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Enforcing New Property Rights in Sub-Saharan Africa

The Ugandan Constitution and the 1998 Land Act

Sandra F. Joireman

A convincing case has been made in both academic studies and policy circles for clearly defined private property rights as a means to economic development. Perhaps best characterized by the recent work of Hernando De Soto, well-defined private property rights are thought to be critical not just for economic growth, but also as tool to alleviate poverty. The argument that the poor have capital that need only be put to efficient use through the creation of institutional structures that will allow them to access it is compelling. De Soto's work follows decades of policy advice provided by the international financial institutions—the World Bank and the International Monetary Fund—to developing countries regarding the privatization of property, both in agriculture and industry. The ideological agenda behind their reform advice has been neoliberalism. Reforms are designed to facilitate trade and integration into the world market. The focal point of De Soto's work, in contrast, is poverty alleviation. Both perspectives suggest policy emphasizing well-defined private property rights that can be both exchanged and enforced.

Countries convinced by this theory have enacted legal reforms to provide an institutional framework that will enable economic growth. These legal changes have occurred at multiple levels. Some countries, such as South Africa, have opted for a legal redefinition of property in their basic law, at the constitutional level. Other countries, such as Ghana, have constitutions that are sufficiently flexible to accommodate change through new laws governing the articulation and regulation of property rights. A different category of countries has made changes in their basic law directed at other issues, which profoundly affect property rights. One such country is Rwanda, which formally recognized women as adults in its 1991 constitution through a clause on citizen equality, for the first time giving them the ability to own property and take out a mortgage in their own name.¹

The focus of this article will be property rights in Uganda, a country that underwent major constitutional reform and democratization in the 1990s. The first part discusses theory regarding property rights and economic development. The second part addresses Ugandan property rights with attention to the political and legal changes that have occurred there in recent years. In the third part three impediments to property rights change—capacity, corruption, and customary law—are identified. The last part returns

to the theory and notes the discontinuities between theoretical predictions and the implementation of new property rights in Uganda.

Two arguments will be put forth. First, the Ugandan Constitution and Land Act articulated in law the extant theory regarding the importance of private property rights. Key components of the Land Act, such as the voluntary titling and registration of customary land rights, amount to the formalization of previously informal property rights to land. Second, the legal changes that enabled the formalization of informal property rights in Uganda are necessary to achieve institutional change in landholding practices but insufficient on their own due to a number of impediments. These two arguments have been discerned through an analysis of the legislation, examination of the institutional structures that support the new privatized rights, interviews with government officials, and fieldwork in the capital city of Kampala and in two regions of Uganda, Tororo and Mbarara.

Uganda emerged from civil conflict in the late 1980s, after which a reform of the institutions of government began, culminating in the ratification of a new constitution in 1995. The new constitution was designed to create the framework for a functioning democracy, providing for regular elections and basic civil liberties. Responding to both political demand and economic necessity, Uganda used its new constitution to recognize specific categories of landholding and to call for a new land law. The constitution created the legal template for the dual processes of democratization and decentralization. These simultaneous endeavors set the context for the development of a new land law. In the effort to create a constitution that would meet the needs of the country, Uganda had a unique opportunity to address pressing issues regarding land allocation and ownership, problems that had festered under a series of dictatorships. Uganda is similar to other African countries, including Ethiopia, Kenya, Ghana, and South Africa, that went through the third wave of democratization and have attempted, not always successfully, to capture democratic transformations in new basic law that can create an institutional environment to sustain both democracy and economic development in the long term.

Definitions and Caveats

The term “property rights” is used to refer to the rights of control over an object, a piece of land, a resource, or an idea within the bounds of the law. Specifically considered here are property rights in land. Land tenure patterns are a kind of property rights system or institution that is controlled through both law and custom. Institutions refer to the rules of the game: the patterns of behavior constructed by law, custom, or tradition and most commonly by a combination of these.

A caveat is in order. Though this article discusses the enforcement of law and the creation of new institutional rules regarding property rights, it should not be assumed that law enforcement is the only solution to a state’s problems. Law enforcement does

not lead to the elimination of social ills and the establishment of social equality, nor is state law always the optimal solution to a problem.² Less expensive models for resolving civil disputes and clarifying property rights may be found in organic institutional development or alternative dispute resolution.³

Creating and Enforcing Property Rights

Economic studies reveal the accepted wisdom that clearly defined and enforced private property rights to land contribute significantly to economic development.⁴ Anthropologists and political scientists have also noted the importance of property rights to both economic and political development.⁵ Secure property rights encourage people to invest in their resources and protect those investments against expropriation. Scholars have argued that economic efficiency requires a clear definition of the rights of ownership, contract, and transfer of land.⁶ Ambiguity in the definition or enforcement of any of these rights leads to an increase in transaction costs in the exchange and transfer of land as well as a residual uncertainty after any land contract.

Economists have argued that privatization and defense of the property rights of the poor worldwide will increase their well-being, giving them access to business and educational opportunities.⁷ Articulating private property rights in law will facilitate economic growth by creating what De Soto calls “meta” property—the paperwork of title and mortgage that can free the surplus value of assets and provide the necessary capital for economic growth and development. Without this legal framework of property rights people can do business effectively only with those that know them or their family.⁸ It is estimated that in Africa more than 50 percent of the periurban population and 90 percent of rural areas have informal tenure and therefore highly insecure and often communal property rights.⁹ Wider economic opportunities for the poor are restricted due to the absence of contracts and law that would enable individuals to mortgage their private property and use the funds for investment.

There is a substantial body of literature suggesting that security of land title leads to greater investment and increased productivity within and outside of Africa.¹⁰ One suggested benefit of land title is the increased availability of credit. A foundational study in Thailand found that credit was readily available where titling of land existed.¹¹ The study confirmed the link between private land ownership and productivity. As in much of Africa, credit in Thailand was nearly impossible for rural landowners to obtain without the complete legal possession of land as collateral. The Thailand study also found that nothing short of privatized tenure would achieve the same effect. However, two subsequent studies in Africa discovered that credit was not strongly correlated with privatized land rights in Niger, Kenya, and Tanzania, because credit was so limited overall.¹² Providing title to land, in an area where none exists, is an extremely costly endeavor.

or, yet the Thailand study established that the payoffs are greater than the cost. In other countries results have been far more equivocal. Klaus Deininger sums up the research.

The positive effect of title on the supply of credit will not emerge universally. Formal land titling and registration . . . are more likely to have a strong credit market impact in situations where informal credit markets are already operational and a latent demand exists for formal credit that cannot be satisfied because of the lack of formal title.¹³

Incentive to invest in land is another link between economic efficiency and property rights. Investments in land are highly varied. Most African farmers engage in some small-scale investment, such as the fertilization of a field with manure from farm animals. Other investments, such as the planting of fruit trees, digging of ditches to channel rain through fields, and the refurbishment of farm buildings or fences, occur regularly with minimal capital outlay. Without secure property rights, farmers will be unlikely to invest in major improvements on their land, such as buildings or irrigation systems. Absent security in land rights, even smaller investments, such as the fertilization of fields, are less likely to occur.¹⁴

Reduced transaction costs are the final economic effect of secure land rights. Scholars have argued that economic efficiency requires a clear definition of the rights of ownership, contract, and transfer of land.¹⁵ Ambiguity in the definition of any of these rights leads to an increase in transaction costs and a residual uncertainty after any land transfer or contract. High transaction costs due to uncertainty have two consequences. First, the value of any immobile property is reduced by the elevated cost of establishing clear ownership of the resource. Second, the high costs of exchange also prevent productive users from obtaining more land, thus leading to the inefficient allocation of resources. With high transaction costs, potential users will be unable to acquire land either through rental or purchase at the point at which they could assure a higher return, because the marginal product of the owner's use plus transaction costs exceed the marginal product of the more efficient user. Thus, high transaction costs can impede the efficient allocation of land within a society.

Implicit in these arguments regarding the importance of property rights is that private property rights to land, once established, are enforced or defended. While legislatures and judges around the world can create the laws and regulations that protect individual property rights, they do not have the responsibility of enforcing them. Enforcement is left to the courts and to the local administrative structures or police forces across the country.

In North America, Europe, and other areas with strong states and sufficient funding, legislative decisions lead to enforcement in a predictable fashion. In these places local administrations are comparatively efficient, legal dicta are clearly communicated, and local authorities are accountable for implementation. Gary Libecap has noted: "With title, the police power of the state can enforce private property rights to land. The courts can issue eviction notices against trespassers or arbitrate boundary disputes, and

law enforcement officials can implement court orders.”¹⁶ This statement reflects the assumption made by many scholars that legislative decisions will be enforced throughout a country by states that have effective control over the entirety of their territory. While this assumption may be true in North America, Australia, and Europe, it is not so in much of the world. Not only are the assumptions of enforcement false, they lead to seriously misplaced policy initiatives that focus on lawmaking, while neglecting the problems of law enforcement or implementation. In the absence of a strong local administrative structure, enforcement of laws regarding property is far less certain. Development of new property law is a necessary but insufficient condition for institutional change in property rights.

According to the reasoning of the property rights school, the best thing for those countries seeking to increase their economic growth rates and fully benefit from the globalized economy would be to make every effort to define private property rights clearly and establish the institutions for the creation of meta property, such as effective mortgage arrangements and accessible titling of customary or informally held lands. However, Douglass North argues that changing the formal rules of a society, such as the definition of property rights, is an incremental process that is constrained by the past. Vested interests in previous institutions see change as a threat to their survival and limit the development of new rules.¹⁷ Theory thus demands a reconstruction of the rules of the game, while at the same time urging caution when discussing any grand changes designed to alter institutions radically. Critical to this theoretical disconnect is the problem of time. Organic property rights change occurs over time marked in decades rather than years.¹⁸ Governments may change law quickly, but implementation of the legal changes is a much longer process in underresourced states.

Added to these issues is the challenge of institutional capacity. Given the lack of resources of governments across the developing world, property rights changes are difficult to achieve even when supported by the executive, bureaucracy, and other necessary organizations. The effectiveness of municipal administrations in rural areas far from the center of power has been questioned in relation to the state, development, and public administration in Africa.¹⁹ Given the dubious capacity of local governance across much of Africa, it is revealing to examine where and for whom laws are enforced and to what degree local administrative structures influence the implementation of changes in property rights.

Land Tenure in Uganda

There were several significant problems with Uganda’s land tenure system that created a poor environment for economic growth and agricultural development. Prior to the colonization of Uganda the Baganda kingdom controlled much of the territory of central Uganda.²⁰ The British defeated the kingdom in 1894 and occupied the entirety of what

is now Uganda. However, given the British colonial policy of indirect rule, whereby the administration of colonies was conducted through indigenous leaders, the British sought the support of the Bagandan king (the Kabaka) and Bagandan elites. This support was arranged through the 1900 Buganda agreement, which allocated land to indigenous notables and relegated those farming the land to secured tenancy. This system, referred to as *mailo*, required peasant farmers to pay yearly rents to absentee landlords. Yet the compliance of tenants was not always assured, and trouble with the system began during the colonial era. After independence, the issue of the status of tenants on *mailo* land was raised again.²¹

In 1975, in an effort to deal with these problems, Idi Amin implemented the Land Reform Decree, which declared all the land in Uganda to be public property under the control of district land boards and ultimately the central government. The 1975 Land Reform Decree turned the *mailo* land certificates into fixed-term leases from the central government. While this change provided further security to tenants on *mailo* land, the landlords were unhappy with it. It was one of several issues from the colonial era and the years of dictatorship that led to confusion over property rights that had to be addressed in any new land law. However, civil conflict precluded any major change in property rights until the 1990s.

After Yoweri Museveni took power in 1986, stability returned to most of Uganda, and the political space opened for a revision of property rights. Priorities for addressing problems of land tenure in Uganda were formulated by researchers carrying out field surveys to determine the necessary changes in Uganda's landholding system. These studies resulted in several goals for land reform in Uganda. First, the land reform system should contribute to the economic development of agriculture and of the nation. Second, the land tenure system should be flexible in the transfer of land so that farmers most capable of using the land profitably would be able to obtain it. Third, the land tenure system should protect access to land for people who have no income-earning possibilities outside the agricultural sector. Fourth, land tenure law should facilitate the evolution of land tenure toward a single, uniform, and efficient system for the whole nation.²² These important studies established the groundwork for constitutional reforms to landholding.

The 1995 Constitution

The constitution diverged from the 1975 Land Reform Decree, which had vested all landholding rights in the government of Uganda, by declaring that all land belonged to the citizens of Uganda. In Chapter 15 of the Ugandan constitution, four different categories of land tenure were established: customary tenure, leasehold, freehold, and *mailo* land.

The constitution called for the creation of a new law that would recognize the rights of bona fide occupants of *mailo* land with security of tenure. This change furthered the uncertainty regarding *mailo* land. To whom did the land belong? What were the specific rights of the tenants? What were the rights, if any, of the landlords? The constitution also raised uncertainties regarding the property rights of those holding their lands on a customary basis. Farmers with customary landholding were guaranteed security of tenure by Article 237 (4): “a) all Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and b) land under customary tenure may be converted to freehold land ownership by registration.” While the provision of the right of registration and freehold to those owning land through customary land tenure systems was wholly in keeping with extant theories of property, the mechanisms for registering and converting land were not in place, nor were they articulated in the constitution. Moreover, laws and regulations regarding the exchange of land and the length of leases, particularly for foreigners, foreign-owned businesses, and corporations, were also unclear.²³ These uncertainties ensured that the creation of a new land law was dictated not just by constitutional decree, but also by grass-roots demand for security of tenure and the economic imperative of a country seeking rapid growth.

One final aspect of the 1995 constitution would become important in the articulation and implementation of the Land Act of 1998: the issue of harmful traditional practices, particularly as they applied to women. In Article 26 of the constitution, every citizen of Uganda is given the right to own property. Article 33 specifically addresses the rights of women, according them “full and equal dignity of the person” with men and prohibiting “laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status.”²⁴ These constitutional guarantees were taken quite seriously by Uganda’s female parliamentarians and leaders.²⁵ They were the first expression of equality under the law and recognition that there were existing practices that were harmful to women. Due to extensive and well-publicized constitutional discussions, many Ugandan citizens, particularly women, were made aware of their constitutional rights. Additionally, women were well-represented in the drafting of the constitution. Women lawyers served on the constitutional commission; women’s organizations submitted opinions; and 18 percent of members of the constitutional assembly were women.²⁶ The result of all this participation was a constitution that was extremely progressive with regard to women’s rights and an educated constituency of women’s activists.

The Land Act of 1998

After the constitution created a parliamentary mandate for a new land law, the specifics of that law were met with great public interest. The parliamentary debate on the Land

Act was vigorous, inciting such great controversy that at one point the government feared civil unrest.²⁷

The Land Act of 1998 brought about a transformation of the titling, dispute resolution systems, and basic land law for Uganda. The law created a mechanism for customary land to be formally recognized and then titled. It captured contemporary economic thought regarding private property rights, insofar as there was a clear focus on creating security and titled freehold where it had not existed previously. There was also provision for the creation of formalized customary tenure and the eventual transition of customary tenure to titled freehold. In addition to the potential for the titling of customary land, the Land Act also sought to increase tenure security by providing legal rights of occupancy to squatters. The Land Act recognized as a "bona fide occupant" anyone who "had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more." This provision had the effect of giving security of tenure even to those resident on land that was not their own.²⁸

In the Land Act women were awarded the right to challenge their husbands if they attempted to sell the land on which the wives resided, through what is referred to as "the consent clause." However, an amendment to the act, which would have given women the right to co-ownership of family land, was eliminated from the final version under dubious circumstances. The government promised that the issue of co-ownership would be raised again in the Domestic Relations Bill, but this promise has yet to be fulfilled and its fulfillment does not appear likely in the future.²⁹ Instead, some of the protections of third party rights (those of dependent children) to land that were present in the 1998 Land Act were retracted when it was amended in 2004.³⁰

The 1998 Land Act clearly embraced the individualized property model. In so doing, it allowed for the creation of meta property that can be mortgaged and transferred, bequeathed, and exchanged.³¹ The provisions of the Land Act correspond with the theory of property rights in that the mechanisms to facilitate exchange, rental, mortgage and dispute resolution in relation to land are clearly articulated and applied to all of the major forms of landholding in Uganda. Moreover, the voluntary nature of the registration and titling process for customary land demonstrated an awareness of the failure of mandatory titling in neighboring states, such as Kenya, and the differences in demand for land and for title across regions of Uganda.³² The titling mechanisms in the Land Act have the potential to, over time and in a voluntary manner, draw all land in Uganda into the formal, titled sphere.

Implementing the Land Act

Making a law and getting it passed by a legislature are only the beginning of the process of institutional change. Implementing and enforcing the changes that are required under a newly written law are a difficult and lengthy process, particularly in countries where

resources at the local level are not sufficient for the tasks of administration. In the United States, as in many other developed countries, once the legislature passes a law, the appropriate implementation and enforcement bodies are informed and are capable of taking action immediately. For example, if the U.S. Supreme Court decides to change the criteria for lawful searches by police officers, once the decision is made public, the police patrolling the streets are informed through a variety of processes. They will likely be made aware of the law through their local state's attorney, district attorney, or county attorney. Regional law officers' associations send out daily bulletins by email updating chiefs of police on legal decisions that might affect them. Websites and publications targeted at the officers on the street that discuss legal changes and their affect on police behavior provide additional information and education for officers. Thus, there are well-developed mechanisms both to pass information along to the people who most need it and to ensure that they are held accountable for knowing about legal changes. In many developed countries, then, the making of a new law is a sufficient condition for institutional change. It is not enough throughout much of the world where the organizational capacity and the resources necessary to convey facts about alterations in law and necessary changes in police or judicial behavior rapidly and accurately are absent. The enforcement of the Land Act illuminates the difficulties in changing property rights institutions through law in an attempt to achieve greater economic growth in challenging settings where the resources of the state are limited.

In order to assess the implementation and impact of the Land Act, paired case studies were conducted in Tororo and Mbarara in Uganda in 2005 and 2006. These two areas represent very different regions of the country. Tororo is in the far western part of Uganda in an area populated by the Japadhola and Teso with a mix of ethnic groups in the urban areas. Tororo district has a population density of 329 people per square kilometer, with some commercial farming projects as well as subsistence farming and the Tororo Cement Factory.³³ Tororo is politically insignificant and poor. Land in the area is held through customary, communal tenure in the countryside. In the towns land is leased on a long and short term basis and can be purchased as freehold. It is possible to lease customary land in the rural areas.

Mbarara is located within the pastoralist corridor that runs from the northwest corner of Uganda through to the southwest. The people around Mbarara are Banyankole with a greater mix of ethnic groups in the towns. Land in the area around Mbarara has traditionally been held through customary tenure on an individual basis. In the countryside people practice subsistence agriculture and some pastoralism. Population density in Mbarara district is 112 people per square kilometer.³⁴ Because President Yoweri Museveni hails from Mbarara, it is often noted as particularly well-resourced in terms of local administration and governance. Tororo and Mbarara were chosen as study sites to examine areas of the country with very different administrative capabilities. In each region, structured interviews were conducted with officials working in the local land tribunals, land board offices, local nongovernmental organizations, and the police to

determine the degree to which the Land Act had been implemented, the nature of disputes in the area, and the problems of implementation. Interviews with people pursuing land disputes were conducted in both areas. In Tororo a local nongovernmental organization facilitated a focus group with women to discuss the consent clause. Officials from the Ministry of Lands, Water, and the Environment were interviewed in Kampala, as were representatives from women's organizations and nongovernmental organizations concerned with the Land Act and its implementation. Approximately thirty interviews and one focus group were conducted overall. Statistics were gathered from the land tribunals regarding the nature of cases heard, the time for a case to move from complaint to resolution, and the number of complaints filed.

Tracking Institutional Change

From the time the Land Act was written, it was clear that there would be difficulties with implementation.³⁵ As the bill was being debated, interested factions in the government bureaucracy, particularly the Directorate of Lands and Environment, a subunit of the Ministry of Water, Lands, and Environment, took up positions to weaken the reforms made and maintain the centrality of their organization. Patrick McAuslan, who participated in writing the Land Act, recounted the specifics of this obstructionist behavior. The Directorate of Lands and Environment delayed instituting the recommendations for implementing the Land Act and fought its own marginalization.³⁶ It previously had controlled funds that under the Land Act are allocated to the districts in order to finance the activities of the district land boards. When the directorate ceased to control the money allocated to the administration of land, it declined in importance. Therefore, it tried to redirect revenue to the institutions created by the Land Act that were under its control, such as the land fund, which was intended to provide compensation to those that lost their land to state appropriation.³⁷

This bureaucratic obstructionism is precisely the kind of impediment to institutional change that North identified. North noted that "dominant organizations (and their entrepreneurs) may view the necessary changes as a threat to their survival. To the degree that the entrepreneurs of such organizations control decision making they can thwart the necessary changes."³⁸ However, there were additional problems of implementation that quickly became evident. Many of these can be captured under the rubric of a lack of capacity.

With all of the new institutions and tribunals created for the administration of land in Uganda, it was estimated that an extra 20,000 trained administrative personnel would be needed to staff the different bodies created by the bill.³⁹ The difficulty in finding trained personnel was perhaps even more acute in Uganda than in other countries due to the effects of AIDS deaths on the working-age population. Tied to the issue of capacity was that of funding. Creating the new land offices and land tribunals required addition-

al monetary resources, but the Land Act made no specific provisions for this funding. Despite the fact that the Land Act was passed in 1998, by 2000 there were no functioning tribunals, and several people were killed in increasing violence over land disputes, perhaps as a result of the absence of government dispute settlement mechanisms.⁴⁰ In Tororo the land board was established and staffed only in 2006. In Mbarara the land tribunal was established much earlier in 2001, but it did not hear cases until 2003 due to logistical problems in getting desks, furniture, and files.

Though the land tribunals are now in place throughout the country, there are still problems with dispensing salary payments to them. In some district land tribunals, money for salaries and expenses can be up to two months late, forcing the tribunals to cease hearing cases.⁴¹ Lapses and delays in the implementation of any major change are to be expected. What is important to note in this case is that eight years after the Land Act was passed by the legislature the problems of capacity persist. In Mbarara the district land tribunal meets once a month, in Tororo less often due to a lack of resources. Even in the capital city of Kampala the district land tribunal meets only two days a month, regardless of the number of complaints filed.⁴²

Corruption also contributes to the difficulties in implementing major institutional change. In Uganda the government bureaucracy is infamous for its corruption and the additional “fees” that are necessary to obtain proper documentation of land ownership or land transfer, unless one is willing to wait years for access to a certificate of title.⁴³ There are multiple instances of citizen complaints regarding delays of up to five years in the titling of land or requests for bribes from bureaucrats responsible for filing the title. There are scandalous examples of land theft and allocation of multiple titles to the same plot. In one high profile case, the Kampala city council was accused of obtaining title to land on which public schools were built, then selling that land. This particular case led to a public statement by the minister of local government that anyone dealing with the Kampala city council does so “at his or her own risk.”⁴⁴ These problems are more pervasive in areas where the demand for land is greater, such as highly populated or urban areas. While this sort of corruption exists in such an important government ministry, the economic benefits anticipated from the new Land Act are unlikely to materialize. Such egregious examples of corruption were not present in either Tororo or Mbarara, where land values were lower, although people in both areas complained of long delays in receiving titles from the central government, unless one was willing to pay a bribe.

Customary law, the uncodified traditions and practices of different ethnic groups, still governs the allocation and inheritance of customary land in much of the country outside the capital city. In Mbarara land is held on a customary basis in individualized plots, so the movement towards individualized private tenure is not as sharp a disjuncture as it is in Tororo and other areas of the country where customary land is communally held by a lineage. In both areas the Land Act has been most controversial in its efforts to recognize the property rights of women. Customary law challenges the letter and the intent of both the constitution and the Land Act, as it interferes with the formal

recognition of the property rights of women. Under customary law, men own or control land. Women may farm the land, but they are allowed access to it only through their relationships with men.⁴⁵

Martin Chanock and others have noted that older men, empowered by the colonization process, formed customary law during the colonial era.⁴⁶ The creation of customary law excluded women's voices and women's property rights. This issue is economically significant across most of the African continent where women are engaged in both production and reproduction.⁴⁷ Indeed, African women are farmers, and it is their responsibility to feed their families. Their access to land and other forms of property is therefore extremely important for economic development. Formalization of customary law in the name of its owner is done in the name of the household head, who is male. This process limits women's use rights to the land that are present under customary law. To the extent that customary law excludes women from ownership of land and other forms of property, it also impedes their access to capital.

According to custom, females marry into the clans of their husband. In rural communities, the clan will allocate customary land to the man upon his marriage. The matrimonial home is usually built on customary land and is regarded as the husband's property until he dies, at which time ownership reverts to the clan. Because customary rules systematically exclude females from the clan or communal entity, they also exclude females from ownership of land. Moreover, since women are seen as belonging to neither their families nor marital clans, they are denied by both sources the opportunity to own land. As a result, they are alienated from land ownership from childhood to widowhood.⁴⁸

The constitution gives women equal access to land with men and forbids discrimination. Article 33.4 of the constitution says: "Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities." Not surprisingly, in practice women do not enjoy equality.

Under the constitution women are granted rights to land that they did not have under customary law. Women now have the right to act on their own behalf in purchasing, transferring, and bequeathing land as they wish and in representing themselves and their property interests in court. However, few women are able to take advantage of these new property rights. Given the nature of marital economic relationships described above, specifically the belief that all marital property belongs to the husband, few women have the resources to purchase land in their own name.⁴⁹

The dilemma for women comes through the recognition of customary land tenure in the constitution and the Land Act without the implementation of joint ownership of marital property (the clause that did not make it into the final document). Under customary land tenure arrangements, no woman has the right to ownership of customary land either through inheritance or through joint ownership of marital property. By recognizing customary tenure, without providing for co-ownership of marital property, the Land Act violates women's constitutional rights to equality.

Article 27 of the Constitution protects the right of women, but it is very difficult for rural women to invoke the constitution in terms of her right to inherit land. In effect they are saying that women can

continue to inherit land under customary law. Which means they won't inherit, and so its taking us back to where we started.⁵⁰

However, the Land Act does protect women's right to live on and farm "family land," whether it is customary or freehold. The marital consent clause prevents one spouse from selling the "land on which is situated the ordinary residence of the family and from which the family derive sustenance" without the approval of the other.⁵¹

The controversy surrounding the marital consent clause gives an indication of the sensitivity of women's property rights issues.⁵² Women face difficulty in blocking their husbands' sale of residential property if they are not aware of their rights or are not legally married. Many women have customary marriages; for these to be recognized by law, the bride price must be fully paid.⁵³ Evidence from a 2006 survey of 2,227 households in twenty districts of Uganda that was conducted by Associates for Development and the Centre for Basic Research shows that consent is being sought by spouses in most areas of the country. The percentage of respondents who sold land and did not obtain spousal consent was 26 percent in the North, 14 percent in the East, the area of the country in which Tororo can be found, 8 percent in the Central area where Mbarara is located, and 10 percent in the West.⁵⁴

Because of the demand for legislation protecting women's property rights, coupled with the educational efforts of women's organizations, the consent clause has been implemented more quickly than other institutional innovations. Yet recognition of customary land tenure in the constitution and the Land Act is still at odds with constitutional guarantees of gender equality. When it comes to the ownership and control of property, customary law and equality of citizenship are incompatible. Because of the public nature of constitutional discussions, women are increasingly aware of their rights. Consequently, some women have lodged cases over land with the local land tribunals based on the constitution. In Mbarara District, there are instances of women who have been married for forty years or more going to the land tribunals and trying, unsuccessfully, to gain a piece of the land of their natal family based on their constitutional rights of equality.⁵⁵ Bikaako and Ssenkumba argue that most women's efforts to achieve control of land through the courts in Uganda are frustrated.⁵⁶ Yet the choice of these women to go to court to pursue these issues suggests that they are aware of their constitutional rights and unafraid of engaging bureaucratic processes to try to achieve them.

Conclusion: Linking Theory and Practice

Hernando De Soto recognized that there might be difficulties in implementing new property rights for the poor. He indicated that the problem would lie with the lawyers who would try to block any reform in order to protect the status quo from "extralegal behavior or large scale change."⁵⁷ Lawyers who are resistant to economic reforms may

be problematic in other contexts; in Uganda the barriers to change have been entirely different.

Controversy over the Land Act arose because some thought it had gone too far in changing land rights and others that it had not gone far enough. These arguments focused on women's land rights, rather than privatization, and the repeated calls for further reform are indicative of demands that go radically beyond what has already been enacted. Although the Land Act provides the legal basis for the award of titles and the adjudication of disputes, the bureaucracies that should facilitate these changes have only slowly been established and have often operated without appropriate staffing or funding. Corruption has undermined the effectiveness of the new titling mechanisms articulated in the law. This has slowed the process of titling customary landholding as well as the transfer or titling of freehold, so much so that according to the Uganda Land Alliance eight years after the implementation of the Land Act not one plot of customary land was titled.⁵⁸ This slowness in implementation is what economic theory would predict is likely to occur when radical shifts in land rights are legislated from the center. North has argued that, "institutional change is incremental, gradual and constrained by the historical past."⁵⁹ The Land Act and the constitution were necessary but not sufficient conditions for institutional change.

One aspect of the past that interferes with the new articulation of rights in Uganda is customary law, specifically as it relates to women and what they can and can not own. "Property can not own property" is an oft-repeated aphorism in Uganda describing why women can not own their own land.⁶⁰ It also sheds light on cultural practices at odds with women's constitutional rights. Customary law in Uganda defines the past institutional structures relating to land allocation in Uganda, and it recognizes women as labor or property.⁶¹

The recent changes in the property law of Uganda have been an effort to achieve the gains from private individualized tenure. The injunction articulated by De Soto and others to recognize and privatize formally the property rights that already exist informally must be weighed carefully against the understanding that allocation of property rights to male heads of household without a legal framework for the joint ownership of property may be exclusionary in ways damaging to economic growth and contrary to concepts of justice. Nevertheless, it is particularly interesting that the one aspect of the Land Act that specifically tries to protect women's use rights to property, the spousal consent clause, has been implemented across the country, as a result of strong demand from below coupled with an array of civil society organizations that carefully monitored its implementation.

The Land Act has not yet been fully implemented and enforced in Uganda. It has not yet been an effective instrument in the formalization of property rights. The necessity of law in changing property rights can not be disregarded, but it is not the end goal in developing countries that it might be in the industrialized world. It is a beginning. Injecting a realistic representation of both time and process into discussions of institu-

tional change is imperative in grasping a more complete understanding of how change occurs and when it is likely to be impeded. In light of what economists say regarding the timing and the difficulty of changing property rights, the failure of law to be an effective tool of economic transformation seems to be a matter of excessively optimistic expectations.

NOTES

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1. Prior to the new constitution, the impediments to women's owning property in their own names were such that it was necessary for a woman to form a corporation or make the purchase in the name of a son or a brother if she wanted to purchase a home, a business, or a piece of land.

2. Bruce Benson, *The Enterprise of Law: Justice without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), noted the large social costs of using legislation to solve problems.

3. Terry L. Anderson and Peter J. Hill, *The Not So Wild, Wild West* (Stanford: Stanford University Press, 2004); Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991); Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review*, 57 (1967), 347–59.

4. Daron Acemoglu, Simon Johnson, and James A. Robinson, "Institutions as the Fundamental Cause of Long-Run Growth," in *National Bureau of Economic Research Working Paper Series* (Cambridge, Mass.: NBER, 2004); Hernando De Soto, *The Mystery of Capital* (New York: Basic Books, 2000); Gary Libecap, "Contracting for Property Rights," in Terry Anderson and Fred S. McChesney, eds., *Property Rights: Cooperation, Conflict and Law* (Princeton: Princeton University Press, 2003); Seth W. Norton, "The Cost of Diversity: Endogenous Property Rights and Growth," *Constitutional Political Economy*, 11 (2000), 319–37.

5. Sara Berry, *No Condition Is Permanent* (Madison: University of Wisconsin Press, 1992); Martin Chanock, "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure," in Katharine Mann and Richard Roberts, eds., *Law in Colonial Africa* (Portsmouth: Heinemann Educational Books, 1991); Martin Chanock, "A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa," *Journal of African History*, 32 (1991), 65–88; Jean-Philippe Platteau, "The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment," *Development and Change*, 27 (1996), 29–85; Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Ithaca: Cornell University Press, 2004); David L. Weimer, *The Political Economy of Property Rights* (New York: Cambridge University Press, 1997).

6. O. E. G. Johnson, "Economic Analysis, the Legal Framework and Land Tenure Systems," *Journal of Law and Economics*, 15 (1972), 259–76.

7. De Soto.

8. These same ideas are echoed in Harold Demsetz, "Toward a Theory of Property Rights II: The Competition between Private and Collective Ownership," *Journal of Legal Studies*, 31 (2002), S653–S672.

9. Klaus Deininger, *Land Policies for Growth and Poverty Reduction* (Washington, D.C.: World Bank and Oxford University Press, 2003), p. xxv.

10. Platteau; Demsetz; Libecap; Gershon Feder and Raymond Noronha, "Land Rights and Agricultural Development in Sub-Saharan Africa," *The World Bank Research Observer*, 2 (1987), 143–169.

11. Gershon Feder, Tongroj Onchan, Yongyuth Chalamwong, and Chira Hongladarom, *Land Policies and Farm Productivity in Thailand* (Baltimore: The Johns Hopkins University Press, 1988).

12. Sarah Gavian, "Land Tenure and Soil Fertility Management in Niger" (Ph.D. diss., Stanford University, 1993); Thomas C. Pinckney and Peter K. Kimuyu, "Land Tenure Reform in East Africa: Good, Bad or Unimportant?" *Journal of African Economies*, 3 (1994), 1–28.

13. Deininger, p. 48.

14. Sarah Gavian and Marcel Fafchamps, "Land Tenure and Allocation Efficiency in Niger," *American Journal of Agricultural Economics*, 78 (1996), 460–71.

15. Johnson.

16. Libecap, p. 155.

17. Douglass C. North, *Understanding the Process of Economic Change* (Princeton: Princeton University Press, 2005).

18. Sandra F. Joireman, *Property Rights and Political Development in Ethiopia and Eritrea: The State and Land, 1941–1974* (Athens: Ohio University Press, 2000).

19. Catherine Boone, *Political Topographies of the African State: Territorial Authority and Institutional Choice* (New York: Cambridge University Press, 2003); Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000); Dele Olowu and James S. Wunsch, *Local Governance in Africa* (Boulder: Lynne Rienner Publishers, 2004).

20. There were other organized kingdoms in what is now Uganda, but the Baganda was the strongest.

21. There was an additional conflict over 9,000 square miles of land that had been appropriated by the colonial government as crown land with the intent of providing some land that could be allocated as freehold to settlers. This land was controlled by the colonial government on behalf of its occupants.

22. Makarere Institute of Social Research and Land Tenure Center of the University of Wisconsin, *Land Tenure and Agricultural Development in Uganda* (Madison: University of Wisconsin, 1989).

23. This issue is particularly sensitive in Uganda. In 1972, when Idi Amin was president of Uganda, he expelled the approximately 60,000 South Asians from the country and effectively nationalized all of their assets. For an overview of the Asian role in the Ugandan economy prior to the expulsion, see Vali Jamal, "Asians in Uganda, 1880–1972: Inequality and Expulsion," *Economic History Review*, 29 (1976), 602–16.

24. Article 33 goes even further, assuring women affirmative action. Article 33 reads as follows. "(1) Women shall be accorded full and equal dignity of the person with men. (2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement. (3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society. (4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities. (5) Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom. (6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution."

25. See Aili Mari Tripp, "Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda," *African Studies Quarterly*, 7 (2004), 1–19.

26. Ibid.

27. John T. Mugambwa, *Source Book of Uganda's Land Law* (Kampala: Fountain Publishers, 2002), p. 50.

28. In the northern part of Uganda where civil conflict has displaced people since the 1980s, this provision has given security of occupancy to those residing on and farming land in areas to which they fled, including land in or near internally displaced people (IDP) camps. This provision also has been problematic in the case of large corporate landowners, such as the Church of Uganda, which purchased land for potential future use on which squatters have established homes. The author also encountered one case in which this clause was

being used by the family of the pastor of a church to try to maintain occupancy of the parsonage after the pastor had died.

29. Legal guarantees of co-ownership appear unlikely to be achieved via legislation. Versions of the Domestic Relations Bill have been in parliament for thirty years without passage.

30. Specifically, the interests that minor children had in their family land were eliminated. The reasoning behind the elimination of the protection of children's rights was twofold. First, it was very difficult to get a mortgage on any piece of land that children might have an interest in because the land itself could not then serve as collateral for the loan if it could not be possessed by the bank giving the loan in case of default. Second, it was felt that children's interests were adequately protected in other areas of law, such as the Inheritance Act.

31. Although in the case of Uganda it also illuminated problems with other areas of law that were also in need of revision, such as the Registration of Titles Act, which regulated mortgages.

32. For information on the problems of titling in Kenya, see Simon F. R. Coldham, "Land-Tenure Reform in Kenya: The Limits of Law," *Journal of Modern African Studies*, 17 (1979), 615–27.

33. Ugandan Bureau of Statistics, *2002 Census* (Government of Uganda, 2002), cited May 30, 2006, available from <http://www.ubos.org/census%20tabulations/cenannext1a.pdf>.

34. *Ibid.*

35. One of the largest challenges with any institutional change that is initiated by the central government is effectively conveying information to the people affected by it. In Uganda effort at disseminating information to the public at large was undertaken by both the government and nongovernmental organizations in both English and Lugandan. As late as 2005 radio campaigns educated people about particular aspects of the Land Act, such as the need for men to get the consent of their spouses before transferring a title.

36. Patrick McAuslan, *Bringing the Law Back In* (Burlington: Ashgate, 2003), 330–36.

37. McAuslan describes the struggle of the director of lands and environment to resist the changes of the Land Act in Chapter 13, aptly entitled "Men Behaving Badly: A Narrative of Land Reform. A Story of How the Best Intentions of Ministers and Parliament can be Corrupted by Bureaucrats."

38. North, p. 117.

39. McAuslan, p. 307.

40. *Ibid.*, pp. 337–38.

41. Interview with JM, September 2005.

42. Interview with DM, May 2006.

43. "Ministry of Lands Needs to Do More," *New Vision*, Oct. 11, 2005.

44. "Has Govt Stopped Recognizing KCC?," *Daily Monitor*, Sept. 17, 2005, p. 6.

45. Women by custom are the cultivators in Uganda; but also by custom men take the produce to market and thereby gain control of the income from farming. The author inquired of women in Tororo whether there were any opportunities for shirking or "weapons of the weak" that women could use to exert control over the marketing of their crops. Two such responses were to resort to farmstand sales at which women would sell their produce by the road near their farms—an option that would be open only to some women with strategically located fields—and simply to eat more of it (or feed more of it to their children) than they would if they could market it themselves.

46. See Chanock; Terence Ranger, "The Invention of Tradition in Colonial Africa," in Terence Ranger and Eric Hobsbawm eds., *The Invention of Tradition* (New York: Cambridge University Press, 1983).

47. World Bank, *Gender, Growth, and Poverty Reduction*, no. 129 (Washington, D.C.: The World Bank, 1999), cited Nov. 8, 2005, available from <http://www.worldbank.org/afri/findings/english/find129.htm>.

48. Jacqueline Asimwe, "Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses," *Yale Human Rights and Development Law Journal*, 4 (2001), 175.

49. For those who choose to do so, often the negative social repercussions are strong, from denial of access to farmland through the husband's customary rights to spousal abuse and in some cases murder. In 2005 many Ugandans followed the murder of Robinah Kayingi, a Ugandan woman lawyer who had lived some years in Australia. She was sued for divorce by her husband, a Ugandan cardiologist also living in Australia. She want-

ed the case heard in Australia so that she would retain some of the marital property. Shortly after she succeeded in having the case transferred there, she was murdered. *Sydney Cardiologist Charged in Uganda* (Melbourne: The Age Company Ltd., 2005).

50. Interview with Atuki Turner, September 2005.

51. The Land (Amendment) Act, 2004. Cap. 227. 18 March 2004.

52. Interview with Carol Bunga Idembe, September 2005.

53. According to Ugandan case law, *John Eduku v. Uganda*, customary marriage is not recognized unless the bride price has been paid. In the many instances where an agreement is made to pay the bride price at a later time, the marriage is not considered legal.

54. Associates for Development and Centre for Basic Research, *Gender Monitoring Baseline Survey for the Land Sector Strategic Plan in 20 Districts* (Kampala: Ministry of Water, Lands and Environment, 2006), pp. 77–78.

55. Interview with JB, February 2006.

56. Winnie Bikaako and John Ssenkumba, “Gender, Land and Rights: Contemporary Contestations in Law, Policy and Practice in Uganda,” L. M. Wanyeki, ed., *Women and Land in Africa* (New York: Zed Books, 2003).

57. De Soto.

58. Interview with Oscar Okech, September 2005.

59. North, p. 64.

60. Unfortunately, it is not just women’s rights to land that are described in this aphorism, but also their right to own any household property, such as a car or a television set.

61. A fact that is acknowledged by the payment of the bride price for a woman to her father on her marriage. The bride price recognizes and is a payment for the loss of labor to her family of origin. In eastern Uganda, if a woman wants to leave her husband for any reason and return to her family of origin, her father must pay back the bride price. In impoverished areas the practice of bride price leads to numerous problems for women. If a woman’s family of origin is unable to pay back the bride price, it is very difficult for her to leave a marriage under any circumstances. It is also sometimes the practice that a woman will be given to a man in marriage with the understanding that he will pay the bride price over a period of several years. If he does not do so, the woman’s family can demand that she return home with any children from that marriage. They can then try to make another marriage for her in which bride price will be paid. This practice is potentially dangerous in a country where HIV infection rates are high.