

LAND REFORM AND CUSTOMARY RIGHTS: THE CASE OF UGANDA

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Over the last ten years land reform has been the subject of intense debate in Uganda. Some of the issues that have arisen (e.g. the future of customary land tenure) are familiar and have been discussed at length in the context of land reform elsewhere in sub-Saharan Africa. Others are rooted in Uganda's particular historical context. The Land Act 1998 (No. 16 of 1998) is the end-product of this debate. It is not a comprehensive code of land law, but it does provide a legal framework governing land tenure, land administration and the settlement of land disputes. Issues of land policy are worked out in some detail in the Act, reflecting the view that a law which recognizes and protects private land rights needs to be specific and clear and that a law which provides for the exercise of powers by officials needs to spell out clearly how such powers are to be exercised, leaving as little as possible to administrative discretion.¹ The Land Act is certainly the most important piece of land legislation since the Land Reform Decree 1975² (which it repeals) and, arguably, it represents as great a revolution in land relations as the Uganda Agreement and other reforms ushered in at the start of the colonial period. Inevitably, it is highly controversial.

In this article I propose first to set out the principal reforms introduced by the Act under three headings (mailo land, customary land, land administration) and then to select for further discussion certain issues of general interest raised by the Act.

REFORM OF MAILO LAND

The most intractable policy issue facing the government was, undoubtedly, the future of mailo land. Indeed, ever since the Uganda Agreement of 1900 between the British Government and the Kingdom of Buganda granted some 8,000 square miles of land (hence known as "mailo" land) to the Kabaka of Buganda and various other chiefs and notables, the nature of the rights of those who had traditionally occupied and farmed those lands has always been a vexed question. In spite of colonial legislation designed to protect customary tenants of this kind, their position was always vulnerable. The Land Reform Decree, 1975, which declared all land in Uganda to be public land to be administered by the Lands Commission, further weakened their position. All freeholds including mailo ownership rights were converted into 99-year government leases and customary tenancies on mailo land were converted into customary tenures on

* I am grateful to Patrick McAuslan for making certain materials available to me.

¹ Patrick McAuslan has argued forcefully in favour of "more" rather than "less" law in the context of land law reform in Tanzania. See Patrick McAuslan, "Making law work: restructuring land relations in Africa" (1998) 29 *Development and Change* 525 at 534ff. The Land Act of Tanzania, for which he was in large part responsible, runs to 186 sections. He applied the same principles in assisting with the drafting of the Ugandan Act; the original Bill was much shorter.

² Apart from the controversial "reforms" introduced by the Decree (promulgated during Amin's regime), the fact that it was poorly drafted and incompletely implemented has led to considerable uncertainty in land matters, an uncertainty which has been compounded by the chaotic state of the land registry system.

public land with little security of tenure. In the discussions on land policy that took place during the 1990s the former mailo owners pressed for the full restoration of their rights while the customary tenants for their part demanded security of tenure of the lands they occupied.

The 1995 Constitution sought to address the land question. While Article 237(1) declared that land in Uganda belonged to the citizens of Uganda, clause (3) made it clear that land was to be held on one of the following four tenures: customary, freehold, mailo and leasehold. Although mailo ownership is equivalent to freehold ownership, the clause left no doubt that the 1975 conversion of mailo rights had been reversed. On the other hand, clause (9) required Parliament within two years to enact a law (a) regulating the relationship between the lawful or *bona fide* occupants of mailo, freehold or leasehold land and the owners of the land, and (b) providing for the acquisition of a registrable interest in the land by the occupant. In the meantime the occupant was to enjoy security of tenure. The determination of the precise nature of the relative rights of owners and occupants was thus deferred. However, while it was obviously desirable to hold consultations on the issue, it was equally obvious that it would be impossible to secure a consensus.

The Land Act severely restricts the powers of the mailo and other (freehold and leasehold) owners.³ On the one hand, mailo owners are given all the powers of a freehold owner and are stated to hold their land in perpetuity.⁴ On the other hand, their tenure is subject to the customary and statutory rights of those persons in lawful or *bona fide* occupation of the land. A "lawful occupant" is defined to include customary tenants as well as any other person who has entered the land with the consent of the owner.⁵ A "*bona fide* occupant" includes those who had been in adverse possession of the land for at least twelve years before the coming into force of the Constitution and those who had been resettled on the land by government before that date.⁶ Given that customary law does not recognize the acquisition of rights by adverse possession, this definition (targetting absentee landlords) was controversial.

Both lawful and *bona fide* occupants enjoy what the Act terms a "tenancy by occupancy"⁷ and the incidents of such a tenancy are set out in some detail. The tenant enjoys security of tenure⁸ and is entitled to apply for a certificate of occupancy.⁹ He is required, however, to pay the owner an annual nominal ground rent.¹⁰ A tenancy by occupancy may be inherited and it may, with the consent of the owner, be assigned, sub-let, pledged, subdivided etc.¹¹ Where the tenant wishes to assign his tenancy or the owner wishes to sell his reversion, he

³ Given the emphasis on furthering social justice in land matters contained in Directive IX (iii) of the Constitution, this was hardly surprising.

⁴ S. 4.

⁵ S. 30(1).

⁶ S. 30(2). A person who had been in adverse possession for less than twelve years is required by s. 31(1) to negotiate with the owner concerning his occupation of the land. However, it is not clear what is to happen if they fail to reach agreement on what is to prevent the owner from evicting the squatter.

⁷ S. 2 and 32(2).

⁸ S. 32(1).

⁹ S. 34(1).

¹⁰ S. 32(3).

¹¹ S. 35. The section sets out the consent procedures including a provision for appeal to the Land Tribunal.

must give first refusal to the owner or tenant as the case may be.¹² Although a tenancy by occupancy is in many ways similar to a common-law tenancy, its existence is conditional on continued occupation of the land by the tenant, his agent or a member of his family. If the land is left unattended for three years or more, the tenancy lapses.¹³

While the Act thus strengthens the position of those in occupation of mailo land, it does not go so far as to provide for the compulsory enfranchisement of customary tenancies, as had been demanded in some quarters and indeed as had been done in neighbouring Tanzania.¹⁴ Instead, a tenant may apply to the owner to be registered as the mailo owner in his place.¹⁵ A Mediator may be called in to assist negotiations between the parties, but it is clear that there is nothing to prevent the owner from simply rejecting the application. To this extent the Act can be seen as striking a compromise between the interests of mailo owners and occupants, albeit one that tends to favour the latter group.

CUSTOMARY LAND TENURE REFORM

Apart from addressing the specific problems relating to mailo land, those responsible for framing a national land policy had to consider the future of customary land tenure. Ever since the Crown Land Ordinance, 1903, whose effect was to make those occupying land under customary law (outside the mailo area) tenants at will of the Crown, the legal position of such people has been extremely precarious. The Land Reform Decree, 1975, declared the customary occupation of public land to "be only at sufferance", though it provided for compensation to be paid if the occupation was terminated by the Lands Commission.¹⁶ Instances of government alienation of such land on freehold (before 1975) or leasehold had led to demands for some degree of security of tenure.

The Constitution itself went some way to meeting these demands. Article 237(2) recognized customary land tenure as being one of the four ways (together with freehold, mailo and leasehold) in which land could be owned, while article 237(4) provided for the possibility (a) of customary owners acquiring certificates of ownership, and (b) of customary land being converted to freehold land by registration. These provisions left open a number of obvious questions which were to be addressed in the course of discussions on the Land Bill, but they did indicate that it was government policy that, at least in the long term, most land in Uganda should be held on individual freehold tenure. To this extent it adopted the free market approach recommended by the 1989 study carried out by the

¹² S. 36. A Mediator may assist the parties in reaching an agreement.

¹³ S. 38(1) and (2). It is far from clear what "unattended" means. No other titles are conditional on attendance. The position is further obscured by the provision that section 38(1) is subject to section 28, itself a problematic section (discussed below) seemingly designed to prevent women or children or persons with disability being denied access to land.

¹⁴ Customary Leaseholds (Enfranchisement) Act, 1968. The enfranchisement process was beset with difficulties. The Ugandan Land Act s. 29 does provide for the enfranchisement of leases of public land; however, enfranchisement is not automatic, as it was under the original Bill, nor, where the area of land exceeds 100 hectares, is it free.

¹⁵ S. 39. Tenants of freehold or leasehold land have equivalent rights.

¹⁶ S. 3(1) and (2). Some of those who were granted large tracts of land under the Decree were less interested in developing the land than in using the land as security for loans to be used for other purposes.

University of Wisconsin Land Tenure Center together with the Makerere Institute of Social Research.¹⁷

If, as the Constitution clearly envisaged, customary owners were to be able to acquire certificates of ownership, the Land Bill had to lay down procedures for determining who was a "customary owner" and to set out the legal consequences of such a person acquiring a certificate of ownership. The adjudication and registration of individual freehold titles in Kenya had threatened the customary entitlements of members of the owner's family (particularly those of women and children) and the question in Uganda was how to strike a balance between promoting a free market in land on the one hand and protecting customary rights on the other. The result was a compromise.

The definition of customary tenure contained in section 4(1) recognizes both individual, family and communal ownership of land, and section 5 accordingly provides that any person, family or community holding land under customary tenure may apply for a certificate of customary ownership of that land. The application is to be determined by the parish Land Committee, a body whose establishment,¹⁸ composition, functions¹⁹ and procedures²⁰ are set out in some detail in the Act. The Committee's recommendation has to be forwarded to the District Land Board which has broad powers to confirm, reject or vary it.²¹ From the Board there is an appeal to the Land Tribunal²² and from the Land Tribunal to the High Court.²³ As in Kenya under the Land Adjudication Act, the determination and recording of customary land rights, including the settlement of any disputes that may arise, is entrusted largely to administrative bodies rather than to the courts. An important difference, though, is the central role given to "elders" in Kenya (rather appointed officers).²⁴

Of particular interest are the provisions designed to protect those who have customary rights in the land that do *not* amount to ownership. Research has shown that the Kenyan land adjudication programme concentrated solely on determining which individual should be recorded as the owner of a particular plot of land (almost invariably the household-head (male)). Little attempt was made to record and protect the customary rights of women, children and others, and these were consequently put at risk.²⁵ The Land Act seeks to avoid this by requiring the Committee to record third-party rights over customary land (including rights of occupation or use)²⁶ and specifically to "safeguard the interests and rights in the land . . . of women, absent persons, minors and persons with

¹⁷ MISR/University of Wisconsin, *Land Tenure and Agricultural Development*, University of Wisconsin Land Tenure Center, Madison, 1990. The Study was funded by the World Bank and USAID.

¹⁸ S. 65. The Committee consists of a Chairperson and three other members appointed by the District Council. At least one member must be a woman and at least one must be experienced in land matters.

¹⁹ S. 6.

²⁰ S. 7.

²¹ S. 8.

²² S. 8(6).

²³ S. 88.

²⁴ Interestingly, in Tanzania there has recently been some debate about the recommendation of the Presidential Commission of Inquiry into Land Matters to give certain responsibilities to a panel of elders (*Baraza la Wazee la Ardhi*). See P. McAuslan, *op. cit.*, at 548.

²⁵ See, for example, S. Coldham, "The effect of registration of title upon customary land rights in Kenya", [1978] *J.A.L.* 91 and F. Mackenzie, "Gender and land rights in Muranga District, Kenya", (1990) *Journal of Peasant Studies*, 17(4), 609.

²⁶ S. 6(1)(e).

or under a disability”.²⁷ Where the Committee has recorded the existence of a third-party right, the certificate of customary ownership will carry a note of such right.²⁸ The holder of a certificate is given broad powers to deal with the land (including leasing, mortgaging, selling, subdividing and leaving it by will), but these powers are subject to any restrictions noted on the certificate.²⁹ A Recorder is to be appointed for each Sub-county with responsibility for keeping certificates of customary ownership and records relating to such certificates,³⁰ and any transaction in respect of the land is ineffective unless registered by the Recorder.³¹ The scheme is that the Recorder will not register a transaction which ignores third-party rights.

In addition to introducing a system which provides for the issuing of certificates of customary ownership of land and for the recording of transactions relating to such land, the Act also makes provision for the conversion of customary tenure to freehold tenure, as required by the Constitution.³² The procedure is similar to the one outlined above and again gives an important role to both the Land Committee, the Land Board and the Land Tribunal.³³ The crucial difference, of course, is that, if the application is successful, it is the Registrar of Titles who issues the freehold certificate of title. The land is now subject to the general land law of Uganda and, in particular, the Registration of Titles Act. However, although customary law no longer applies, customary third-party rights are to be protected by the endorsement of the certificate of title with an appropriate restriction, condition or limitation.³⁴ It is not clear exactly how this is to be done, but one possibility would be to enter a restriction that no dealing with the land should be registered without the consent of, say, the spouse, children and parents of the owner. Such a restriction would, of course, undermine one of the objectives of land registration, namely, to increase the marketability of land. This is discussed below.

The Act recognizes that there are areas of the country where the recording of individual ownership of land (whether customary or freehold) would not be appropriate, that is, where land is communally owned and managed. The Act therefore makes provision for the formation of Communal Land Associations under the overall supervision of the District Land Registrar.³⁵ Where not less than 60 per cent of the members of a group wish to incorporate themselves as

²⁷ S. 6(1)(g). The original Bill did not set out the functions of the Committee in this detail. It made no mention of third-party rights and it did not contain the equivalent of section 6(1)(g). Neither the Bill nor the Act require the matrimonial home to be registered in the joint names of the spouses, as had been demanded by women's groups.

²⁸ S. 8(3).

²⁹ S. 9(1), (2).

³⁰ S. 69.

³¹ S. 9(4).

³² S. 10. Section 11 allows any person to apply to be granted land in freehold. The procedure is the same.

³³ S. 13 and 14. The procedure is simplified where the applicant already possesses a certificate of customary ownership of the land. However, whereas an applicant for such a certificate need only show that s/he has exercised rights over the land which “should be recognised as ownership of that land” (s. 6(1)(d)), in an application for freehold title the Committee must consider whether the applicable customary law “recognises or provides for individual ownership of land” (s. 12(2)). The difference in wording is presumably intended to be significant, though the significance may well be ignored by the Land Committees.

³⁴ S. 14(4) and (6)(b), 15(3).

³⁵ S. 16. The original Bill contained a single section providing for communal land-holding; it said nothing about Communal Land Associations.

an Association, they must elect 3–9 persons to be the officers of the Association.³⁶ The officers must then prepare a constitution for approval by the majority of the members³⁷ and, once this is done, they must apply for incorporation as a “Managing Committee”.³⁸ The Committee holds the land and may deal with the land on behalf of the Association members,³⁹ and it may set aside areas of land for common use to be managed in accordance with a “common land management scheme”.⁴⁰ Provision is also made for an individual or family who is occupying and using a part of the communal land in accordance with customary law, to apply to have that part excised from the communal land and recorded/registered in the name of the individual or family head as customary/freehold owner.⁴¹ The carving-up of the communal land into individual farms would, of course, eventually lead to the dissolution of the Association.

LAND ADMINISTRATION

In addition to introducing major tenurial reforms, the Act, as envisaged by the Constitution, establishes machinery at various levels for the administration of land and for the settlement of land disputes, thereby reflecting the importance that the government attaches to land matters as well as its belief that the decentralization of authority will promote a democratic culture. A Land Commission is to be set up at the national level which will be responsible, *inter alia*, for holding and managing government land.⁴² Moreover, Land Boards are to be established at district level.⁴³ They will have various statutory powers and duties, including an important role to play in the land reform process, as noted above. Finally, a Land Committee is to be appointed by the District Council for every parish,⁴⁴ and it is these committees which will have initial responsibility for considering applications for certificates of customary ownership as well as applications for grants of land in freehold and applications to convert customary tenure to freehold tenure. The success of the land reform programme will depend in large part on the effective operation of these committees.

The Act further requires a Land Tribunal to be established for each district, to consist of a Chairperson (qualified to be a Magistrate Grade 1) and two other persons.⁴⁵ Such tribunals are to have a very broad jurisdiction over land disputes,⁴⁶ though in appropriate cases they may advise parties to use the services of traditional

³⁶ S. 17.

³⁷ S. 18.

³⁸ S. 19.

³⁹ S. 20.

⁴⁰ S. 24(1). The ingredients of such schemes as well as the duties and rights of members in relation to such schemes are set out in some detail in the Act. The most common type of scheme is likely to be for the grazing and watering of livestock and such a scheme would be expected to contain restrictions designed to maintain or increase the carrying capacity of the land. Similar schemes to preserve the rangelands of Tanzania (under the Range Development and Management Act) and of Kenya (under the Land (Group Representatives) Act) were not very successful.

⁴¹ S. 23.

⁴² S. 47 and 50. The Act makes provision for the Commission’s membership, its meetings and its powers.

⁴³ S. 57. In addition, section 60(6) requires every District Council to have a District Land Office containing the offices of the Physical Planner, the Land Officer, the Valuer, the Surveyor and the Registrar of Titles.

⁴⁴ S. 65(1).

⁴⁵ S. 75.

⁴⁶ S. 77.

authorities or of a Mediator appointed by the Tribunal to assist in the mediation of the dispute.⁴⁷ Appeal from the District Land Tribunal lies to the High Court.⁴⁸

CRITIQUE

The Ugandan land reforms possess a number of interesting and original features and in many ways constitute a compromise between several competing considerations. At this stage it is, of course, impossible to predict whether they will be successful in achieving their objectives, let alone whether they might provide a useful model for adoption elsewhere in Africa. None the less it is appropriate to highlight some of these features here.

Compulsory versus voluntary registration

The reform, indeed the upgrading, of customary land tenure lies at the heart of government land policy. For the first time, those with customary land rights are to be given security of tenure in the form of a documentary title, whether customary or freehold. However, unlike what occurred in neighbouring Kenya where the adjudication and registration of titles was conducted on a systematic area-by-area basis, in Uganda the Act merely provides a framework within which an individual or group may apply for a certificate of title. Such an approach reflects the new orthodoxy which recognizes that the systematic conversion of titles (a "replacement" strategy) is not only extremely costly but is likely to be ineffective unless accompanied by other reforms of the rural economy. Where, as in Uganda, the majority feel secure with customary rights of access to land, the incremental adaptation of customary land tenure within a suitable institutional and legal framework may be more appropriate.⁴⁹ Registration of titles should be gradual, demand-led and funded (in part, at least) by the applicant.⁵⁰ The argument is a persuasive one. Population densities and types of land use vary considerably within the country, from the extensive rangelands of Karamoja to the tiny fragmented smallholdings of Kigezi, and demands for enhanced security of tenure may vary too. A Kenya-style frontal programme would be very expensive and would require a considerable investment in technical staff such as surveyors, registrars and other officials. On the other hand, in densely populated areas affected by land fragmentation it would be wasteful of resources to leave the adjudication of titles to individual initiative; it would only make sense for a large area to be surveyed and adjudicated as a whole. Moreover, where the grant of certificates of title is based on individual applications, there is always a risk of land-grabbing, that is, that an applicant may lay claim to a larger area of land than that to which he is customarily entitled. It may be that a flexible approach, allowing for both systematic and voluntary adjudication and making use of pilot schemes, is called for.

⁴⁷ S. 89(2).

⁴⁸ S. 88.

⁴⁹ See John Bruce and others, "Land and natural resource tenure on the Horn of Africa: synthesis of African trends and issues raised by land tenure country profiles of East Africa countries, 1996", in *Workshop Report on Land Tenure Issues in Natural Resources Management in the Anglophone East Africa with a focus on the IGAD Region*, Addis Ababa, 11–15 March, 1996, unpublished.

⁵⁰ M. Marquardt, "Access to land and other natural resources: Research and Policy Development Project Uganda", *ibid.* He argues that registration should be related to the commercialization of agriculture and the need to secure investment.

Parallel registration systems

A novel feature of the Act is that it gives an individual or group the option of applying either for a certificate of customary ownership or for a freehold title, and it provides a straightforward procedure for converting the former into the latter. Given that it is government policy that, in the long term at least, all land should be held on freehold tenure, the question arises whether it would not have been more sensible simply to have provided for freehold applications. The argument for a two-stage process (first register customary titles, then convert them to freehold titles) would have been stronger if the incidents of the two types of tenure had been markedly different, but that is not the case. It is true that the general law applies to freehold land, whereas customary law continues to apply to land subject to a certificate of customary ownership, yet in two important aspects the incidents of the two types of tenure are very similar. One is the basic requirement that dispositions of both types of land should be recorded; in the case of freehold land they should be registered under the Registration of Titles Act and in the case of customary land they should be registered by the Recorder.⁵¹ The other is that both customary and freehold titles will be registered subject to third party rights, usually customary rights of a family nature. The mechanism for protecting such rights will depend on the form of tenure, but in either system they will constitute a major restriction on the freedom of the titleholder (whether customary or freehold) to deal with the land.⁵²

Security of title and transactions

Assuming that the existence of two parallel registration systems (one for customary titles and one for freehold titles) can be justified, the question still arises as to whether the registration programme introduced by the Land Act is likely to achieve its objectives. It is certain that the Act will go a long way towards clarifying land rights in Uganda and providing security of tenure for those in occupation of land where previously they were at risk of eviction by government or by mailo "owners" or by government lessees. However, the grant of a documentary title to land, particularly a freehold title, is also intended to promote development by giving the titleholder an incentive to invest in his or her land and the opportunity to raise credit on the security of the land. In addition, it is likely to stimulate the market in land and to ensure, the argument goes, that land is in the hands of those best able to develop it. It was considerations of this kind that lay behind the land adjudication and registration programme in Kenya which resulted in the abolition of customary land tenure and the registration of household-heads as "absolute owners" of their land.⁵³ Moreover, it was these considerations that informed the recommendations of the University of Wisconsin Land Tenure Center 1989 report that Uganda should move towards

⁵¹ Note, in particular, section 9(4) which provides that no lease, mortgage or sale shall have the effect of passing any interest in the land unless it is registered by the Recorder.

⁵² See ss. 9(1) and (2), 15(3), mentioned above.

⁵³ The well-known Swynnerton Plan proposed that "the African farmer . . . be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against financial credits." R. J. M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya*, 1954, s. 13.

a land tenure system based on freehold titles free from development conditions.⁵⁴

Supporting this view, Marquardt claims that research points to the desirability of moving to open land markets in Uganda and that, rather than causing landlessness, the move may result in a more equitable distribution of land.⁵⁵ In particular, he found that the majority of women landowners had acquired their land by purchase, leading him to conclude that a functional land market may be beneficial rather than detrimental to women.⁵⁶

The government of Uganda has adopted this policy in so far as the Land Act sets out procedures for the move from customary to freehold tenure and imposes no development conditions on freehold (or customary) titles.⁵⁷ However, the alleged benefits of titling are likely to be undermined by the Act's insistence on the protection of third-party, essentially customary, land rights. It is, of course, understandable that the government would yield to pressure to protect the rights of spouses, children and other household members rather than putting them at risk, as had occurred in Kenya, by failing to enter them on the register. It is obvious, though, that the greater the number of rights or restrictions entered against a person's title, the less negotiable that title becomes. Under the Land Act the number could be considerable.

Some of the provisions have already been mentioned. The procedure relating to the issue of certificates of customary ownership clearly envisages that such certificates should be subject to such restrictions as are necessary to give effect to customary entitlements (those of women, minors, absentees and persons under a disability are specifically mentioned) and that an owner's freedom to deal with the land should be circumscribed by such restrictions. Similarly, where a person applies for the grant of a freehold title or for the conversion of a customary title to a freehold title, third-party rights are to be protected on the land register. It is not clear what form this protection will take. If they are to be substantively registered, the Registrar will face the difficult task of finding in the general law an equivalent for a customary right. Alternatively, the Registrar may simply enter a restriction prohibiting dealings with the land without the consent of certain named persons. In either case, given the potentially large number of

⁵⁴ As mentioned above, the government of Uganda embraced the freehold option in the 1995 Constitution. So the question hardly arose in the debates on the Land Bill. It has been argued, however, that Ugandan farmers do not need freehold titles as long as they have security of tenure. See Nyangabyaki Bazaara, "Land reforms and agrarian structure in Uganda; retrospect and prospect", (1995) 34/35 *Nomadic Peoples* 37. It has also been argued that government attempts (e.g. in Kenya and Tanzania) to intervene in indigenous land tenure arrangements are generally misguided. "Governments can best devote their resources to other uses, while standing ready to intervene to the minimum extent possible . . . where some tenure reform is required." T. C. Pinckney and P. K. Kimuyu, "Land tenure reform in Africa: good, bad or unimportant?", (1994) 3(1) *Journal of African Economies* 1 at 26.

⁵⁵ M. Marquardt, op. cit. At the same workshop Professor Nsibambi also argued in favour of an open land market. A. R. Nsibambi, "Land tenure relations in Uganda 1900-1995", *ibid.*

⁵⁶ Ambreena Manji also argues that women are likely to benefit from individual titling. "In Tanzania individualisation, registration and titling on the Kenyan model is more likely to be the means by which the State provides women with land rights." Ambreena Manji, "Gender and the politics of the land reform process in Tanzania", (1998) 36(4) *Journal of Modern African Studies* 645 at 666. Government policy in Tanzania has, of course, been based on the premise that marketability of land increases insecurity of tenure.

⁵⁷ Contrast policies adopted elsewhere in sub-Saharan Africa, e.g. in Tanzania where development conditions are attached to granted rights of occupancy and in Zambia where they are attached to the grant of government leaseholds. The Land Act is not concerned with land use except in relation to common land.

customary rights-holders, the marketability of the land will be affected. Indeed, paradoxically, the Act may make land less marketable than otherwise.

In addition to the provisions discussed in the last paragraph, there are two other provisions in the Act which are designed to protect certain classes of person and which impose further limits on the alienability of land, sections 28 and 40. Section 28 provides that any decision taken in respect of customary land shall follow customary law, but that if the decision “denies women or children or persons with disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land”, it shall be null and void. While the drafting of this section is not wholly satisfactory,⁵⁸ its purpose is fairly clear. It applies both to land which is the subject of a certificate of customary ownership (in which case it introduces a further, but *unrecorded*, limitation on the owner’s powers of disposition), and to land which is not so subject. It would seem to invalidate any dealing with land currently occupied or used by a woman, child or person with disability (regardless of consent) since sales, leases, mortgages and subdivisions would all deny, or at least restrict, access. The invalidation of conditions imposed in violation of certain Constitutional provisions is similarly intended to protect women (article 33), children (article 34) and persons with disabilities (article 35). However, there are differences in the nature of the protection provided. The protection given to women is directly relevant, since article 33(4) gives women the right to equal treatment with men and article 33(6) prohibits customs and traditions “which are against the dignity, welfare or interest of women”. Allocations of land which discriminated against women would thus be void. However, the protection given to children and people with disabilities is formulated in more general terms,⁵⁹ and it is not certain that decisions relating to land which disadvantaged such persons would be unconstitutional.

Section 40 gives protection specifically to spouses and children of land owners. It provides that no person shall sell, exchange, pledge, mortgage, lease, give away or “enter into any other transaction in respect of land” except with the prior written consent of any spouse or dependent child of majority age residing on the land. In the case of minor children the consent of the Land Committee is required. Any transaction entered into without the requisite consent (not to be unreasonably withheld) is void. Although section 40(7) recognizes that a spouse or major child may enter a caveat on the certificate of title or certificate of customary ownership, there is no requirement to do so. Indeed it seems that the section’s protection extends to land which is not the subject of a certificate of title or ownership.

Although the Act thus contains a number of provisions designed to protect the interests of those occupying land under customary law, some of these provisions are not well drafted and the way in which they interlink is a trifle

⁵⁸ A word like “action” might be better than “decision”, though “decision” is apt to include a determination of the Land Committee, Land Board or Land Tribunal. The expression “access to” is unclear. The location of the section in the statute, wedged between a series of sections dealing with Communal Land Associations and a long section dealing with the conversion of leaseholds, is odd. In the original Land Bill the fore-runner of this section gave no protection to persons with disability and it omitted the reference to unconstitutional conditions.

⁵⁹ For example, article 34(7) (“The law shall accord special protection to orphans and other vulnerable children”) and article 35(1) (“Persons with disabilities have a right to respect and human dignity and the State and society shall take appropriate measures to ensure that they realise their true potential”).

confusing. For example, as noted above, the procedures to be followed after a person has made an application for a certificate of customary ownership or a certificate of freehold title require the Land Committee to adjudicate and record *all* rights affecting the land (taking particular care to safeguard the position of women, minors, absentees and those under a disability), and to ensure that such rights are entered on the certificate. However, the effect of section 28 is to make these procedures largely redundant as far as certificates of customary ownership are concerned; a purchaser of customary land will be bound by the rights of women, children and those under a disability whether these have been entered on the certificate or not, and regardless of the parties' consent. The effect is that the marketability of customary land will be severely restricted. Moreover, as if any further protection was needed, section 40 imposes a consent requirement for land dealings where a spouse or child is residing on the land. The relationship between sections 28 and 40 is not entirely clear, but section 40 is likely to be particularly significant in relation to freehold and mailo land; there will be no incentive for spouses and children to protect their rights on the register. Again one of the purposes of the adjudication process is undermined and the marketability of the land diminished.

Land reform inevitably involves a rearrangement of rights which has winners and losers, and the extent to which customary rights should be protected has proved a vexed question in sub-Saharan Africa. In Kenya, as noted above, the effect of the land registration programme was that male heads of household would usually be registered as owners of land and little attempt was made to protect the interests of customary occupants. As customary law had been abolished, there was little to prevent an owner from evicting them from his land. Although a system for the control of land transactions was set up, the criteria governing the grant or refusal of consent to a proposed transaction were primarily developmental.⁶⁰ The effect of the reform was to stimulate the land market, facilitating the accumulation of land by some and increasing the risk of landlessness for others. By way of contrast, the recently enacted Land Act of Tanzania (No. 4 of 1999) in many ways continues the "socialist" policies of the 1960s and 1970s. Thus, the Act makes no provision for freehold titles; all land is public land and the greatest interest that a person can have in land is a right of occupancy, either a customary right of occupancy or a statutory (or "granted") right of occupancy.⁶¹ Both the grant and disposition of statutory rights of occupancy remain subject to conditions.⁶² The Act says little about village land, where, it is assumed, "customary law" will continue to govern land relations.⁶³

⁶⁰ However, there is some evidence that land control boards have been concerned to consult the owner's family where the effect of the transaction would be to leave them with insufficient or no land. See S. F. R. Coldham, "Land control in Kenya", [1978] *J.A.L.* 63.

⁶¹ During the period of British rule only a very small area of land was held on freehold or government leasehold titles, and these were converted to statutory rights of occupancy in the 1960s. When public land was granted, whether to Africans or non-Africans, it was granted on a statutory right of occupancy for a term and subject to conditions. At independence around 98 per cent of land was held according to customary tenure on a customary right of occupancy. The general picture remains the same today.

⁶² See Part VI generally. The provisions relating to the need to obtain the consent of the Commissioner for Lands for the disposition of a right of occupancy are complex. Of particular interest in the present context is section 41(1)(e) which requires the Commissioner to have regard for the interests of groups at risk such as displaced persons, children and low income persons.

⁶³ Interestingly, the Draft Bill contained a whole Part (60 sections) devoted to the formalization of land tenure on village lands. It proved too controversial, however, and that Part was omitted from the final version.

The Ugandan land policy charts a rather curious course between those of its East African neighbours. It espouses a move towards freehold titles (like Kenya), it shies away from an open land market (like Tanzania),⁶⁴ and (unlike both Kenya and Tanzania) it rejects the imposition of any administrative consent requirement.⁶⁵ While its rejection of a consent requirement was justified, it has been argued here that, in so far as the registration of titles is intended to increase the marketability of land, that objective is likely to be undermined by restrictions protecting customary rights.

Implementation

Just as it was important to have public consultations in the period preceding the enactment of the Land Act, so it will now be necessary for the government to launch a campaign to educate the public about the objectives of the Act and about the ways in which these are to be achieved. Furthermore, it will be essential to train the cadres who will be responsible for implementing the Act. In addition to increasing significantly the existing number of surveyors, planners and registrars, it will be essential to train the members of all the new administrative bodies (land committees, boards, and tribunals) destined to play a central role in the process. It will have become clear from the above discussion that the Act's provisions are detailed and sometimes complex and that their effective implementation will require a knowledge of both the general law and customary law. While an extensive recruitment and training exercise will add substantially to the cost, the land reform programme is already controversial and, if it is carried out in a way that is insensitive or inept, it will leave behind a legacy of disputes and bitterness.⁶⁶

CONCLUSIONS

The Ugandan Land Act is important, not simply because it ushers in a new era in land relations in Uganda, but because it embodies new ideas on land reform in Africa, and while it seeks to provide answers to problems that are specific to Uganda, the nature of its successes and failures will be of general interest, just as the land reform policies of Kenya and Tanzania have spawned a vast literature. Although the last few years have seen widespread discussions of land matters in Uganda and although the Land Bill went through a number of drafts,⁶⁷ it would be unrealistic to suggest that the Act represents a consensus. It is not simply that the Act may be seen as a victory for some groups and a defeat for others, but there were a number of policy issues on which opinion would always be divided. The Act has introduced a legal framework governing land tenure, land administration and the settlement of land disputes. It has

⁶⁴ Among the fundamental principles of land policy set out in section 3(1) of the Tanzanian Act are the need both to facilitate the operation of a market in land and to regulate the operation of a market in land so as to ensure that rural and urban small-holders and pastoralists are not disadvantaged.

⁶⁵ For a discussion of the free market approach versus public law regulatory approach see P. McAuslan, *op. cit.*, at 537ff.

⁶⁶ One writer has identified corruption as a major source of conflict in land matters in Uganda. See A. Nsibambi, "The land question and conflict", in K. Rupesinghe (ed.), *Conflict Resolution in Uganda* (International Peace Research Institute), Oslo, 1989, at 239.

⁶⁷ This, as well as the need to ensure enactment by 2 July, 1998, may account for some unsatisfactory drafting, for the "scissors and paste" feel of a few provisions.

introduced certainty into an area of law for a long time beset by uncertainty and conflict. Its detailed provisions regarding land tenure and administration should ensure certainty in the future. It provides security of tenure for customary occupants of land (both mailo and non-mailo land). It decentralizes land administration and establishes specialized land courts. These are all desirable outcomes. However, doubts have been expressed above about some of the other reforms, about whether registration of title should be left solely to individual initiative, about whether there is a need for both customary and freehold titles, about whether customary restrictions on titles will not adversely affect the marketability of land, and about whether sufficient has yet been done in terms of public education and the training of officials for the Act to be capable of implementation in the near future.