Why Uganda should be cautious about amending ARTICLE 26 of the Constitution

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15th July, 2017

1. Introduction

This paper by Land and Equity Movement in Uganda – LEMU – a national Land Rights' advocacy Organisation, recommends to Members of Parliament not to pass the proposed Bill 13 of 2017 to amend Article 26 of the Constitution which states that all people have a right to own land individually or in association and are protected by law from ***deprivation of property***. LEMU recommends that, instead, Parliament should urge the Government to either amend the Land Acquisition Act (CAP 226) or enact a new law to operationalize the implementation of Article 26 of the Constitution and other related laws in the Land Act (CAP 227). The two reasons LEMU gives for this recommendation are:

1) The law under which compulsory acquisition has been implemented – the Land Acquisition Act (CAP 226) is an out-dated law passed on the 2nd July 1965 before the 1995 Constitution was passed. Parliament was to pass a law to make provision for "prompt payment of fair and adequate compensation". Besides Sections 42, 76, and 77 of the Land Act that provided for three types of payment when land is compulsorily acquired: **- i)** market value of the land; **ii)** payment for improvement of the land and **iii)** disturbance allowance, the procedure to be followed for compulsory acquisition, remained unchanged as per the Land Acquisition Act passed at a time when land was not vested in citizens but in the Uganda Land Commission. The process of compulsory acquisition was then, as it seems to be today, squarely in the hands of the Ministry of Lands, Housing and Urban Development (MLHUD);

2) Clause 2(b) of the proposed amendment seeks to allow government to deposit the disputed compensation awarded in court. This amendment seeks to change the purpose for which courts are instituted – from that of hearing disputes between two parties and decideding on the matter in favour of one party, to that of a Bank where money is deposited.

As is typical in modern democratic states, there are Articles in the constitution (and other relevant legislation) that allow for the compulsory acquisition of land in certain circumstances. This measure, when used properly, can facilitate the completion of projects that are in the public interest, and which might not otherwise be able to progress. This is typically relevant for infrastructure projects such as railway lines, where the state risks being held to ransom over land acquisition, causing significant cost and delay. However, dispossessing someone of his or her land is a very serious step to take, and is not a short cut to completing a project, nor should it be considered as a way to keep costs low. Compulsory acquisition of land should always be a **last resort,** and always be subject to checks and balances on state power to ensure that citizens are protected. If it is too easy for the state to acquire land through compulsory means, no matter what the text of the constitution says, in practice the state is effectively merely allowing people to hold the land until they decide that they require it.

This paper considers: the checks and balances set out in law, with analysis of issues, conclusions and recommendations.

2. Article 26. Protection from deprivation of property

Article 26 of the 1995 **Constitution, (as amended)** is currently under consideration for amendment. However, it is understood that any changes will add to the existing provisions, and not remove the essence of the protective nature of the law. The key clauses in relation to the terms on which compulsory acquisition can currently take place are as follows:

"2. No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—"

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and (ii) a right of access to a court of law by any person who has an interest or right over the property.

The checks and balances set out here are reasonable and proportionate, as well as being in line with international standards. However, the concern of Land and Equity Movement in Uganda (LEMU) relates to the proper *implementation* of these legislative clauses, for the following reasons:

Land necessary for public use (etc.).

The current law, the Land Acquisition Act (CAP 226) that came into effect on the 2nd July, 1965, before the 1995 Constitutions – at a time when land was not as yet vested in the citizens and before the conditions stated in Article 26, is what seems to be used for the process of compulsory acquisition and yet some of the provisions of this Act is contrary to the provisions of Article 26 of the Constitution and Sections 42 and 77 of the Land Act. Parliament should have passed or amended the Land acquisition Act to provide for prompt, prior and right of access to court .The only other relevant law passed after 1995 Constitution are Sections 42, S. 76(1)(b) and S. 77 of the Land Act (Cap 227) which states as follows:

S. 42 – Acquisition of land by the Government - *"The Government or local government may acquire land in accordance with Articles 26 and 237(2) of the Constitution".*

S. 76(1)(b) – Jurisdiction of the district land tribunals *–The jurisdiction of a district land tribunal shall be to:"...determine any dispute relating to the amount of compensation to be paid for land acquired under Section 42:"*

1. S.77 Computation of compensation

(1) *"The district land tribunal shall, in assessing compensation referred to in S.76 (1)(b) (when disputes arise on acquisition of land by the Government or local government) take into account the following*

a) *In the case of a customary owners, the value of land shall be the open market value of the unimproved land;*

b) *The value of the buildings on the land, which shall be taken at open market value for urban areas and depreciated replacement cost for the rural areas;*

c) *The value of standing crops on the land, excluding annual crops which could be harvested during the period of notice given to the tenant.*

(2) *In addition, the compensation assessed under this section, there shall be paid as a disturbance allowance 15% or, if less than six months' notice to give up vacant possession is given, 30 per cent of any sum assesses under sub section (1)*

(3) *The rates set out in the list of rates of compensation referred to in Section 59(1) (e) shall be used in determining the amount of compensation payable."*

S.59(1)(e) of the Land Act makes it the function of the District Land Board to "*compile and maintain a list of rates of compensation payable in respect of crops, buildings of a non-permanent nature and any other thing that may be prescribed;"*

The Land Acquisition Act has not been amended to be in line with Article 26 of the Constitution or the relevant provisions of the Land Act. The procedure that the government could have applied in acquiring land compulsorily is therefore out-dated and contrary to Article 26 of the Constitution and Sections 42 and 77 of the Land Act. Might this not be the reason that government is finding difficulties in having land owners accept awarded compensation? The Land Acquisition process is produced below so the readers can assess whether the law was correctly applied or the law was abused:

3. How Government is to acquire land when the owner refuses to sell

The Land Acquisition Act (1965) was created to say the Government can acquire land which it needs, when an owner does not want to give it or sell it. Sections 2 to 7 describe the exact steps which must be followed by the authority which wants to acquire the land. There are three key stages:

i. Application to the Ministry of Lands, Housing and Urban Development for permission to acquire through compulsion

ii. Assessment of compensation claims and sale price

iii. Taking possession of the land

i. Application to the Ministry of Lands, for permission to acquire through compulsion

The Minister responsible for the Ministry of Lands, Housing and Urban Development has to be satisfied that the land is needed by the Government for a public purpose and that no alternative land is available. The Minister makes a public declaration that the acquisition should go ahead, and then appoints an "assessment officer" who makes sure that a map has been drawn up of the exact land to be acquired. "Assessment officer" is described as "*a public officer or other person appointed by the Minister to be an assessment officer for the purposes of this act, either generally or in a particular case"*

ii) Assessment of compensation claims

The assessment officer is responsible for putting up notices of the Government's intention to acquire the land by compulsory acquisition, in public places near the land and in the Gazette (the Government's own paper), calling on anyone with an interest in the land to apply for compensation. The deadline for making these claims will be set by the assessment officer, but he must give people between two and four weeks. The assessment officer appointed by the Ministry then investigates all the claims, and must decide how much compensation should be paid in total, and how this money should be divided between all the different people with the same interest in the land. People have to appeal to the High Court, if they do not feel the levels of compensation were adequate or if they were not given any compensation but felt that they should have been.

iii) Taking possession

The Assessment Officer is responsible for notifying everyone about the decisions reached for compensation. It is the Assessment Officer who formally 'takes possession" of the land, and who is responsible for notifying the Registrar of titles, so that they can issue a freehold title in the name of the Uganda Land Commission.

Issues from the above law

It is clear from the above provisions that they are not in line with Article 26 of the Constitutions and Sections 42 and 77 of the Land Act in that:

a) The current process of compulsory acquisition does not include local governments and yet the Land Act and the proposed amendment do;

b) The District Land Board has been given the responsibility for setting compensation rates for crops or other non-permanent structures on land, but not the value of the land itself or any permanent buildings.

c) There is no provision for determining the market rate of the land to be compulsorily acquired.

d) The 1965 Land Acquisition Act says that the Assessment Officer can take possession of the land as soon as compensation claims are decided upon, even before they are actually paid, but the 1995 Constitution stipulates that compensation must be prior to possession and must be prompt. It is the Constitution that must be followed.

e) The court for disputes as per the Land Acquisition Act is the High court, as per the Land Act it is the Land tribunal (whose work was transferred to the Magistrates court) and the proposed amendment talks of "court".

With the discrepancies in the Land Acquisition Act, Article 26 of the Constitution and Sections 42 and 77 of the Land Act, should the law maker not first find out how compulsory acquisition has been implemented in Uganda, especially in Bunyoro region where land will be needed for oil extraction, before considering the proposed amendment? Should the law makers not first find out who of the two parties have suffered injustice from the discrepancies in the laws – the Government or the land owner?

Right of access to a court

Legally, Ugandan citizens and Government have the right of access to a court. *Article 26 (2) (b) (ii) states that there must be "right of access to a court of law by any person who has an interest or right over the property".* In the case of compulsory acquisition, government definitely has an interest and therefore has access to court to decide on an issue. In cases where the government and the land owner do not agree on compensation, should the aggrieved party not first go to court to present their case and allow court to pronounce on it? The proposed amendment is seeking to use court as a Bank to deposit disputed money instead of first instituting a case in court as provided for by Rule 1 under Order VI of the Civil Proceedings Rules of Statutory Instrument 71 which states that *"Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defense, as the case may be."* If the government is aggrieved with land owners refusing to accept compensation awarded, by law, government is entitled to file a case against the land owner and present its case for the court to declare that the compensation awarded is in accordance with the law, or it is not. Rule 9 allows court to make a "Declaratory judgment". Similarly, a land owner who is aggrieved by the decision of government has the same rights to take government to court. By proposing that the disputed compensation money be deposited in court, the amendment is changing the purpose of court from that of deciding on disputes, to that of a Bank for only receiving and keeping the money but not performing other functions that banks perform such as give interest. The proposed amendments should not confuse functions of institutions but put them to their intended use. Clause 2(b) of the amendment further states that "…… pending determination by the court of the disputed compensation…." Where there is no case filed by the Government, on what basis will the court determine the compensation?

Conclusions and Recommendations

As set out above, the devil is in the detail, and the application of the law is of equal importance to the text. Delayed amendment of the Land Acquisition Act or the passing of a new law to operationalize Article 26 of the Constitution and S.42 and 77 of the Land Act to define simple words such as 'public use' prompt, fair, market price, adequate" demonstrate that the proposed amendment is not a solution to the issues raised above but an attempt by government to make it easy to take land from citizens. There are too many parts of the law that rely on the state following the spirit of the law in their actions to offer adequate protection to citizens. This is not a satisfactory state of affairs, particularly in a country which is perceived poorly in corruption terms. **(Uganda ranks at 151 out of 176 countries in Transparency International's Corruption Index 2016).** Article 26 of the Constitutions and S.77 of the Land Act should therefore be strengthened with operational laws rather than be weakened or indeed completely removed by passing the proposed amendment as law.

The proposed amendment Bill 13 of 2017, if allowed to pass, will make it very easy for the state to acquire land compulsorily and effectively render the protection under Article 26 of the Constitution, Sections 42 and 77 of the Land Act of no use to the citizens of Uganda. If the amendment passes, the statement that many are likely to construe is made by Government is that *"I am more powerful than you. This is the compensation I have decided for you – take it or leave it"*

LEMU therefore recommends that the proposed amendment should not be passed and instead, the government be urged to either amend the Land Acquisition Act or enact a new law to operationalize the procedure for implementation of Article 26 of the Constitution. In the meantime, Parliament should ensure that compulsory acquisition is in line with Sections 42 and 77 of the Land Act.

LEMU also recommends that where the government or the land owner is unhappy with the compensation, the aggrieved party should file a case in court for a declaratory order but furthermore, that government, being the more powerful party and with more responsibility, should provide a land owner with the services of an advocate.

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