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The Position Paper of LEMU on the National Land Policy - Draft 3

July 2008



**Land and
Equity Movement
in Uganda (LEMU)**

Making land work for us all

Introduction.

The draft Land Policy indeed identifies and sets out ways to put right so many of the problems afflicting the land sector. For simplicity's sake, we are presenting specific modifications to paragraphs in plain text, which follow the numbering in the third draft of the national land policy. The justificatory arguments for our proposals are presented in italics. Our suggestions come only from our analysis of what we believe would actually work in the current context in Lango, Teso and Acholi.

1. Customary tenure and the other system.

The 1995 Constitution legalized four land tenure systems, Mailo, Freehold, Leasehold and Customary. *The first three are similar in that they are titled in the names of individuals or legal entities. But all three put together do not form the majority in Uganda. Customary tenure on the other hand is unregistered, held in units of individuals, families and communities and the predominant system in Uganda. Policy makers have always described customary tenure as "communally owned" and similar to an open access tenure. Because of this, the policy has always been to convert customary tenure into one of the registered tenure systems, believing it to be outdated and bad for economic growth. Policy needs to understand that customary tenure is not "an open access regime" where land belongs to all and to no-one in particular. It is important to distinguish two kinds of common properties. Much of this are actually owned as private property by communities - their grazing lands, hunting grounds etc. In law, these are private property just as much as is individual agricultural land. The policy seems here to be referring to land which are legally owned by the State (wetlands, rivers, etc.) and the policy statement is absolutely right about these. It is important, though, to distinguish in order not to give rise to the belief that other common property is not 'really' owned and that therefore the State has the power to decide where it should be vested.*

Recommendations in the long term.

Support to customary land tenure system and management to evolve in its own rights and not

be forced (by lack of policy interest) to "convert" into a freehold through titling of land.

Specific proposed changes to 5.2.11 (104 xiii) of the proposed national land policy

Replace the whole sentence with "properties which were held customarily as common properties, but are legally vested in the State, such as wetlands and rivers, will be inventorised and vested in communities to be managed under customary law, subject to management rules being approved by the relevant State authorities (e.g. **NEMA**)"

2. Protecting land rights through titling

One of the main vehicles for strengthening people's land rights in the Government's Plan is by turning land held under customary tenure into titled land. The belief is that titles will give people greater security of ownership and will also enable people to invest in their land, by using the titles as security for loans.

In part, this policy is based upon the mistaken belief that land with title is more secure than land held under customary tenure. In fact, customary land is quite secure and legal ownership is guaranteed, and titling, in certain conditions, may make things worse.

There are three principal dangers in the process of titling. First, the law of customary tenure is that land is held in trust, usually by a family head, for the benefit of the family members. He or She (usually a widow) has the responsibility to look after their land rights and to allocate land fairly to all. The land is not all his personal property, though in everyday speech, the land would be said to 'belong' to him or her. If land is titled in the name of a family head, all other people and households who had rights to parts of that land suddenly lose them. A very careful process of social investigation is necessary to make sure that all rights to the land are agreed and then recorded on the title (as encumbrances, which remain even if the land is sold). Without such a careful process, the process of titling will serve to erode land rights, not protect them.

The second danger is that titled land is no longer administered locally by people's own social systems. Disputes cannot be heard amicably

by clan elders, but must go to courts. Apart from the financial price that may be necessary, there is a huge social cost for people who take their disputes with neighbours outside the community for settlement through an adversarial legal process. Even non-conflictual matters become difficult. When someone dies, ownership can only be transferred through obtaining letters of administration from a court, and then going to the land registry. This is a difficult, costly and foreign process for most, and one with many dangers of fraud, for people who cannot afford lawyers or who do not understand English. Experience from Masaka District has shown that land ownership quickly runs into difficulties where it is taken out of a 'living' system. Land transactions become paralysed, and not facilitated, when most titles are in the names of persons already deceased. Titling works well where there is an efficient system of land administration and where people understand well what is involved by registering their rights in land. Establishing this is one of the Government's main priorities. We believe that pushing for Titling before an efficient land administration system is in place and before we have reached a level of development where society is more individualised, is a serious mistake.

The third danger is that most people have more than one plot or field of land that are not adjacent. This would necessitate one person or one family acquiring more than one title, making their administration even more difficult.

General Recommendation.

The objective of improving security of tenure can be secured in less controversial ways. The need is to establish clear, publicly recognized land ownership and boundaries, and back these up with a system that can enforce those rights. Currently, only the customary system can offer this protection, but it will need support to do so. This can be achieved by bringing it into harmony with the State system, ensuring that its rules follow the Constitution, and in return giving its decisions the full backing of the state judicial system - as the 1998 land act had envisioned. This customary system can be used to publicly

demarcate boundaries through the use of specific tree species. This will achieve the same security as from surveying, but will keep the land under its current tenure system, and so will not alter existing land rights.

3. Strengthening land administration.

Customary land tenure management had its own system of management based on a trust system. The institutions for managing land under customary system are the Clan whose responsibility is to protect rights of vulnerable people, set rules for use of land and ensure land remains in the family for all, including for the future generation, and to adjudicate on land cases. The clan allowed land to be given out for good reasons. The clan delegated its responsibilities for managing land in trust to the head of the family, and after him, his widow. The head of the family is responsible for allocating land to its members, for protecting land rights and protecting land. Land is given to individuals who had rights to this land in perpetuity.

Despite the intention of the Constitution in recognizing customary tenure, the land act did not pass enabling laws for customary institutions to function. The interest of the land act seems to be to change customary tenure into a free hold system through a two step system - first acquiring a certificate of customary ownership and then converting it to a freehold title.

It is now encouraging to note the priority given to support the customary land administration system, within which most land transactions occur and most disputes are solved.

General Recommendations.

We would stress the need for these State systems to work together with the customary institutions. This would include the need to:

- Recognise the roles of the customary institutions in making rules governing land, solving disputes, protecting rights and land.
- Record all land rights and land transaction, not only those on registered (titled) land;

- Manage communally owned land such as grazing land, hunting land,

Specific proposed changes to the national land policy

6.2.4 (125)

Subsection iii)

Replace ‘individual and community participation’ with ‘individual, family and community participation’.

The family, and not the individual or community, remains the basic productive unit in Uganda and the basic unit of ‘land administration’, meaning that most land rights are derived from membership in a family.

7.2.3 (139 ii)

Add sentence: “These should be based on existing local practices, such as the planting of tree species locally recognised as denoting boundaries.”

Self-explanatory

7.2.4 (141 iv)

Add sentence: “This will necessitate a process of support to encourage customary authorities to adopt the practice of recording cases and judgments.”

Self-explanatory

4. Protection of rights of vulnerable people.

Currently, the state law caters for protection of wives only and does not cater for widows, children’s protection. Even with the consent clause meant to protect wives and husbands, there is no institution given the responsibility to ensure protection happens.

The clans that had the responsibility to protect widows and children are excluded by the land act from performing these roles.

General recommendation.

Policy strategies should add a section on protection of land rights, especially of vulnerable people such as widows, women, orphans and children. Customary system gives this

responsibility to the clan but the state should hold the clans accountable.

Specific proposed changes to the national land policy

6.2 (119)

Add sub-section: “give legal responsibility to specific institutions, both of the State administration and of the customary authorities, to ensure that land rights are protected.”

a) We believe this is a fundamental of land law until now: protection has been written in, but no one is actually responsible for applying it, so it rests on paper.

b) If customary authorities have the legal right to administer customary land, then they must also be held liable for their work - which must meet the standards of customary law and of State law / constitution.

5.2.7 (94 vii)

The phrase ‘provide special protection to widows and orphans against deprivation of land resources through distress sales and discriminatory transmissions’ be replaced by “provide special protection to widows and orphans against deprivation of land resources through distress sales, expropriation of land by family members or in-laws, and discriminatory transmissions”. *The main threat is from the widows’ in-laws (or orphans’ uncles). The problem is less the ‘discriminatory transmission’ which implies that this is sanctioned locally, and more from behaviour which is actually in breach of local customary law.*

5.2.8 (95)

The sentence “It is estimated that between 70-80% of the country’s agricultural labour is supplied by women but only 7% of those hold title to land” be deleted.

The point about gender inequality is important, but presenting this statistic implicitly makes two other points.

a) Having title to land is “real” ownership and owning land under customary tenure is a lesser form of ownership. This is not the view which the policy presents elsewhere - but what else could be

meant by only saying how many women own registered land?

- b) One often sees claims that there is gender inequity because little land in Africa is owned by women. In fact, in the Ugandan case, we believe this cedes the very case we should be fighting, because it implies acceptance that the position claimed by many men, that under customary tenure “women don’t own land”, is true. We believe this is a distortion of customary law and not the true position. Customary and state law give women land rights - it is unchallenged unfair practice which is denying them rights.

5.2.8 (96)

Add as section i): “enact legislation giving statutory responsibility to particular office holders, in both the State administration and customary administration, to enforce existing legislation protecting women’s rights (e.g. rights of inheritance, the consent clause) and for ensuring that customary practice complies with the Constitution and laws on non-discrimination against women.”

In our analysis these are really secondary to issues of protection. This is because the law - both customary and statutory - both grant women reasonable land rights. The rights may not be totally equal, but women’s real problem is that the level of protection that exists in theory today is not working. Adding better ‘theoretical’ protection is not, therefore the main point (correct though it may also be). The consent clause making it mandatory for consent of spouses when land is sold is there - but until someone is legally responsible for checking that it is there in every land sale, it will continue to be ignored. Abuse will continue unchallenged until customary authorities are legally responsible for upholding the protection of women, e.g. widows, and can thus be personally sued for negligence if they don’t do their best to protect their rights.

5. Land for Development.

Land market policy that land should become a commodity for sale

The current policy which is again reflected in the draft land policy is that land should become a marketable commodity so that progressive farmers may access land. This is one of the reasons titling of customary land is promoted since selling titled land makes the land market efficient. Much as this is so, we also know that in our district where the wealth in form of cattle was destroyed and where people stayed in camps for over 20 years, the decision to sell land will not only be an economic one but also one to meet other consumption and social needs. People are forced to sell land for school fees, for dowry for marriage and to meet emergency needs. Policy should therefore recognize that the land market is also a vehicle through which land rights and land access is lost, especially for the vulnerable group. Policy should also expect that in future, we shall have landless people amongst us. This is why it is very important to monitor the land market as a policy. There should therefore be a policy to establish the level of landlessness in Uganda and to monitor it as well as a policy strategy to reduce distress land sales. Policy proposes to counter the negative impact of this policy through resettlement and creation of land banks.

General Recommendation.

We propose to counter the land market policy with the following:

- *Support people with land rights under customary tenure to be leased out to investors of their choice by putting in place documentation of land transactions and recording of land under customary tenure.*
- *Recognize the customary management system so that the clan may control irresponsible land sales by heads of families;*

Specific and Proposed policy changes are as follows:

Resettlement of the landless and displaced.

We recommend that **this clause be deleted:**

a) Resettling the poor in concentrated areas away from their communities may give them land, but will remove them from their families and friends, social safety nets, etc. There will be inevitable stigmatization of 'resettlement areas' which may lack social and economic infrastructure, including markets. How will people find paid labour to meet immediate needs if they are in a community of 'the resettled poor'? This cannot be the way forward - but finding them all land in their own communities will be impossible.

b) Signaling that when people have no land the State will pick up the pieces, is to give a green light to land expropriation by relatives and in-laws. Social protection is the joint responsibility of communities themselves and the State. The State can achieve this better (more effectively and more cost-effectively) through social welfare payments rather than through resettlement and land banks.

3.2.5, section 54 sub-section (iv)

The phrase "resettlement of all displaced persons to their **areas** of origin" be amended to "resettlement of all displaced persons to their **homes of** origin, or their temporary settlement in their areas of origin"

The resettlement of IDPs is currently under discussion in northern Uganda, and there are proposals from within the Ministry for creating permanent settlement out of IDP camps in order to create 'cooperatives' on the land around them. This is extremely dangerous for many reasons - partly because it denies people the rights of their own land, and denies the land rights of the owners of the land around these camps. There have been many misconceptions that land ownership under customary tenure is 'communal' and so anyone can be settled anywhere in their 'area' of origin. Any phrase

which undermines the fact that IDPs owned land as families or individuals should be avoided, as it could be used to undermine land rights.

6.2.3 (122)

Replace "resettlement of the landless and displaced populations" with "temporary settlement of displaced populations".

a) "Resettling the landless" is a very complex game to enter. There is no policy currently on who has a right to be resettled or where, and what the rights and duties of host communities are. This matter is causing a lot of tension, partly because it is being dealt with in an ad hoc way. Until there is a clear policy on resettlement of the landless, this should not be mentioned. Any such policy should always try and settle people within their own communities. However, the idea that the State is the final safety net through the allocation of free land to the landless is not tenable.

b) The internally displaced should always be allowed to return to their own land and not be resettled on others land. If they are landless, then their case is as above. If they cannot return home, then it should be clear that we are talking about temporary resettlement, until such time as they are able to return. People who are displaced by large projects such as dam construction are compensated and so should find their own land through the market.

6.2.3 (123)

Delete sub-section (ii)

Most Districts have no free land which is vested in the Land Boards, and no funds to acquire land. It is not advisable for the State to acquire land in advance of any specific need, when it is known idle State land will be under threat of encroachment.

Compulsory acquisition of land for investment.

4.2.2 section 67 sub-section (ii)

This sub-section should be deleted.

The proposal that the State should be able to enforce compulsory acquisition of land for 'investment' has been much debated, not least in the proposed Constitutional amendment of 2005. It has been generally recognized that this would be too dangerous in the context of Uganda. It would effectively undermine everyone's security of tenure. Even in the absence of this legal provision we have seen far too much illegal and unconstitutional expropriation of land for investors. The idea that this can be 'carefully defined' and controlled is, sadly, too optimistic.

It would be wrong anyway to reintroduce as policy recommendation that which was explicitly debated - and rejected - by parliament, as this one was.

National Parks.

5.2.4

Add new paragraph after 85

"The establishment of many National Parks and other public lands was on land previously owned under customary tenure at a time when these rights were not acknowledged. Although it is not advisable now to attempt to compensate those who lost land rights long ago, the principle should be established that part of the revenues of National Parks and tourist sites should go directly to communities now bordering these amenities."

There are some schemes where this does already happen, but the principle should be enshrined in national land policy.

6. Implementation of this land policy.

9.1 (162)

Replace final sentence, The first steps in this process... with "The first steps in this process will entail a rigorous enforcement of existing legislation protecting land rights. The process will then continue through dissemination, public dialogue, programming, institution building, monitoring and evaluation and legislating".

It's very important to stress that many of the

current problems come from failure to implement what is already there.

Bringing in new things (laws, policies, and institutions) is a secondary matter that can only work if it is shown that what exists on paper is actually implemented in reality.

7. Recommendations for policy changes in the short term.

The land policy will take time to be approved and translated into laws for implementation. Land problems are increasing daily and taking criminal turn each day. To arrest the situation from getting out of hand, we recommend the following measures in the interim.

- Set up clan committees to be the first place people go to for land dispute mediation/ determination before state courts.
- Area Land committees should be set up, using the customary structures as much as possible, in order to reduce boundary conflicts and to promote boundary tree planting.
- Support to local land administration is urgently needed. LC III courts should be set up, using the customary structures as much as possible to ensure justice is upheld.
- Funds for recruitment of District Registrars should come from central government for supporting formation of communal land associations to protect communal land from private enclosure.
- Recorders (Government Sub County) Chiefs to be supported to record land transactions in customary land.
- Support to traditional institutions to disseminate customary principles and, practices governing customary tenure, where these are developed.

END



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Making land work for us all

