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Proposal for Compulsory Land Acquisition for Economic Investment in Uganda

John Mugambwa
Murdoch University

Abstract

Under the Ugandan Constitution, the Government has the power to expropriate any land required for public use. This power does not include expropriation of land for economic investment. The writer argues that the Government should have this power, subject to appropriate checks and balances.

Introduction

Uganda's economy is largely dependent on agriculture. According to the 2010 - 2015 National Development Plan (NDP) (Government of Uganda [GoU], 2010, p.37), the government envisions transforming Ugandan society from a peasant-based to a modern and prosperous country within 30 years. To this end, one of its strategies is to promote and actively encourage domestic and foreign investment in the country as the "engine of growth and development" (-p.43). Uganda expects the recent discovery of oil in Western Uganda to boost investment and economic development. However, investing in Uganda, as in other developing countries, poses several major challenges. One of these challenges is gaining access to land to conduct business. A survey of investors identified access to "vast industrial and agricultural land" as one of the main constraints to investment in Uganda (Uganda Investment Authority, 2013, p.7). Since the enactment of the 1995 Ugandan Constitution (current constitution) most of the land in Uganda is in private ownership.

This article reviews the scope of the government's power to acquire land compulsorily. The article seeks to argue that the government's lack of power to acquire land compulsorily for economic investment may hamper the country's socio-economic development. It proposes the amendment of Article 26 of the Constitution, to include economic investment, as one of the grounds for compulsory acquisition of land. The article proposes various measures to protect the landowners and to eliminate possible abuse of the powers.

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 Constitution, all land in Uganda was public land centrally vested and administered by the Uganda Land Commission (Mugambwa, 2002, p.7). 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. 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. 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. Nor are there restrictions on who can acquire land in Uganda, except that non-citizens of Uganda may only acquire leaseholds for a maximum period of 99 years (*Land Act*, s 40[3]). The duration of the lease is a matter for negotiation between the parties.

The land tenure reforms were part of the government's strategic plan to liberalise the country's economy and open it up for domestic and foreign investment. The framers of the Constitution 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 land on a willing seller and buyer basis (Adoko & 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. In the event, 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; others are reluctant because land is their major source of livelihood or security of last resort. Whatever the reasons, this has created a problem of access to land for would be domestic and foreign investors alike. 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.

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 (CRC) to amend Article 26 of the Constitution to allow compulsory acquisition of land required for economic development. However, the CRC rejected the government's proposal (CRC 2003). Sensing political unpopularity the government

dropped the proposal. Meanwhile, the government tries to meet the demand for land for investors by granting them part of the land that is still under its control, such as prisons, schools and hospitals land and forest reserves. This in turn generates considerable 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 has led to demonstrations and, in some cases, riots and court actions against the government.

Recently, the Government reportedly appointed a Cabinet subcommittee to consider yet again submission to the CRC another proposal to amend Article 26 to *legalise* compulsory land acquisition for investment in order to “boost investments needed to create jobs” (Mugerwa, 2014, p.1). Clearly, the issue is still alive.

Scope of the Government’s power

The sovereign power to acquire privately owned land by compulsory means for the public good, also variously known as *eminent domain* 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 the public good, subject to compensation for persons concerned. In Uganda, the power to acquire land compulsorily is enshrined in the Constitution. Article 237(1)(a) states that notwithstanding clause 1 (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 may, subject to Article 26, acquire any land in the *public interest* subject to laws prescribed by Parliament. Article 26(2) prohibits the government from compulsory taking or acquiring any person’s property unless three conditions are satisfied. First, the acquisition must be necessary for public use or in the interest of defence, public safety, public order, public morality or public health. Second, the acquisition must be under a law that provides for prompt payment of fair and adequate compensation prior to the taking of possession. Third, the law must provide for a right of access to the courts for interested persons aggrieved by the decision

The present concern here 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 the construction of public roads or government offices, clearly would satisfy the requirement of *public use* because, not only does the government

become the ultimate owner of the land, the land is also 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 acquire compulsorily certain land in Kisenyi (one of the city slums) for a private investor to re-develop the land as a modern commercial zone. The project is expected to create hundreds of jobs and inject billions of shillings into the national economy. The question is whether the proposed acquisition is for *public use* within the meaning of Article 26 of the Constitution. To date no Ugandan court case has interpreted this term. Judged by the proposals to amend Article 26, clearly, both the CRC and the Government of Uganda interpret the term narrowly to mean *land required for use* by the government. Therefore, the KCCA's purpose for acquisition would be unlawful.

In the United States of America, in contrast, the Supreme Court interpreted a similar term in the Fifth Amendment of the US Constitution to include expropriation of land for private investment where there was demonstrable significant public benefit (*Kelo v. City of New London*, 2005). If the Ugandan courts adopted a similar interpretation, arguably, the KCCA's purpose for acquisition of the land would satisfy the *public use* threshold. For purposes of this article, we shall assume that *public use* in Article 26 does not include economic investment.

Should the Government have the power?

In its submission to the CRC, the government argued that compulsory acquisition of land for economic investment was in the public interest because it would promote economic development (CRC, 2003). In response, the CRC sought to differentiate compulsory acquisitions of land required for investment for 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 investors and members of the public who wish to use the facility equally benefit (CRC, 2003, pp. 143, 230). Whereas compulsory acquisition for economic investment:

[I]mply 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” (CRC, 2003, p 143).

The CRC also played down the government’s claims of shortage of land for investors. 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 (CRC, 2003, p.230).

Admittedly, it would be 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, it would be discriminatory for the government to facilitate the acquisition of land by compulsory purchase for some investors whilst other investors have to purchase or lease the land on the open market. However, it is argued here, there may be circumstances where compulsory acquisition of land for investment may be justified in the national interest in the same way as compulsory acquisition of land for infrastructure is justified. In this author’s opinion, to preclude compulsory acquisition merely because the land is for private investment and/or that it is discriminatory amongst investors unduly impedes the country’s socio-economic development. All factors must be taken into consideration and it be determined whether the expected public benefit from the investors’ use of the land outweighs other considerations. For instance, in the Kisenyi slum hypothetical, the slum is an eye-sore with a high crime rate and mass unemployment. It is improbable that the landowners/occupants 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 deteriorate or expropriate the land for investment. Considering all circumstances, public interest might favour expropriation of the land for private investment. As the US Supreme Court stated in *Berman v Parker*, private investment may serve the public interest as well or better than the government.

The CRC also felt that it was unnecessary to amend the Constitution as the government proposed because its current provisions give enough latitude to acquire land compulsorily in “*every conceivable areas*” [emphasis added] including mineral exploitation (CRC, 2003, p 143). In the author’s opinion, the government has less power to acquire land

compulsorily than the CRC opined. We shall argue below that Article 244 of the Constitution, 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 if required for investment. For example, in Malaysia, the *Land Acquisition Act 1966*, as amended, gives the government 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. For example, in the case of *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 5 MLJ 129.*, the Court held that acquisition of land for the development of a new town was beneficial to the region's economic development because it would generate new jobs and boost commercial activities in the region.

Similarly, the Singaporean *Land Acquisition Act, 1966*, as amended, gives the government extensive powers to acquire land compulsorily for myriad purposes. For example, the government may acquire private land for any of the specified purposes 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. The first Singaporean Prime Minister justified these powers 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” (Parliament of Singapore, 1964). 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” nation, in part to “the bold steps which the State had taken to acquire land for public purposes in the past” (Chew, Hoong, Koon & Manimegalai, 2010, p 167).

India is another example. Until recently, under the Indian *Land Acquisition Act 1894*, the government had the power to acquire land compulsorily, inter alia, with the ultimate purpose of transferring 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 since 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; National Alliance of People's Movements [NAPM], 2013; Vij, 2013).

Of course, not everyone in these countries supports the compulsory acquisition of land for economic development. In the USA, for example, some argue that it is a form of exploitation of the poor to benefit the rich in the name of economic development (Malloy & Smith, 2008). Others criticise it as an attack on the fundamental human right of private ownership of property (Singer, 2006; Kerekes, 2011). In Malaysia, in the debate leading up to the amendment of the *Land Acquisition Act*, the leader of the opposition predicted that it would "open the floodgates for wholesale acquisition of urban areas for 'development' and profiteering by individuals and politically favoured ... companies" (Siang, 1991).

Should Uganda follow suit?

This article supports the proposal that the government should have the power to acquire compulsorily any land required for economic investment, where the expected public benefits outweigh other considerations. In the author's opinion, the *re-development of Kisenyi slums* hypothetical illustrates such possible circumstances. Another hypothetical, which deals with a topical national issue: the exploitation of the oil recently found in Western Uganda, will illustrate further this point. Suppose that the government grants a company licence to produce petroleum. The company requires land in a particular area to construct a refinery, office buildings and residential houses for its employees. The company tries to negotiate with the landowners to purchase or lease the land it requires, but the landowners refuse to sell or lease their land to the company under any circumstances or only on terms, which, for present purposes we shall describe as *unreasonable*. Attempts by the government to persuade the landowners to sell or lease their land to the company are unsuccessful. We argue below that under the current law the government has no power to acquire the land compulsorily for the company. The question is whether it should have the power.

A bit of background is necessary to give perspective to this example. Article 244(1) of the Ugandan Constitution 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 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. To date, the government has issued a few exploration licences to giant international oil companies. 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 the construction of a refinery (Mugerwa, 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. The issue is whether compulsory acquisition of land required for construction of the refinery contravenes the Constitution.

In this example, some may argue that the government has the power to acquire any land required in connection with the oil development because under Article 244(1) it owns all minerals and oil wherever found in Uganda. This, indeed, seems to be the present thinking of the government as demonstrated by President Museveni's statement during a conference on mineral wealth. 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 was in reaction to reports of frustration of investors in negotiating with some landowners who for various reasons, were refusing to lease their land. Museveni reasoned that, "[t]he people who have to give you consent are the people who own the minerals, and that is the government. The other man [sic - landowner] has no consent to give because the property is not his [sic]. ... [They] cannot stop the State from accessing its assets" (Wesonga, 2014).

In the author's opinion, 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 that 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*” [emphasis added]. In legislative drafting, the term *subject to* is the standard way of making it clear which provision is to govern in the event of a conflict between provisions (*C & J Clark Ltd v Inland Revenue Commissioner [1973] 1 WLR 905*). In the author’s opinion, the purpose of the proviso in Article 244(1) is to preclude parliament from enacting legislation that contravenes 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. This power does not violate Article 26 of the Constitution, because 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 giving the government power to expropriate land required, for example, for construction of an oil refinery and other purposes mentioned in our hypothetical. In any case, in the author’s 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*, purported to give the government power to lease to investors the 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 that gives the government general power to acquire any land compulsorily. The Act states, inter alia, that the government may acquire any land it requires for a “*public purpose*” [emphasis added]. 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 the supreme law of the land and any law that is inconsistent with its provisions is void. This article

assumes that *public use* means land actually required for the government's own use or for investment in infrastructure. Accordingly, in this present 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 CRC 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 this 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 socio-economic development is irrelevant to the interpretation of Article 26. The proviso "*Subject to Article 26*" in Article 244(1) reinforces this proposition [emphasis added].

Many Ugandans, including President Museveni would rightly be amazed that although the government owns all minerals and petroleum wherever found in the country it has no legal power to expropriate the land that contains these resources. Yet, that seems to be the current legal position. The hypothetical, in the author's view, demonstrates why the government should have this power. The oil industry will attract numerous other 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 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*.

Predictably, the proposal 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, and including the landowners, it forces to give up their land (CRC, 2003, 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 ancestral 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 to purchase consumables rather than investing it. Once the money is gone, they will have nothing to fall back on. Potential for corruption is another 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.

It is agreed here that the proposal has many potential downsides. Notwithstanding, in the author's 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 educating 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. Although most landowners resent being forced to give up their land 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 itself 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.

Corruption is rampant in all branches of government in Uganda, as it is in most developing countries. Several measures need to be taken towards the elimination of potential corruption and abuse of the power with regard to compulsory acquisition of land. These may include a requirement of transparency, for example, by publishing in the newspapers the location of the land required, the reasons for requiring the land, the identity of the potential grantees and rigorous parliamentary scrutiny.

Compensation for landowners is another critical matter that 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 paying inadequate compensation for their land and evicting them from the land before payment (Tumusiime, 2012). 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”. Neither the Constitution nor the *Land Acquisition Act* has a definition of *fair and adequate* compensation. 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 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. It is argued here 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. 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. The Indian *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* has been drawn on for some of these proposals. Invariably, the manner of compensation will vary depending on the circumstances of each individual case.

Conclusion

The Constitution of Uganda prohibits compulsory acquisition of land except, *inter alia*, where the land is required for *public use*. The view has been expressed here that the scope of the government’s power to acquire land compulsorily is severely limited, which may be detrimental to the country’s socio-economic development. This article has demonstrated for example, that the purported compulsory acquisition of land required by a petroleum processing company to establish its industry is unlawful, because the land is not required for *public use* (or any other purposes stipulated in Article 26 of the Constitution). This article has argued in favour of amending 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. The author disagrees with the recommendation of the CRC that compulsory acquisition of land for investment, whether by private investors or the government, is objectionable *per se*, except where the land is required for public use. In the author's opinion, the question of whether the land the government seeks to acquire compulsorily is required for *public use* is an important factor, but must not be the sole determinant. This article has suggested various checks and balances to eliminate possible misuse of the proposed powers and to protect landowners. Compulsory acquisition is never a perfect solution; it will always leave a 'bitter pill in the mouth' of most landowners; but it may be necessary for the *public good* to be achieved.

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