SUSTAINABLY UTILIZING OUR NATURAL HERITAGE

LEGAL IMPLICATIONS OF THE PROPOSED DEGAZETTEMENT OF BUTAMIRA FOREST RESERVE

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Acknowledgements

With the adoption of the Poverty Eradication Action (PEAP) and the Plan for Modernization of Agriculture (PMA) by the Government of Uganda, the sustainable development debate has taken on a new dimension. The need to reconcile key government interventions aimed at promoting economic growth and its commitments to eradicate rural poverty while maintaining the integrity of key ecological systems has become more pronounced. In this policy series, we bring you a case study that demonstrates how the various government policies can converge while bringing poor people at the centre of the development process. ACODE Policy Research Series No. 4 analyses the legal, policy and constitutional aspects of the proposed degazettment of Butamira Forest Reserve in Buyego sub-county, Jinja District.

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We are also grateful to several persons who reviewed and made comments on this policy brief. Their comments have been valuable in helping us clarify key legal and policy issues as well as making our arguments more focussed. All ACODE Research Associates who in one way or the other contributed to this policy brief are acknowledged. However, the views presented in this policy brief are those of the authors and do not necessary reflect the views of ACODE, our reviewers or our donors.

Executive summary

The Legal Aspects of the proposed degazettment of Butamira Forest Reserve (ACODE Policy Research Series No. 5. Forthcoming) analyses the constitutional, legal and policy aspects of the ongoing efforts by the Uganda Government to degazette Butamira Forest Reserve. The Reserve is located in Buyengo Sub-county in Jinja District. The Reserve is currently a subject of controversy and hotly being contested by the Mahdivani Sugar Company who want to turn it into a sugar cane plantation and the Buyengo community who have invested in the Reserve under permits from the Forestry Department. The interests of very many stakeholders including the personal involvement of the President, the Busoga Kingdom Government, the Jinja District Administration, and environmental pressure groups that are interested in environmental protection and upholding the rule of law amplify the Butamira controversy.

In this policy brief, the researchers make the following observations:

· The proposed degazettment is contrary to the spirit and letter of Article 237(2)(b) of the 1995 constitution since the effect of the said degazettment would be to extinguish the beneficiary interests of the people of Uganda in general and the Buyengo community in particular;

· The successful investments by the local permit holders clearly demonstrate convergence of key government policies and in particular the Plan for Modernization of Agriculture (PMA), the Poverty Eradication Action Plan (PEAP) and the National Forestry Policy, 2001. Dispossessing these permit holders would therefore undermine public support for the implementation of government policies;

· The communities are using natural resources as an asset to engage in productive activity as envisaged under the various policies and there are noticeable positive changes in their incomes and conditions. Government should support their efforts by providing them with incentives such as soft loans and security of tenure rather than frustrating them;

· The public trust doctrine which is now enshrined in our Constitution and the Land Act, 1998 provides legal limits within which Government can deal with natural resources. The proposed decision that will extinguish this trust property is unconstitutional and does not reflect the aspirations of the people of Uganda as expressed to the Uganda Constitutional Commission.

· The Solicitor General has wrongly advised Government on the legal aspects of degazetting natural resources. His reference to the Forest Act of 1964, which Government has dismissed as being out of touch with the Constitution and emerging forest management principles, appears to be misplaced. Government is already engaged in a process to amend the 1964 Forest Act and the proposals for the new legislation clearly captures the new government policies on pro-poor and people centered investments, community empowerment and democratic decision-making;

· The Government proposal to amend the Land Act based on the need to give a lease to AES Nile Power over the bed and River Banks of the Nile at Bujagali is not born out of facts and serious analysis since section 45(5) of the Land Act provides transparent legal mechanisms and instruments for sustainable investment in natural resources and their preservation for our future generations as envisaged under our Constitution.

The authors conclude that Section 45(4) is the only mechanism for providing Parliamentary oversight on how Government as a public trustee deals with and manages our natural resources assets. Parliamentarians as peoples'

"The important thing to note here is that the people want natural resources to be exploited for the benefit of all citizens, and that there should be some restrictions on foreigners and the rich grabbing these resources, especially land. Although in the development of the country, they welcome private local and foreign participation people do not want to see a few people grabbing the natural resources of the country, or carrying development only with the short term view of reaping profits. Development must take the long term view of sustainability of resources and must be sensitive to the dignity of the citizens and the effect on the environment".

[Quoted from the Report of the Uganda Constitutional Commission: Analysis and Recommendations, 1993. Page 646, para. 23.62. Otherwise known as the Odoki Commission]

"...In the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources."

[Quoted from M.C Mehta V. Kamal Nath & Others (1997) Supreme Court Cases (India)

1. Introduction

This policy brief analyses the constitutional and legal aspects of the proposed degazettment of Butamira Forest Reserve. The Government of Uganda is attempting to degazette and lease out the land comprised in the Reserve to Kakira Sugar Works for sugar cane growing. The net effect of the degazettment and re-allocation is that it will extinguish the investment interests of the local community and their ability to raise their incomes jeopardized contrary to what is envisaged under Pillar 3 of the Poverty Eradication Action Plan[1]. It will also lead to the dissolution of the trust property since the land comprised in the Reserve shall be appropriated to the private interest and cease to be held in trust.

The purpose of this policy brief is to highlight the constitutional and legal aspects of the proposed degazettment and its implications for the local community in Buyengo. First, this paper argues that the 1995 Constitution created a trust over natural resources in Uganda. Degazettment extinguishes the trust property and is therefore unconstitutional and violates well-established principles that govern public trust property. Secondly, it argues that the activities of the permit holders in Butamira Forest Reserve demonstrate a convergence between government policies to modernize agriculture, eradicate household poverty by improving the incomes of the poor and promote an ecologically stable and prosperous country. The ongoing attempt to extinguish the rights of the permit holders is a violation of their right to engage in productive activity. It also undermines implementation of government policies.

Through a case study approach, we try to demonstrate that by proposing to destroy the modest investments of the local people in Buyengo Sub-county, government is undermining its efforts to promote sustainable agriculture and community investment in ecologically sound natural resources based agricultural diversification. In this Reserve, investments in tree growing combined with permitted crops, including beans, maize and soya bean and the other successes that have been registered by the Butamira community disprove the sceptics who have criticized the Plan for Modernization of Agriculture[3] as panacea for further natural resources degradation. The ongoing efforts by government to degazette this Forest Reserve and dislocate

1 The Uganda Constitutional Commission was headed by Hon. Justice Benjamin Odoki now Chief Justice of Uganda.

2 Revised Volume 1 of the Poverty Eradication Action Plan (PEAP)-Final Draft. Ministry of Finance, Planning and Economic Development, Kampala. July 2000.

the entire community in the name of private investment in sugar cane plantation growing casts doubt on government policy to invest in people-centred agriculture modernization.

In Butamira Forest Reserve, 148 community groups as well as 30 individuals, hold plots of land that have been planted with trees and a series of crops as permitted by the allocation permits from the Forestry Department. The prospects of increased incomes and ecological stability brought about by their efforts are bringing new hopes to a community once impoverished by lack of access to productive assets brought about by the traditional exclusionist policies of the colonial and post colonial governments[4].

The investments of the local community in Butamira Forest Reserve clearly demonstrate that there are synergistic facets of the Poverty Eradication Action Plan, the Plan for Modernization of Agriculture as well as the National Environment Policy[4] and in particular, the Uganda Forestry Policy[5]. The agricultural activities of the community groups in Butamira provide evidence to policy makers of the possibility of local private investments in modern tree growing bringing with it the prospects of potential financial and ecological gains. The efforts of the community to defend their proprietary interests in the Reserve are also evidence of community empowerment and public participation in decision making as envisaged under the PEAP, the PMA and other government policies.

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2. Case Study of Butamira Forest Reserve Controversy: A Community Under Siege:

2.1 Background

The History of the current controversy over Butamira Forest Reserve dates back to 1929. Located in Buyengo Sub-county in Jinja District, Butamira Forest Reserve measures approximately 5.4 sq. miles. It was first established by the Busoga Kingdom Government around 1929 and later gazetted as a Local Forest Reserve under the management of the Kingdom Government. Evidence suggests that by 1939, the Busoga Kingdom Government had fully planted

[3] Republic of Uganda (2000). Plan for Modernization of Agriculture: Eradicating Poverty in Uganda (Government Strategy and Operational Framework. Ministry of Agriculture, Animal Industry and Fisheries/Ministry of Finance, Planning and Economic Development, Kampala.

[4] For a detailed discussion of the Social-Economic importance of the Reserve to the local community sec. Uganda Wildlife Society (2001):
The Social-Economic Ecological implications of the proposed Degazettement of Butamira Forest Reserve. UWS, Kampala.

[5] See Republic of Uganda (2001). The Uganda Forestry Policy, Ministry of Water, Lands and Environment, Kampala. The Uganda Forestry Policy was approved by Cabinet and published in early 2001.

the Reserve with eucalyptus trees. At the moment, Butamira is the largest Forest Reserve in Jinja District contributing approximately 20% of the entire forest estate in Busoga[6].

In 1939, Butamira Forest Reserve was leased to Madhvani Sugar Company (Kakira Sugar Works) for a period of 32 years[7]. The Reserve was to be used for producing firewood for the sugar company and payment for the firewood and ground rent was to be paid to the Busoga Kingdom as well as the Protectorate Government.

All through the 1950s and beyond, Kakira Sugar Works made attempts to acquire the Reserve for sugar cane growing. In 1954[8], the Company managed to excise approximately 50 ha (114 acres) from the Reserve. In 1956, Kakira Sugar works made attempts to acquire part of the Forest Reserve in the name of a donation of a farm school to the Busoga Kingdom Government. The Forestry Officials at the time resisted this attempt[9]. During this period, Madhvan rejected any offers of land elsewhere in Busoga arguing that the location of the school in Butamira Forest Reserve was essential for advertising the donation. Rejecting the argument, the Provincial Forest Officer for the Eastern Region at the time observed as follows:

"Though I am certain that the District Commissioner and Agricultural Officer have tried very hard to meet the wishes of the donor of the gift, it has just not been possible to fill them, with the exacting conditions which he has laid down. Likewise, it would be foolish not to realize very clearly the implications of the present position, that we are being asked to alienate 300 acres of a small and very hard-won forest estate, with land available elsewhere to satisfy the self advertisement of one individual (emphasis original)"[10]

Meanwhile, between 1968 and 1970 the Company had reduced the nearby Walulumbu Forest Reserve from 2686 ha to only 119[11] ha. It is also important to note that even the purportedly remaining 119 ha are under sugar cane plantation by Kakira Sugar Works.[12]

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[6] This information is obtained from an undated Forestry Department Memo attached to an April 19, 2001 letter from the Permanent Secretary, Ministry of Water, Lands and Environment to The Principle Private Secretary to His Excellence the President of the Republic of Uganda. (Ref. DLE/168/229/01)

[7] Efforts to obtain the lease documents were not successful during the course of this study.

[8] According to a June 9, 1955 letter written to the Chief Conservator of Forests by the Provincial Forest Officer for the Eastern Region, this excision was because of an error in the survey of the sugar estate. No evidence has been found during this study to suggest that Kakira Sugar Works ever paid for this land.

[9] In a communication to the then Chief Conservator of Forests, the Busoga District Commissioner proposed that the land requested by Mr. Muljibhai Madhvani be exercised from the Butamira Forest Reserve. The Chief Conservator of Forests flatly rejected this proposal. This information has been synthesized from the correspondences between the various officials during the 1950s.

[10] See letter of 9th June 1955 with reference KP/65.

[11] See The Forest Reserves (Declaration) Order, SI No. 63 of 1998.

[12] No information has been obtained on the status of this land, how KSW obtained it and under what terms it is cultivating the remaining 119 ha of the Walulumbu Forest Reserve. The Forest Reserves (Declaration) Order, SI No.63/98 only stated that this Reserve is 119 ha.

There is almost no documentation of whatever transpired concerning this Forest Reserve from the early 1970s to the mid-1990s. This may be accounted for by the fact that in 1972, Idi Amin expelled all the Asians and their businesses were taken over by the military junta or its sympathisers.

However, events took a new turn sometime in 1997 as the 32-year lifespan of the permit originally granted to Kakira Sugar works neared expiration. In 1997, Kakikira Sugar Works (1985) Ltd applied[13] to the Forestry Department to utilize Butamira Forest Reserve for its operations. Permission was subsequently granted in the same year and a new permit issued effective July 28, 1998.[14] This permit, unlike the previous one gave KSW the rights to put the entire reserve under use for general purposes and the original conditions were ignored. Consequently, KSW embarked on a scheme to clear the existing forest estate and replace it with sugar cane plantations. The communities around Butamira Forest Reserve complained against the decimation of the forest estate.

Events took a new turn when in 1999, the Permanent Secretary, Ministry of Water, Lands and Environment requested the Inspector General of Government to investigate the affairs of the Forest Department.[15] In the investigations that ensued by both the Inspector General of Government[16] and the Parliamentary Committee on Natural Resources, it was found out that the 1998 permit granted to KSW was issued fraudulently and in disregard of the law. The Parliamentary Committee in particular recommended, inter alia, that the permit to KSW be revoked.
In November 2000, the Forestry Department acting through the District Forestry Officer-Jinja embarked on a process to allocate plots of land to various community groups and individuals. In all, 148 groups and 30 individuals hold plots in the reserve ranging between 3.5, 7 and 10 ha. The community groups have undertaken substantial investments in tree growing and other permitted crops for cash and food. It is this investment that some sections of Government wish to unravel to enable a private person alienate what under the constitution is public trust property.

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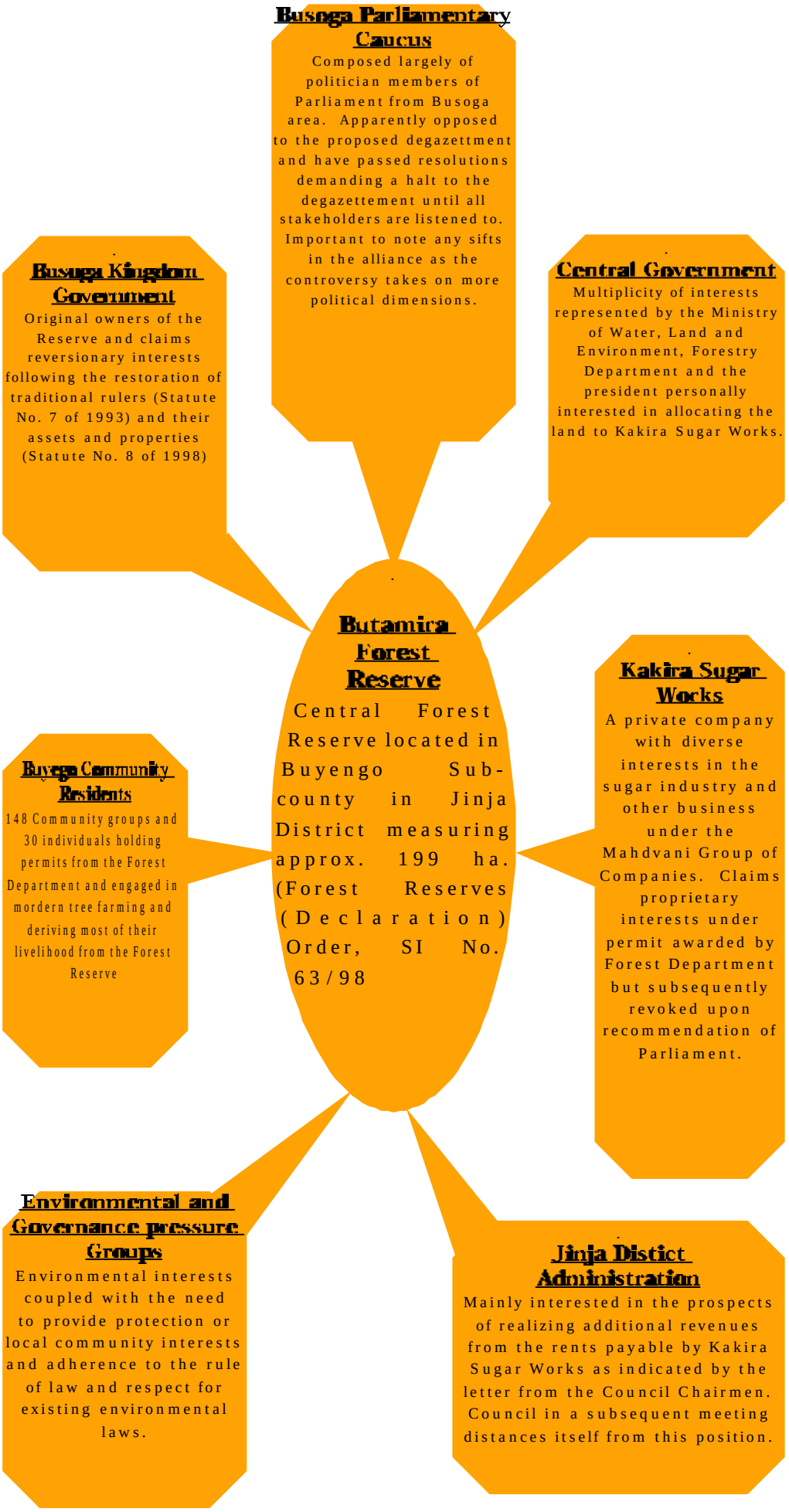
* The proposed degazettment therefore raises significant social, policy and constitutional problems as discuss in detail below.

[13] Efforts to have access to the application by Kakira Sugar Works were not successful.
[14] Correspondence between the Commissioner for Forestry and the Managing Director, KSW Reference 3/39 dated July 7, 1997.
[15] See letter dated 24th November 1999.
[16] Republic of Uganda, 1999. Report of Findings of the Investigations Carried Out on Operations of Forestry Department. Inspectorate of Government. Kampala.

See UWS, 2001: Social-Economical and Ecological implications of the proposed Degazettement of Butamira Forest Reseve bid.

Butamira Forest Reserve: Stakeholder Analysis



2.2. Convergence of government policies and Poverty eradication objectives

The Butamira case study provides evidence of convergence of several government policies. Both from a theoretical and practical perspective, it is clear that the activities of the community groups and individual permit holders attest to the fact that natural resources investments can yield considerable dividends and contribute to eradicating rural poverty while promoting ecological stability. The notion that agriculture and natural resources conservation are mutually exclusive is cast in doubt and a synergistic relationship between various government policies amplified.

The fundamental objective of the PMA is to enable the poor people to improve their natural resource based livelihoods in a sustainable manner thrrough multi-sectoral interventions.

Many government plans, policy documents and studies have noted the inability of poor people to access productive assets as one of the major impediments to poverty eradication.[17] Since its inception in 1997, the Poverty Eradication Action Plan has guided the evolution, formulation and implementation of government policies. Consequently, all the major government policies that have been formulated subsequently have poverty eradication and empowerment of poor people as their overarching objective.

The vision of the Revised Volume 1 of the PEAP, which among other things states that the poor must be able to participate in bringing about national economic growth, resonates with what is stated in many other government policies.[18] The Plan for Modernization of Agriculture for example states in part that *"the fundamental objective of the PMA is to enable the poor people to improve their natural resource based livelihoods in a sustainable manner* through multi-sectoral interventions"[19] (emphasis ours). The Uganda Forestry Policy recognizes the important role of forests and forest products in the overall growth of the economy and their potential to contribute to poverty eradication. Government commits itself to promote "profitable and productive forest plantation business" through among other strategies "encouragement of small to medium-scale commercial plantation development, to foster local economic benefits, especially for the poor, women and youth".[20]
While it is not often easy to see official government policies converging and being implemented in practice, the case of Butamira essentially demonstrates this convergence. It is a classic case of local people helping government to achieve its stated policy objectives. Consequently, it is tenable to argue that the community groups in Butamira Forest Reserve should be supported and encouraged by Government to continue to develop the policy lessons that are apparent in their activities. Dispossessing and relocating them involuntarily will create an undesirable precedent in government policy implementation. The pressure that these community groups are facing and the eminent danger

[17]Republic of Uganda (2000). Revised Volume 1 of the Poverty Eradication Action Plan (PEAP)-Final Draft. Ministry of Finance, Planning and Economic Development. Kampala; Republic of Uganda (2000). National Programme for Good Governance in the Context of the Poverty Eradication Action Plan. Uganda Governance Capacity Assessment Project/Ministry of Finance, Planning and Economic Development. Kampala.

[18]PEAP-Final Draft, ibid. Pg6.

[19]Ibid, pg 2.

[20]Supra. Pg 17

of alienation of their labor and investments are already creating a sense of desperation and frustration. Relocating them is likely to create further frustration and impoverishment.

3. Assault on the public trust: Degazetting is illegal both in national law and at common law.

As already indicated, Uganda's national legislation has been coalescing to incorporate the public trust doctrine in our legal system.[21] The legal effect of this legislation has been to remove important natural resources from the absolute Government control and vest them in the public realm. Both the Constitution and the Land Act enjoin Government or a local government to hold these resources in trust for the people of Uganda. Unlike in the past, today resources are no longer available for expropriation and abuse by 'overzealous' governments, and a system of checks and balances has been created to allow more public involvement in making decisions over the use of these resources. Any government that claims to uphold the rule of law ought to accept this shift in the ownership and management of natural resources. Such management must conform to the well-established principles of the public trust doctrine.

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While the history of the public trust doctrine can be traced in pre-colonial Ugandan societies, statutory provisions relating this doctrine only dates to the 1995 Constitution. The rationale for providing constitutional protection to natural resources can be found in the report and recommendations of the Uganda Constitutional Commission that was published in 1993.[22]

After careful consideration of the views and proposals submitted, the Commission noted that there was broad agreement on the need to control and regulate the ownership and exploitation of important natural resources including land, water, forests, petroleum and minerals.[23] The views and proposals presented to the Commission also showed considerable unanimity among the people of Uganda on the need to put in place mechanisms for limiting the possibilities and opportunities for grabbing of these resources in disregard of the interests of the people of Uganda and the environment. In view of these proposals, the Commission recommended:

[21] Article 237(2)(b) of the 1995 Constitution; Also see Section 45 of the Land Act.

[22] See quotation on pg 1

"The Constitution should vest the ownership, control and right of exploitation of the important natural resources including land, water, minerals, oil and forests in the people of Uganda, with the State as the guarantor of the peoples' interest".[24]

The proposals and the recommendations of the people of Uganda and the Uganda Constitutional Commission appear to have been predicated on the historical experiences of the immediate post independence governments. During the 1970s and 80s, public trust lands were either alienated or officially allocated as political gifts. What we see in the Butamira Forest Reserve case and the proposed amendment to Section 45(4) of the Land Act is an attempt to abrogate the will of the people as expressed to the Odoki Commission[25] and enshrined in article 237 of the Constitution.

During the 1970s and 80s, public trust lands were either alienated or officially allocated as potential gifts. What we see in the Butamira Forest Reserve case and the proposed amendment to section 45(5) of the Land Act is an attempt to abrogate the will of the people as expressed to the Odoki Commission and enshrived in article 237 of the Constitution.

There is no established judicial practice of enforcing the public trust doctrine in Uganda. Understanding the principles that underpin this doctrine therefore ought to be discerned from its historical development under common law and other jurisdictions.

Historically, the Public Trust Doctrine is one of the oldest but constantly evolving doctrines relating to the ownership and use of essential natural resources. It governs the use of property where title is presumed to be held by a given authority in trust for the citizens. While there was substantial debate on the nature and scope of this doctrine in the 1970s and the early 80s, especially in the United States, its implication to natural resources management in East Africa in particular are yet to be ascertained. The proposed degazettment of Butamira Forest Reserve therefore creates an opportunity to broaden the debate on this concept and its implications not only for natural resources management but also for transparency in government decision-making.

The existing body of literature traces the evolution of the Public Trust Doctrine to the Roman law.[26] It originated from the declaration of the Justinian Institute that there are three things common to mankind: air, running water,

[23] ibid para. 23.61

[24] Ibid para. 23.63

[25] See The Land (Amendment) No.2 Bill, 2001. Also see Cabinet Memorandum CT (2001): Amendment of the Land Act, 1998. Memorandum by the Minister of Water, Lands and Environment.

and the sea. The title to these essential resources was vested in the State, as the sovereign, in trust for the people. While not strictly the property of the Roman people, these resources, especially the seashores, were considered to be *res communes* and as such excluded from private control. The purpose of the trustee then, was to preserve these resources in a manner that made them available to the public for certain public purposes. Indeed, Nanda and Ris have asserted that the protection and control of navigable waters and shorelines is the oldest and best developed of all evolutionary theories about the Public Trust Doctrine.[27]

The incorporation of the doctrine in the English common law may itself be traced to the Magna Carta. Paragraph 5 of the Magna Carta made explicit reference to the guardianship of land. It extended that Guardianship "to houses, parks, fishponds, tanks, mills and other things pertaining to land".[28] As early as 1865, the English House of Lords defined the concept of public trust more explicitly as is now known in the common law. In the case of Gann v Free Fishers of Whitestable, it was held that "the bed of all navigable rivers where the tide flows, and all estuaries or arms of the sea, is by law vested in the crown. *But this ownership of the crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subject of the realm".[emphasis ours]*[29] Wyche has argued that the retention or adoption of the Public Trust Doctrine under common law, especially as it related to navigable waters was meant to protect England's position as a maritime power and to preserve the common rights of navigation and fishing in tidal waters.[30]

Under common law, the Public Trust Doctrine imposed a high fiduciary duty of care and responsibility upon the State. This responsibility rested on the nature of the relationship between the state and the beneficiary communities. While the existence of a fiduciary relationship has often been invoked in many areas of law including contract, it is one of those legal concepts that

[26] See for example Ved P. Nanda and William K. Ris, Jr. "The Public Trust Doctrine: A Viable Approach to International Environmental Protection" in **5 Ecology Law Quarterly, No. 2, 1976.**

[27] Ibid.

[28] Avalon Home Page; http://www.yale.edu/lawweb/avalon/magna.html

are less conceptually certain. Generally, relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics. First, the fiduciary has scope for the exercise of some discretion of power. Second, the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. Thirdly, the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The courts have emphasized the fact that "the notion underlying all the cases of fiduciary obligation is that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other...".[31] The hallmark of a fiduciary relation, therefore, is that the relative legal positions are such that one party is at the mercy of the other's discretion.[32]

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(i) The fiduciary has scope for the exercise of some discretion of power
(ii) The fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiary s goal or practical interests
(iii) The beneficiary is peculiary vulnerable to or at the mercy of the fiduciary holding the discretion for power.

Professor Joseph L. Sax has asserted that fiduciary duty under a trustee-beneficiary relationship entails three major restrictions on the trustee.

- First, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;
- second, the property may not be sold, even for a fair cash equivalent; and

- third, the property must be maintained for particular types of uses.[33] This duty includes the obligation not only to preserve the trust property, but also to seek injunction against, and compensation for any diminution of the trust corpus. Thus, under natural resources governance regimes, the doctrine could be used either against the state for a breach of its duties as a trustee, or by the state to protect the resources subject to the trust.

In a later US case, Illinois Central Rail Road Co. v. Illinois

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29 11 English Reports (ER) 1305 (1865) HL.

30 Bradford W. Wyche: "Tidelands and the Public Trust: An Application for South Carolina" in **7 Ecology Law Quarterly, No. 1, 1978.**

31 Hospital Products Ltd. V United States Surgical Corp. 91984), 55 A.L.R. 417 [per Dawson J. at pp. 488]

32 With respect to our case study, there is evidence of vulnerability on the part of the people of Byengo Sub-county. Very little assistance has been availed to them by Government in putting their case against the Madhvanis.

,[34] the United States Supreme Court reaffirmed the House of Lords position in Gann v. Free Fishers of Whitestable by holding that the government could not abandon its responsibility and authority over an area of the public trust. The court set very limited parameters within which the trustee could deal with the trust property. It considered using, managing, or disposing of the trust property in a manner that would infringe upon the *publicum* an abuse of the fiduciary relationship between the trustee and the beneficiary. Therefore, **an alienation of resources held in trust could only be proper where the conveyance either promotes the interests of the public or does not impair substantially the public interest in the remaining property.**(emphasis ours)

The above and several other court decisions suggest that the courts could employ and uphold the Public Trust Doctrine to mitigate administrative abuses in natural resources management as is apparent in the Butamira case. Indeed, according to Professor Sax, the court in Illinois Central "articulated a principle that has become the central substantive thought in public interest litigation. **When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties**"[35] (emphasis ours). While re-affirming the Public Trust Doctrine as being part of the Indian law, the Indian Supreme Court in M.C Mehta v Kamal Nath and Others [36] emphasized the essence of the doctrine in the following terms;

An alienation of resourses held in trust could only be proper where the conveyance either promotes the intrest of the public or does not impair substantialy the public intrest in the remaining property

> "The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters, and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective

[33] Joseph L. Sax, "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" in Michigan Law Review, vol.68, Part I.

[34] 146 US 387: 36L Ed 1018 (1892)

of the status in life. The doctrine enjoins upon government the duty to protect the resources subject to the trust for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes"

Since the Justinian Institute declaration, the doctrine has continued to evolve both in terms of scope and application. It has since then been extended from its traditional common law application to uses such as navigation, fishing and commerce to cover a broad range of natural resources. The U.S courts in particular have been very instructive in expanding the scope of the resources protected by public trust. American judicial decisions suggest growing judicial concern in protecting fragile and ecologically important lands such as fresh water, wetlands and riparian forests.

The observation by the Supreme Court of California in the Mono Lake case to the effect that the protection of ecological values is among the purposes of public trust, tend to render tenable the argument that the ecology and environment protection is a relevant factor to determine which lands, waters, or air are protected by the public trust doctrine. Indeed, the Indian Supreme Court in Mehta v. Kamal Nath and Others cited authoritatively the decision of the United States Supreme Court in Phillips Petroleum Co. v. Mississippi[37] to uphold Mississippi's extension of the public trust doctrine to areas underlying non-navigable tidal areas. In that case, the Court expanded the public trust doctrine to identify the tidelands not on commercial considerations but on ecological concepts.

The Public Trust Doctrine has also influenced the debates over the management of resources that are considered to be of global significance. The debate about the global commons, common heritage etc, within the United Nations system is nothing other than an affirmation that certain resources are essential for the survival of humanity and should be protected to serve the common interest. This may be validated by the growing consensus among states that such areas like the antarctica, the High Seas or even outer space should be protected against expropriation by

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35 Ibid.
36 M.C Mehta v Kamal Nath and Others, Writ Petition (c) No. 182 of 1996. (Supreme Court of India)-Decided on December 13, 1996.
37 108 SCt 791 (1988)

individual states.

It is, therefore, true to assert that the Public Trust Doctrine is increasingly gaining acceptability as a legal and planning tool for managing natural resources both within and beyond the jurisdiction of States. In all cases, therefore, the Public Trust Doctrine represents a viable legal tool for establishing a system of governance that provides a dynamic and interconnected framework for intergenerational responsibility for the management of natural resources.

4. The Public Trust in Uganda's Law

Since the new Constitution was promulgated in 1995, there has been a significant shift in the emerging legal regimes regarding ownership of natural resources. A number of laws and policy documents have been enacted emphasizing the increasingly dominant opinion that natural resources belong to the citizens and the state simply holds them as a custodian. By these pieces of legislation, the state continues to arrogate to itself the duty to manage the resources for the benefit of the public. This effectively establishes a trust-beneficiary relationship between the state and the citizens. This has created opportunities for consolidating these productive assets of poor people and gearing them towards increased income generation and poverty eradication.

"The Public Trust Doctrine represents a viable legal tool for establishing a system of governance that provides a dynamic and interconnected framework for intergenerational responsibility for the management of natural resources"

The trust-beneficiary pact between the state and the citizen in Uganda is contained in the constitution.[38] The constitution establishes this trust relationship as a major guiding principle in the management of Uganda's natural resources. It states thus; "The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda."

The Public Trust Doctrine is restated in the more substantive provisions of the constitution relating to land and the environment. Chapter 15 in relevant part provides thus; "237(2)(b) the Government or a local government as determined by Parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks, and any land to be reserved for ecological and touristic purposes for the common good of all citizens." The incorporation of these provisions in the constitution and the consensus of opinion that characterized the debate on natural resources control demonstrated the resolve of the constitution makers to establish a new regime of resource ownership. The effect of these provisions is to make the state the protector, the guarantor and the custodian of natural resources in which the public has a "beneficial interest."

"237 (2)(b) the government or local government as determined by Parliament by law, shall hold in trust for the people and protect natural lakes, rivers, wetlands, forests reserves, game reserves, national parks, or any land reserved for ecological and touristic purposes for the common good of all citizens"

The provisions of Article 237(2)(b) of the Constitution are produced verbatim in section 45(1) of the Land Act.[39] The Land Act explicitly prohibits the Government or local government from leasing out or otherwise alienating any natural resources referred to in section 45.[40] This trend in the nature of resource ownership is evident specific sectoral laws.[41] Indeed, the current wildlife legislation[42] is founded on the same principles. Section 4 of the Uganda Wildlife Statute provides thus; "4(1) The ownership of every wild animal and wild plant in its wild habitat in Uganda is vested in the Government on behalf of, and for the benefit of, the people of Uganda."
The philosophy that underpins the Wildlife statute is that individuals and communities can appropriate certain resources in the form of wildlife use rights.[43]

The **P**ublic Trust **D**octrine is therefore part of Ugandan law and the natural resources to which it applies must be held, managed and developed in accordance with acceptable principles. Upholding those principles is not only a clear affirmation of the sanctity of the Constitution and other national laws but is also a means of providing productive assets to the poor.

38 Constitution of the Republic of Uganda, 1995
39 Act no. 16 of 1998
40 Ibid. Section 45(4)
41 The Forest Reserves (Declaration) Order, Supra. reaffirms that subject to article 237 of the Constitution, forest reserves shall be held in trust, managed and controlled by government or local government on behalf of people of Uganda for the common good of all citizens.
42 Uganda Wildlife Statute, No. 14 of 1996

5. To Degazette or not to Degazette

The community dependent on Butamira Forest Reserve has been exposed to severe vulnerability by the proposed degazettment of the reserve and its proposed subsequent leasing out to Kakira Sugar Works. But can government proceed to effect this proposal without acting altravires and therefore violating the constitution and breaching the rule of law. The Solicitor General who is the chief legal advisor has said government can go ahead to degazette provided a few conditions are complied with.[44] We beg to differ substantially from the legal opinion of the Learned Solicitor General and argue that he has consistently misadvised Government on this matter.

In his earlier opinion on the proposal to degazette a series of Forest Reserves on Bugala Island to provide space for the Palm Oil Project, the Solicitor General again stated,

> " Article 237(2)(b) of the Constitution has been implemented by the Land Act, 1998. These provisions relate to ownership, management and purpose of inter alia, forest reserves. The said provisions do not prohibit change in status of ownership, management and use of land covered by forest reserves. The latter is a matter of policy backed by appropriate legislation".

He goes on to state that
"Forest reserves are not established and governed by the Land Act but by the provisions of the Forest Act, CAP 246". In his opinion he asserts that "under section 4 of the forest Act, the Minster has power to declare, by statutory order, any area to be a forest reserve after making requisite inquiries. Section 18(3) of the Interpretation decree empowers the Minster to evoke any statutory order made by him or his predecessors".

He concludes by stating that on those authorities " *Subject to an Environmental Impact Assessment Study under s.20 of the National Environmental Statute, the Minster has power to degazzette a forest reserve to make it available for alienation for private development"*

[43] Ibid. S. 4(2) thus provides; "Where any wild plant or wild animal is law fully taken by any person, the ownership of such plant or animal shall, subject to the provisions of this Statute, vest in that person. See also Part VI establishing a regime of wildlife use rights.

[44] In his June 22, 2001 letter to the Permanent Secretary, Ministry of Water, Lands and Environment, the Learned Solicitor General observed, "degazettment is subject to an Environment Impact Assessment Study under the National Environment Statute, 1995.

The Solicitor general clearly did not address his mind to the doctrine of Public trust as espoused in the Constitution and in the Land Act and therefore fundamentally erred in his opinion. Contrary to his assertion that the provision of the Land Act do not prohibit change in status of ownership, section 45(4) of the Land Act clearly prohibits government or local government leasing out or otherwise alienating any natural resources refered to in the same section. Moreover, whereas the Solicitor General espouses the opinion that the Forest Act and not the Land Act governs the establishment and management of forest reserves, he does not address his mind to the fact that the Land Act in the relevant section reproduces verbatim the Constitutional provisions on this issue.

In addition, the interpretation decree cited by the Solicitor General also states that where two laws are in question the latest in time applies. It is important to point out at this point that in terms of policy, the constitution is the key policy document. The 1995 Constitution of Uganda radically altered the policy situation on ownership and management of land in Uganda including forest reserves. When Article 237(1) vested land in the citizens of Uganda, it was recognised that for the environmentally sensitive areas and those with special ecological value, the government will continue to hold and manage them but only in trust for the people of Uganda.

The Land Act, which reproduces the constitutional provisions, is a later legal instrument than the Forest Act, which was based on old colonial policies. The old Forest Act has already been discarded as an old piece of legislation that does not reflect modern principles of forest management. What is apparent through the Uganda Forestry Policy is also an attempt to look at forestry resources as a means for achieving the broader goals of poverty eradication. The Solicitor General's advice to Government to rely more on the old Forest Act rather than the Land Act is devoid of serious anlysis of the legal and constitutional situation.

6. The proposed amendment to Section 45(4) of the Land Act

The latest attempt to erode the constitutional protection accorded to natural resources such as Butamira Forest

Reserve is the current government proposal to amend section 45(4) of the Land Act. The proposed amendment to the Land Act provides as follows:

> "Section 45 of the Land Act, 1990 is amended by substituting for subsection (4) the following-
>
> "(4) Government or a local government shall not lease out or otherwise alienate any natural resource referred to in this section; **except that in special circumstances** a natural resource referred to in subsection (1) of this section may be leased by government with the approval of the Cabinet".[45] (Emphasis ours)

A one-sentence memorandum to the draft amendment provides that "the object of this Bill is to make certain provisions concerning the leasing of any natural resource by Government in special circumstances with Cabinet approval". According to a Cabinet Memorandum attached to the proposed amendment, the genesis of this Bill is the need to grant a lease to AES over the banks and riverbed of the River Nile. The Memorandum notes that "the unconditional prohibition of leasing out the said natural resources, particularly the riverbeds, the river banks and wetlands has created a very unfavourable environment for investment even for projects which would have no negative impact on the local environment or compromise shared natural resources".

The legal effect of this proposed amendment is to remove the protection provided for natural resources as public trust property. First, the amendment doesn't give an indication as to what amounts to "special circumstances". Government is given the discretion to determine what amounts to "special circumstances". The Butamira Forest Reserve controversy suggests that if this was the position at law, the communities concerned would have no legal protection and they would be denied access to justice. The propensity of overzealous governments to abuse such discretionary powers cannot be underestimated and is dotted all through Uganda's history.

Secondly, the Solicitor General makes no mention of section 45(5) of the Land Act that prescribes ways in which natural resources can be used for development. This section provides that "the Government or local government may grant

[45] See a Bill for an Act entitled The Land (Amendment) (No.2) Act, 2001

concessions or licenses or permits in respect of any natural resource referred in this section subject to any law". Dealing with natural resources in this way is important because on the expiry of the concession, permit or license, the status of the trust property is maintained unlike in cases of full-scale degazettment. It is argued that the solicitor's General's assertion that the Bujagali Hydro-Electric Project cannot secure debt financing in the absence of a lease is untenable. This is because the investors can secure the above-mentioned instruments for their investment since they are recognized in law.

"The government or local government may grant concessions or licenses or permits in respect of any natural resources referred to in section 45(i) subject to any law".

Finally, the importance of Article 237(2)(b) and section 45 of the Land Act towards democratic decision-making over natural resources need to be emphasized. As equal "shareholders" in Uganda's natural resource assets, these legal provisions allow every Ugandan citizen to participate in making decisions over how these assets are utilized. Vesting power in the Cabinet to determine what circumstances are special and which ones are not is to reverse the process of democratic decision making over natural resources that has been slowly gaining ground. Consequently, the minimum legal condition for dealing with natural resources other than is provided for under section 45(5) should be a requirement for approval by a more representative body such as the Parliament.

"Degazetting of Butamira Forest Reserve and evicting the current poor wood farmers is inconsistent with pillars three and four of the Poverty Eradication Action Plan."

Conclusion

In this paper, we have set out at least two key arguments. First, we have argued that degazetting Butamira Forest Reserve and evicting the current poor wood farmers is inconsistent with pillars three and four of the Poverty Eradication Action Plan. It would violate the rights of these communities to engage in productive activities, earn a living from their labour. This would inevitably undermine implementation of several government policies. Secondly, we have also laboured at length to show that any proposed degazettment goes against the spirit of the Constitution, the Land Act and other sectoral laws that have embraced and upheld the trusteeship of the state over natural resources. Degazettment of forest reserves tantamount to abrogation of the fiduciary relationship between the state and citizens created under the Constitution and reaffirmed

under the Land Act.

Thirdly, Government should take advantage of section 45(5) of the Land Act to enable it use natural resources without changing their ownership status through the proposed amendment to section 45(4). Section 45(5) provides for concessions, permits and licenses as legal instruments that can also be used for security. The inability of prospective investors to negotiate appropriate conditions in these instruments cannot be a just cause for amending national legislation or worse still the Constitution. Instead of proposing a blanket amendment to the Land Act, we recommend that Government should instead focus on creatively using these instruments to promote sustainable utilization of natural resources.

Any proposed degazettement goes against the spirit of the constitution, the land act and other sectoral laws that have embraced and upheld the trusteeship of the state over natural resources.

Finally, the community groups in Butamira need government protection for their efforts and investments. In another policy brief in this series[46], we have shown the socio-ecological implications of the proposed degazettment to the Butamira community. Protecting their interests will not only act as an incentive to local communities to implement government policies, it will also enhance their capacity to engage in activities that support their livelihoods, promote good governance and environmental accountability.

Government should take advantage of section 45(5) of the land act to anable it use natural resources without changing ownership status through the proposed amendment to section 45(4) .

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