include education or informing members of the public why in some cases it may be necessary for the Government to force landowners to sell their land to investors. Already, most people are familiar with the Government's power to acquire land compulsorily if required, for example, for road construction. Of course, most landowners resent being forced to give up their land, but they accept it because they understand the rationale, the sticking point usually only being over the assessment of compensation. The same reasoning should apply in respect of acquisition of land for investment. Equally important, the power to acquire land compulsorily must not be at the forefront of Government policy. There must be a mechanism to ensure that the Government only uses it after it or the investor has exhausted all reasonable attempts to acquire the land on a willing seller and willing buyer basis and the land in question is essential for the proposed investment. Obviously, the expected benefits of the investment to the country or community must be significant and demonstrated to justify such a drastic action.

Corruption is rampant in all branches of government in Uganda, as it is in most developing countries. Several measures need to be taken towards elimination of potential corruption and abuse of the power of compulsory acquisition of land. These may include a requirement of transparency, for example, by publishing in the newspapers the identity of the land required, the reasons for requiring the land and the identity of the potential grantee(s). Another possible measure is to subject a proposed acquisition to scrutiny by a parliamentary or other committee before the relevant Minister, or, preferably, the President ratifies the acquisition. Article 26(2)(b)(ii) of the Constitution requires that any legislation that provide for compulsory acquisition of land must contain a provision giving any interested person a right of access to court. The parliamentary scrutiny would provide another layer of protection and transparency.

Compensation

Compensation for landowners is another critical matter, which needs careful consideration. Already there is controversy over compensation paid to landowners whose land the Government acquired compulsorily for road construction in Kampala City and in the oil region. Many landowners accuse the Government of inadequate compensation for their land and evicting them from the land before payment (Tumusiime, 2012). As we stated earlier, Article 26(2)(b)(i) of the Constitution provides that legislation for compulsory acquisition of land must provide for prompt payment of "fair and adequate compensation, prior to the taking of possession or acquisition of the property". The Constitutional Court of Uganda, in its recent judgment declared that section 7(1) of the *Land Acquisition Act*, which empowers the Government to take possession of any land it acquired compulsorily prior to

payment of compensation was void because it contravenes this Article (*Advocates for Natural Resources and others v Attorney-General*, 2013).

Neither the Constitution nor the *Land Acquisition Act* has a definition of "fair and adequate" compensation. To date there is no Ugandan court judgment on the interpretation of this phrase. Generally, the phrase when used in the context of compulsory acquisition of land it means the fair market value of the land at the time of acquisition. Probably, that is how the Ugandan courts would interpret the phrase. Of course, in practice it would be very difficult to determine what constitutes fair and adequate compensation of a person who the Government has forced to part with his or her land to make way for "rich" investors. We argue that prima facie, wherever possible the Government must assist the landowners to resettle in other areas. Moreover, there may well be an argument in favour of granting compensation in excess of the market value of the land acquired for private investment as opposed to land acquired for public use. In appropriate cases, compensation may include a requirement to offer the landowners job opportunities and or shares in the business established on the land in recognition of their contribution to the business. To eliminate the temptation of spending the compensation money on consumables rather than investment, the compensation need not be in a one off lump sum. Instead, some of the compensation could be in a form of periodic ground rent payment for the life of the business conducted on the land. This would guarantee them regular income as a form of social security. These are just a few examples of a myriad of ways of ensuring that as much as possible the landowners obtain "fair and adequate" compensation for giving up their land in public interest. We have drawn on the Indian Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (The Gazette of India), for some of these proposals. Invariably, the manner of compensation will vary depending on the circumstances of each individual case. Compensation together with educating the people why compulsory acquisition for investment is necessary, might go some way towards easing the pain of forced sale of one's land.

Conclusion

The Constitution of Uganda prohibits compulsory acquisition of land except, inter alia, where the land is required for public use. The courts have not yet defined this term. We have expressed the view that courts will interpret it narrowly to mean land required for use by members of the public, such as for infrastructure. If that is the correct interpretation, in our view, the scope of the Government's power to acquire land compulsorily is severely limited, which is detrimental to the country's socio-economic development. We have demonstrated, for example, that under the current law the Government cannot compulsorily acquire land required by a petroleum processing company to establish its industry because the land is not required for "public use" (or any other purposes stipulated

in Article 26 of the Constitution). Most Ugandans would find it preposterous that although the Government owns all minerals and oil wherever found in Uganda, it cannot compel the landowners to surrender the land required to exploit the resources. We have argued in favour of the Government's original proposal to amend Article 26(2)(a) of the Constitution in order to include compulsory acquisition of land required for investment not only for the development of the oil industry but also in all circumstances where there is significant public benefit in acquiring the land. We disagree with the recommendation of the Constitutional Commission that compulsory acquisition of land for investment whether by private investors or the Government is objectionable, except where the land is required for public use. In our opinion, the question of whether the land the Government seeks to acquire compulsorily is required for public use is an important factor, indeed a critical factor, but must not be the determinant factor. The determinant factor for compulsory acquisition should be "public interest", which includes "public use" and "private use".

Finally, we suggested various checks and balances to eliminate possible misuse of the proposed powers and to protect landowners. Admittedly, compulsory acquisition is never a perfect solution; it will always leave a bitter pill in the mouth of most landowners, regardless of the amount of compensation. We hope that when the people see tangible benefits of the acquisition there will be less opposition.

Postscript

According to recent media reports, the Government has appointed a Cabinet subcommittee to consider submission to the Constitutional Review Commission a proposal to amend Article 26 to "legalise compulsory land acquisition [for investment] in strategic areas" in order to "boost investments needed to create jobs". Predictably, some political leaders have already expressed hostility towards the proposal and have vowed to fight it (Mugerwa, Evotaru, Nalugo, Imaka, Arinaitwe, and Wesonga, 2014). Notwithstanding, we submit that the country needs to debate the proposal and its merits weighed against all other considerations. We hope members of parliament and other political leaders will debate the proposal in a rational manner in the interest of the country. Unemployment is rife. The country needs massive capital investment in the oil industry and other sectors to boost the economy. Without private investment, the Government's vision of converting Uganda into a middle-developed country by 2030 will remain a dream.

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