UNDERSTANDING THE EVOLUTION OF PROPERTY RIGHTS TO LAND IN UGANDA: 1900-2010

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ABSTRACT

Understanding the Evolution of Property Rights to Land in Uganda: 1900-2010

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It is a nearly established fact in the literature on economic growth and development that institutions, particularly well-defined and enforced property rights are vital for economic growth. Accordingly, knowing the right institutions to establish and understanding how to secure them is important to any country seeking economic advancement. Yet even among institutionalists, there are wide ranging controversies regarding the definition of institutions, how to identify the right institutions and obtain them. Further, there exists much uncertainty regarding the interaction between formal and informal institutions in engendering the de facto institutional environment. Existing research and practice do not shed much light on the immense challenge of transforming bad institutions into good institutions.

This study investigates the evolution of property rights to land in Uganda during the period 1900 to 2010 in order to understand why, when, in what direction, and how property rights emerged and changed in order to contribute to the discourse on the emergence and change in the institution of property and aid our understanding on how desirable institutions can be acquired.

Using an institutional analytical framework based on the field of New Institutional Economics, we examine in a historically chronological manner, the changes in property rights to land in Buganda, a region in the central part of Uganda.

The thesis then concludes that, firstly, property rights do not necessarily change in response to changes in relative prices. Neither does property rights change always happen when we expect it to. Other factors such as vested interests of political actors and interest groups within a society conceptualised as veto players can interfere and delay change or stop it altogether. Relative price changes only lead to institutional change when the price change coincides with the interests of the state and powerful groups in society.

Secondly, even when property rights mutate in response to relative price changes as predicted, it may not be towards greater specification, efficiency and tenure security. Property rights change may follow multiple trajectories and culminate in common property, state property, other restrictive property arrangement or even a mix of individualised and communal tenure. Moreover, even where private property is witnessed, rights may not be clearly defined and enforced and there may be a prevalence of overlapping and conflicting rights on the same piece of land. In Buganda, path dependent political factors were particularly significant in determining the trajectory of property rights to land. Thus, the assumption that institutional change is linear and towards the direction of private property and increased efficiency is not necessarily valid.

Thirdly, this thesis underscores the importance of distinguishing between formal and informal institutions when trying to understand and explain institutional change because each category emerges and changes for different reasons. While it is the deliberate decisions of political actors that may change formal property rights, informal property rights are more likely to be the consequence of the designer’s cognitive limits and unintended consequences. This thesis has also distinguished between the various kinds of informal institutions and drawn attention to reactive informal institutions, a category that is often overlooked in analyses of institutional change. They emerge in response to overly constraining formal laws, have no relationship to culture and can change relatively quickly.
DEDICATION

This thesis is dedicated to the memory of my late father, Yafeesi Sabiiti and late mother Regina Sentongo Sabiiti, who loved me so much and gave me a good education yet did not live long enough to witness even my first graduation. Dad, I remember you giving me ‘Animal Farm’ by George Orwell as a present on passing my Primary Leaving Exams which although unappreciated at the time laid the foundations for setting me on the path of appreciation of literary works. Mum, the one -on one session with me at a tender age doing mental maths taught me to be ‘alert and quick’ and those science experiments with me at home prepared me for investigations such as this study. Dad, Mum, this will be my third graduation without you. Each time, you are both so dearly missed. May your souls rest in eternal peace!

And to my lovely daughters, Jenna whom I left in Uganda at age 15 to pursue my doctoral study and was absent while she prepared for both her O and A Level exams; and Salma whom I left in Uganda at age 6, joined me in Manchester at age 8 but never ever seemed to understand why mum was always studying and not doing fun things with her or even simple things like taking her to the park more frequently and never ceased to ask “Mum didn’t you complete your studies when you were young?”
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The decision to pursue a PhD of necessity entailed enormous sacrifice and disruption to both work and family life, especially so because it was in another country. Therefore, given the daunting nature of the endeavour, completion of the PhD and certainly this thesis, would not have been possible without the support of many others.

Above all, I give all the praise, glory, and honour to God the Almighty, my heavenly Father, who from the beginning of this research to the very end was with me, and at all times, empowered and equipped me with all I needed to accomplish this highly fulfilling yet onerous undertaking. Thank you so very much Father God in the precious name of Jesus Christ.

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I am grateful to all the administrative staff at University of Manchester’s School of Law especially Jackie Boardman and Stephen Wadsworth for practical support throughout my PhD. They assisted me in many different ways, were always willing to help and made the PhD experience that much more pleasant.
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I am extremely fortunate to have an infinitely dedicated and supportive family. They all deserve acknowledgment for their various generous contributions. I am particularly immensely thankful to my siblings in Uganda and elsewhere in the diaspora for their unwavering support: my brother Emmanuel on the other side of the Atlantic for always being there for me, and providing me with much help and assistance when no one else could- Emmanuel, my mere expression of thanks does not seem to suffice but thank you so much; my brother Eric for providing a home and support to my family (Andrew, Jenna, Natasha and Oscar Junior, and Salma for two years) that I left in Uganda and making it possible for me to be at ease here in the UK knowing that they were well looked after; my sister Amelia for being ‘mother’ to my daughter Salma in the summer of 2013 and allowing me the space and time to finalise my thesis and of course for her incessant prayers for me.

Last, but by no means least, I acknowledge the sacrifices my children made when I left them in my home country Uganda to travel and reside in the UK to work on this thesis. My daughter Salma often wondered why I gave up a “real job” to pursue this academic endeavour and my older daughter Jenna had to stay without a mother even at critical times when she sat both her O’ and A’ Level exams and even when she started a whole new life as a student at university.

Space constraints do not allow me to mention everyone by name, but I am grateful to all individuals who contributed directly or indirectly to the successful completion of this thesis.
DECLARATION

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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Chapter One: Introduction

1.1 Contextual Background.

Having served as a Local Government Councilor and as a Speaker of a District Local Government Council for eight years, I was continually perplexed by the question of how to eradicate poverty in Uganda and wondered why all the solutions suggested and policies adopted by both local and Central Government did not seem to succeed in breaking the seemingly vicious cycle of poverty. My electorate lived in abject poverty, a situation not very different for people in other rural areas of Uganda. I was almost daily overwhelmed with feelings of helplessness as I was confronted with electorate requests such as payment of children’s fees, maintenance of feeder roads, improved access to clean water, seeds for planting, help with medical and funeral expenses, and roofing of schools. The puzzle that continually preoccupied my mind was what could be done to reduce or altogether eliminate the poverty that seemed so deeply embedded in the community. What was the reason for poverty in Uganda and how could it be overcome?

Years later, while studying for a Master’s Degree at the University of Manchester, during a Law and Development Module; I was introduced to Hernando de Soto’s ‘dead capital’ thesis. I was exhilarated by the belief that I had stumbled upon the solution I had always sought. I thought I had found the silver bullet to economic development. I sustained the interest and fascination with the ‘dead capital’ thesis until three years later when an opportunity arose for doctoral research and I reckoned that it was time to undertake a more in-depth study of de Soto’s thesis in order to understand how to tackle the demise of poverty in Uganda. It is Hernando de Soto’s thesis therefore, which I believed to be the panacea for poverty in Uganda that kindled interest in this study.

However, an overview of the literature quickly revealed that appreciation of de Soto’s ‘dead capital’ thesis and his prescription of formalisation of property rights are not enough to end poverty. For instance, he does not take into account the great complexity involved in attempting formalisation of rights on land which is long settled and over which there may be several layers of mostly overlapping and conflicting claims.¹ There are several challenges that one would have to grapple with.² Besides, formalisation of property rights per se although necessary is not sufficient for engendering economic development.³

According to de Soto, the progress of developing countries is not hindered by the peoples' lack of capital because they have more than is widely believed only that it is 'dead capital'. The poor in the developing world own vast possessions – land, houses, and businesses but they hold them in defective forms and are therefore ‘dead capital’ because they are not represented in a manner that allows production of additional value. These possessions cannot readily be turned into capital because, inter alia, they cannot be traded outside the narrow circles where people know and trust each other and cannot be used as collateral for a loan. ‘Dead capital’ can only be converted into ‘live capital’ by formalization of property rights. De Soto argues that ill-defined and unenforced property rights result in high transaction costs, thereby impeding the development of impersonal exchange systems necessary for the creation of surplus value. Thus de Soto concludes that formalization of property rights is the sine qua non for releasing economic growth in developing countries. De Soto’s work has become very authoritative for both theory and policy-making.

Other writers before de Soto have also asserted that institutions, including property rights institutions, have substantial impacts on economic development. Bauer argues that capital formation is an outcome of institutions, essential for an economy to progress from subsistence to market production. Thus, the works of these other authors also provide theoretical linkages between secure and well-defined property rights and economic development consistent with de Soto.

Over the past two decades, there has been an emerging view among economists that institutions play a central role in a nation’s economic development. In fact, there is now a broad consensus among scholars and development policy-makers that “institutions matter”, indeed

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5 Ibid., p.16
6 Ibid., p.6, 16
that they ‘are a key determinant of the wealth and poverty of nations.’ In recognition of this fairly recent pre-eminence accorded to institutions in understanding economies by scholars and practitioners in various fields, Gérard Roland, a development economist commented that “we are all institutionalists now.” It is argued that the quality of institutions, particularly property rights, plays an important role in facilitating transactions, and thereby impacting economic development mainly through the following channels: (1) reduced transaction costs, (2) incentive to invest, (3) collateral for credit, and (4) efficient use of resources. This is a move away from conventional economics scholarship which has for long regarded economic development as a consequence of the stock of capital and labour.

1.2 Statement of the Problem.

Existing literature and empirical studies reveal that clearly defined and secure property rights institutions contribute significantly to economic development. However this proposition is not supported by all. Empirical evidence exists that challenges the validity of some of the channels through which property rights are said to impact economic development. For example, evidence from other countries including de Soto’s own programme in Peru does not reflect a positive correlation between land titling and increase in credit accessibility.

Empirical studies in parts of Africa have also not succeeded in establishing a link between title and accessibility to credit. Similarly, a more recent study in Ethiopia suggests that farmers

17 North, supra n. 14; Demsetz, supra n. 9
do not necessarily relate land title with enhanced credit accessibility.\textsuperscript{21} Even outside Africa the situation has not been much different hence Professor Gilbert’s observation that ‘[i]n Bogotá’s self- help settlements, property titles have not resulted in a healthy housing market or a regular supply of formal credit. The uncomfortable truth is that, in practice, the granting of legal titles has made very little difference.’\textsuperscript{22}

Some scholars contend that securing rights through private titling can cause conflict and perpetuate inequality in society, both of which can stymie growth, especially pro-poor growth.\textsuperscript{23} Yet, other scholars fear that this view jeopardises the future of communal land tenure systems.\textsuperscript{24}

Others point to the colossal expense associated with establishing a formal property rights system such as the cost of cadastral reform and suggest that resources could be better utilised to improve simpler forms of rights or directed to other issues that could be more critical for development.\textsuperscript{25}

Whereas the view that well defined and secure property rights contribute positively to development, emphasises reforms of the institutions that define rights to real property, others contend that this view obscures the importance of other legal institutions that are vital for ensuring the accountability- enhancing role of property rights such as creditor protection laws, particularly those relating to the conditions under which creditors can seize the assets of those who default on their contractual obligations.\textsuperscript{26}

Even where the role of property rights in fostering economic development is generally acknowledged, attention is drawn to the existence of other factors that are conducive to ‘growth and that may be equally or more important than property rights themselves, such as the existing distribution of wealth or the degree of competition in financial markets.’\textsuperscript{27}

\begin{flushleft}
\textsuperscript{21} Berhanu Adenew and Fayera Abdi, "Land Registration in Amhara Region, Ethiopia," in London; IIED (2005), 22.
\textsuperscript{22} Gilbert, supra n.2 p.16
\end{flushleft}
Nevertheless, academics and those in policy circles have convincingly articulated the case for clearly defined and enforced property rights as a means to economic development. Thus, it may well be said that it is now widely accepted that economic development requires the creation of sound political, economic and legal institutions, in particular, secure and functional property rights. Accordingly, knowing the right institutions to establish and understanding how to secure them is important to any country seeking economic advancement. Indeed, mere acknowledgement that “institutions matter” is not very meaningful ‘unless we have a common understanding about what institutions are and how they are formed.’ Yet there are still gaps in our knowledge regarding how institutions emerge and change. Even among institutionalists, there are wide ranging controversies regarding the definition of institutions, how to identify the right institutions and how to obtain them.

Further, although we are aware that informal institutions are also critical in ensuring a healthy institutional environment, we are far from understanding what they are, how they work and how they evolve over time. There also exists much uncertainty regarding the interaction between formal and informal institutions in engendering the de facto institutional environment. Existing research and practice do not shed much light on the immense challenge of transforming bad institutions into good institutions. The reason for this could be as North concedes, that a clear understanding of how institutional processes evolve and interact dynamically is still lacking.

We hope that the following chapters of this thesis will make a small contribution to better understanding of these issues.

**1.3 Objectives of the Study.**

The overriding objective of the Study is to understand and then explain institutional change. Solely demonstrating that the existence of quality institutions is critical for economic development is not very useful if that is not followed by a valid proposition of how such good institutions are likely to emerge or be developed. We have explained in section 1.2 that there is still a gap in our knowledge of the processes of institutional change and consequently in our

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knowledge of how to acquire good institutions. Yet, we cannot explain institutional change usefully unless and until we understand the process.

In order for us to understand why and how the institution of property emerges and changes, we will examine the evolution of property rights to land in Uganda in a context which is highly specific in terms of its unique mailo\textsuperscript{33} land tenure system, its peculiar socio-political and economic circumstances including that Uganda is one of the countries in Sub-Saharan Africa that has embraced contemporary economic thought that formalized, secure, and well-defined private property rights are crucial drivers of economic development and has made a debut in formalization of property rights by law reform. Our findings will aid our understanding of the process of institutional change and further knowledge on this important subject so that nations that desire economic advancement can have a point of reference on how to acquire institutions that are conducive to economic growth.

This Study specifically seeks to understand and explain the emergence and change of property rights to land in Buganda, a region in the central part of Uganda and this will be achieved by attempting to answer the following questions:

(1) Why do property rights institutions emerge and change? What are the factors that have influenced the development of property rights in Uganda?
(2) When do property rights change?
(3) In what direction do property rights institutions change?
(4) What is the process of property rights change?

Although a large and growing body of literature exists on property rights in Uganda, existing research either does not directly address this study’s questions or cover its scope in terms of the period examined (1900-2010) or the case study selected. For example West, one of the foremost mailo land tenure experts in newly independent Uganda undertook a study of the historical development of property rights in Buganda.\textsuperscript{34} The legislation which defined the official land policy in Buganda constituted his analytical framework. He provided a well-researched exposition of the emergent intricate patterns of land tenure. However, his work does not cover the evolution of property rights after 1972 when his work was published, and he neither considers informal property institutions nor explains the process of property rights change even for the period covered by his research.

\textsuperscript{33} This is the Ugandan people’s (Baganda) pronunciation of the English word ‘mile’ and refers to the square miles of land given to the ruling oligarchy under the 1900 Buganda Agreement.
Joireman investigates institutional change in the horn of Africa and briefly considers the evolution of property rights to land in Buganda in the colonial period.\(^{35}\) She asks whether ‘the political equilibrium in a country, the balance of the government, interest groups and state strength are as important as the economic equilibrium in driving changes in property rights’\(^{36}\) and concludes that it is important to integrate politics in the evolutionary model of property rights change. Her study is limited to formal property rights and does not cover the post-colonial period (1962- to date) when several important changes in the property institutions in Uganda have taken place.

Porter too has examined property rights to land in Uganda and argues that property rights change in Uganda may be attributed to the gradually accumulating outcomes of the historical contests between the state and the citizenry leading to the creation, negotiation and sustenance of both formal and informal land rights regimes.\(^{37}\) That therefore, ‘Uganda’s route to formalization underscores an evolving process whereby the Land Act of 1998 affirmed what was inevitable.’\(^{38}\)

Several studies investigating various aspects of Uganda’s revolutionary Land Act of 1998 have also been carried out. For instance, in his earlier work, McAuslan traces the steps leading to the passing of Uganda’s Land Act of 1998 highlighting the pre-eminence of politics in the process and investigates the first steps in its implementation.\(^{39}\) Similarly, Mugambwa’s latest work contains an in-depth account of the processes leading to the passing of the 1998 Land Act including the policy options, consultancy reports and their recommendations as well as the parliamentary debates on the Land Bill. He also explains the background and principles of the law tenure system in pre-colonial and colonial Uganda.

Adoko and Levine have carried out a number of studies on land rights in Uganda examining, \textit{inter alia}, the impact of the 1998 Land Act on economic development in northern Uganda,\(^{40}\) and how women’s and internally displaced peoples’ land rights have been affected in

\(^{35}\) Sandra Fullerton Joireman, \textit{Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development} (Dissertation.com, 1997).
\(^{36}\) Ibid., p.63.
\(^{38}\) Ibid., p.205.
its implementation. However most of their research is focused on the northern and eastern parts of Uganda which have a significantly different economy and tenure system from the southern part of Uganda where Buganda is situated.

In Porter’s study of emerging *de jure* land rights in Buganda since 1900, she highlights how urbanisation coupled with mailo tenure led to the overlapping rights of usufruct and ownership of land. She also critically analyses the 1998 Land Act particularly the provisions regulating the relationship between owners and occupiers of mailo land and concludes with a discussion of the implementation of the Act through decentralised land administration.

Joireman considers property rights to land in Uganda with particular focus on the new property rights regime ushered in under the Constitution and Land Act of 1995 and 1998 respectively. She identifies lack of capacity, corruption and customary law as impediments to the enforcement of the new laws.

Whereas most studies of land rights privatisation tend to focus on whether the intended objectives of the law have been achieved, Hunt reviews some of the unintended consequences of the 1998 Land Act and recognises that unintended outcomes may sometimes reflect appropriate adaptations of legal provisions at the local level.

More recently, McAuslan has reviewed aspects of statutory land laws in seven countries of East Africa, Uganda inclusive that have been the subject of reform in the period 1961-2012. He concludes that land law reform is a highly political issue and that the driving force behind such change, may not be, improving security of tenure, increasing agricultural productivity or even creating land markets but rather internal political pressures. Significantly, McAuslan employs justice as a key concept in his analysis and confines his conception of land rights to legal rights thereby leaving informal property institutions outside his analysis. He also does not explain institutional inertia such as why some laws for example the Registration of Titles Act which is in dire need of reform has not been amended.

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43 Ibid.
Thus, there still exists a gap in the literature which we seek to contribute to narrowing in this research.

1.4 Research Design and Methodology.

The methodology used in this research is not classically legal, in that we neither concentrate on legal niceties nor confine ourselves to issues of legislative clarity and consistency. Instead, we adopt an interdisciplinary ‘law and economics’ approach tempered with references to veto player literature and Helmke and Levitsky’s framework for the interaction of formal and informal institutions. Mainly and more specifically, we employ an Institutional Analytical Framework based on the field of New Institutional Economics (NIE). Each theory has strands used in this study as elaborated in the theoretical chapters 2, 3 and 4. In Chapters 5, 6 and 7, the discussion turns to the case study and an attempt is made to answer the research questions in light of the analytical framework gleaned from the theories and leading to the conclusion of the study.

The case study selected for this research is Buganda; a region in the central part of Uganda. Several reasons explained in the next section (1.5) determined our selection of this region. In order to explain why and how property rights to land emerged and changed in Buganda, we traced the trajectory of their development from 1900 to 2010 and divided the period of analysis into the pre-colonial, colonial and post-colonial eras.

We identified and developed a theoretical framework on the basis of a literature review of journals, conference papers and specialized text books on the subject of property rights and institutional change. Deductive and inductive approaches based on the literature review were employed.

Our choice of an institutional analytical framework based on NIE as the conceptual lenses in our study was due to its analytical strength in dealing with the kind of questions asked in this study. A central tenet of NIE is that ‘the determinants of institutions are susceptible to analysis by the tools of economic theory’ quite distinct from neo-classical economics which treats institutions as a given and consequently excludes them from analytical models. The reality is that institutions are not invariant. They change over time for several different reasons. This realisation and the provision of analytical tools to examine the process of change is what set NIE apart. One of the reasons for the success of NIE is that it goes beyond ‘giving new answers to the traditional questions of economics-resource allocation and the degree of utilization and instead focuses

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on ‘answering new questions, why economic institutions emerged the way they did and not otherwise; it merges into economic history, but brings sharper [microanalytic] . . . reasoning to bear than had been customary.’

Study of the Buganda case was accomplished using mainly a qualitative literature based approach complemented by primary and secondary legal resources such as Ugandan statutes, proceedings of parliamentary debates (Hansards), reviews of legal reforms, commission reports and journal articles respectively. Websites of reputable organisations involved in issues of property rights, land rights, institutional change and development were also reviewed.

1.5 **Scope of the Study.**

The study analyses property rights institutions in Uganda, a developing country, during the period 1900 to 2010 in order to understand their emergence and change.

Buganda, a region in the central part of Uganda is the specific historical case studied. Justification for the delimitation of this study to Buganda may be found in Buganda’s history with respect to land as ‘the scene of a unique experiment in African native land settlement.’

Additionally, the people of Buganda have the longest period of contact with European education and administration, hence their disproportionately prominent role in the Protectorate’s development. This coupled with the fact that Buganda is in the central part of Uganda, controls the most fertile areas around Lake Victoria, and that it is the region which surrounds Uganda’s capital City, Kampala, and is home to the nation’s largest ethnic group, the Baganda. Centrality, urbanization and Mailo tenure have intensified land claims in Buganda and led to overlapping rights of usufruct and ownership of land. In fact, land tenure has been a highly contested issue since 1900 when the British created an extremely unequal land tenure system that gave the political leadership large areas of land while turning the majority of Baganda into tenants. This agreement was a result of the fact that Buganda was, since the latter part of the eighteenth century, the most dominant kingdom in the interlacustrine area. In fact, it was very largely with Buganda’s assistance that the protectorate was extended over the

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49 Ibid.
52 Porter (2008) supra n.42
rest of what is now Uganda. While there has been limited success over the past century in limiting the powers of landlords, the system itself has remained. Indeed Buganda landlords and the Buganda Kingdom establishment have been one of the strongest forces in opposition to current attempts at land reform by the National Resistance Movement (NRM), the ruling government led by Museveni. According to Uganda’s National Land Policy:

[p]erhaps the most critical and challenging elements of Uganda’s land question, courtesy of a colonial legacy, are to do with disentangling the multiple and conflicting tenure rights and interests, often overlapping in the same piece of land. At the time of creation of mailo and native freeholds, pre-existing private interests of smallholders, mainly land use rights were not legally recognized. Despite attempts to rectify this, with the enactment of the Busulu and Envujo Law of 1928 for Buganda (…) the multi-layered structure of rights persisted and has become a defining characteristic of the complexity of land relations in Uganda today. It has been largely blamed for the escalating land conflicts and evictions in the central region where resolving dual interests of ownership between the registered owner and the lawful or bona-fide occupants is nearly impossible, in addition to mediating and sustaining relations for harmonious co-existence, that is untenable.

In this thesis therefore, our emphasis and focus will be on the evolution of land tenure in Buganda. We will then try to understand how the institution of property (land rights) changed from what it was in Buganda during the pre-colonial period to the present day complex system of contradictory and overlapping rights that are mostly ill defined and poorly enforced.

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54 The Swahili prefix for a country is U and in the early days of the Protectorate, the Kabaka’s kingdom was usually called Uganda by Europeans. With the extension of the Protectorate, it became necessary to differentiate between Kabaka’s Kingdom, which retained its rightful name, Buganda, and the Protectorate as a whole which was called Uganda.
55 Green, supra n.53 p.371.
Figure 1.1 below is a map of Uganda showing the location of Buganda

Source: Buganda Kingdom website at http://www.buganda.com/ugamap2.gif

This study particularly considers the institution of property rights with respect to land. We focus on property rights to land because of the primacy of land in the early development of economies worldwide.57 In many countries, land constitutes between ‘half and three-quarters of national wealth’58 and is an important factor in agriculture.59 Additionally, the revenues from various land transactions and land taxes where applicable comprise a major source of government income.

59 When the definition of land includes the immoveable property fixed to land.
According to Daniel Omara Atubo, a minister for Lands, Housing and Urban Development (MoLHUD), land is ‘the most emotive, culturally sensitive, political [sic] volatile and economically central issue in Uganda.’\textsuperscript{60} Further, Uganda’s draft National Land Policy (NLP) states:

Land is the basic resource (in terms of the space it provides, the environmental resources it contains and supports, and the capital it represents and generates). It is a commercial asset that can be used and traded, it is a critical factor of production; it is an essential part of the national patrimony; and it is a key factor in shaping individual and collective identity through its history, the cultural expressions and idioms with which it is associated, and it influences spirituality and aesthetic values of all human societies. Thus, land is perhaps the most essential pillar of national development.\textsuperscript{61}

Further, Uganda’s National Population Policy also attests to the centrality of land to Uganda’s economy when it reveals that 38.5% of Gross Domestic Product (GDP) and more than 90% of the country’s export earnings are attributed to the agricultural sector which is also the source of livelihood to about 90% of the population.\textsuperscript{62} The importance of land therefore cannot be over-emphasized.

This study focused on the period 1900-2010. The specific context of the study starts in 1900 when the Buganda Agreement between the Kingdom of Buganda and the British Crown was executed; an agreement of great importance considering that it is generally believed to be the genesis of individualized property rights to land in Uganda and perhaps of the bulk of the land issues in present day Uganda.\textsuperscript{63} We identified 2010 as the cut-off date for the scope of this thesis given that it is the year in which the heavily contested Land (Amendment) Act, No.1 of 2010, the current last amendment to the statutory law relating to land in Uganda was passed.

1.6 Significance of the Study.

This study is significant in a number of ways. In this section therefore, we discuss its relevance to both theory and practice.

This thesis seeks to understand and explain the evolution of property rights to land in Uganda in the period 1900 to 2010. Land tenure patterns are a form of property rights institution. Land – tenure reform is therefore an important precondition for economic development and ought to be an objective of government policy. Uganda is one of the countries engaged in land tenure reform and making a debut in issues of property rights formalization. Its 1995 Constitution and Land Act

\textsuperscript{60} Ministry of Lands Housing and Urban Development, “The Uganda National Land Policy (Final Draft),” (Uganda: Ministry of Lands Housing and Urban Development 2011). 1. In a foreword to the Policy
\textsuperscript{61} Ibid., p.4.
of 1998 embraced the contemporary economic thought that formalized private property rights to land are crucial drivers of economic development.

The importance of property rights institutions in fostering economic development is undeniable. The issue for policy makers therefore is no longer whether or not institutions matter but rather ‘which institutions matter and how does one acquire them?’ This study is aimed at understanding the emergence and change of property rights institutions. Why, how, and in which direction do property rights emerge and change? Knowing this is beneficial as it is a step towards ascertaining how good institutions may be acquired.

This research enhances our understanding of the emergence and change of property rights institutions. It is therefore relevant for practice and policy makers as they need to be alerted to the limitations of a purely market approach to property rights change. We agree with McAuslan when he observes that, ‘[p]olitics not markets then are and will remain the driving force behind land tenure reform in Africa; governments, African and donor, international agencies and consultants will forget this at their peril.’

The thesis is also important to the people and government of Uganda and to policy makers in Uganda because it explains the evolution of property rights to land from an institutional theoretical stance that government may not have considered before. Indeed the thesis is important to governments everywhere who require an in-depth understanding of how to establish institutions that are conducive to economic growth in their countries. The Information it contains is useful for anyone wanting to influence or intervene in policy.

This study also examines the interaction between formal and informal institutions and addresses the ‘why’ and ‘how’ of their emergence and change. This is relevant to international financial institutions, UN agencies, bilateral donors and governments which may need historical evidence to support the notion that it is not only formal institutions that matter in economic development. Rather, that informal institutions which take various forms, and emerge for diverse reasons matter more than may otherwise be thought and are even more predominant in some economies. The findings of this thesis could therefore be a guide on how best to intervene in land reform in developing countries.

Related to this is that the findings of this research support the proposition that the inclination to improve the economic performance of a country by simply transplanting or adopting formal

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65 McAuslan, Bringing the Law Back In: Essays in Land, Law and Development: 308.
institutions from a seemingly more developed location is untenable. A healthy institutional environment that encourages favourable actor incentives does not consist of only formal institutions and their enforcement mechanisms but also of informal institutions which are usually peculiar to the communities within which they emerge. Successful policy intervention that seeks to establish good institutions must therefore carefully study the given economy, explore the interaction between formal and informal institutions, understand the sources of imperfect enforcement, consider the challenge of interdependent institutions, and assess the impact of value systems and learning on institutional and economic change.

In the process of writing this thesis, the author conducted a literature review of theories of institutional change, veto players and the emergence and change of informal institutions as well as their interaction with formal institutions. This thesis will therefore be of benefit as a reference resource to scholars working in these fields.

From a theoretical standpoint, the study is relevant to the ongoing discourse on institutional change and specifically property rights change. It is a contribution to the literature that seeks to answer the less frequently asked questions regarding the process and direction of institutional change. Although the case study is Buganda in Uganda, the findings made may be applied to other developing countries as well.

This study is timely because Uganda and other developing countries are currently making initiatives in formalisation of property rights. Uganda is in the final stages of adopting a National Land Policy. It is therefore important as a basis for countries to self-evaluate and establish whether they are taking the right approach which will produce the desired and expected results.

Generally, the findings of this research may be applied in other countries with similar circumstances. The challenge of how to establish appropriate institutions conducive to economic development is not peculiar to Uganda. It is a pervasive phenomenon in most of the developing countries. Therefore a detailed study of the evolution of property rights to land in Uganda could deliver some useful lessons for other developing countries.

1.7 Structure of the Thesis.

This thesis comprises eight chapters including the introductory Chapter One. Chapters Two, Three and Four are an elaboration of the theoretical basis of this study while chapters Five, Six and Seven are a discussion of the historical case of Buganda in light of the analytical framework gleaned from the theoretical chapters. Chapter Eight concludes the study.

66 North, supra, n.25, p.157
Chapter Two is a theoretical chapter which elaborates an analytical-cum-conceptual framework and explains why and how the institution of property rights to land emerges and mutates over time. In doing so, the chapter asks the following questions: (1) why do property rights institutions emerge and change? (2) When do property rights change? (3) In what direction do property rights institutions change? (4) What is the process of property rights change?

Chapter Three is an exposition of our framework for studying informal institutions. Conceptually, the chapter explains our meaning of the term ‘informal institution’ and sets out the patterns of formal-informal institutional interaction: complementary, accommodating, competing, and substitutive based on the Helmke –Levitsky typology.\(^{67}\) Theoretically, the chapter examines two issues that have been minimally explored in the literature on informal institutions: the question of why and how informal institutions emerge, and the sources of stability and change for informal institutions.

Chapter Four reviews the literature on veto player theory and helps us to open the ‘black box’ of political decision making given that formal institutions change as a result of political processes. Tsebelis’ veto player approach helps us to understand why legislative reform may sometimes pass or fail and which factors determine the possibility of policy and legislative change.

Chapters 5, 6 and 7 are organized in a historically chronological manner and in them we demonstrate the application of the theoretical framework of this thesis to the Buganda case. For us to clearly appreciate the process of emergence and change in the property institutions in Buganda, we trace the evolution of land tenure from the pre-colonial times and are then able to ascertain and explain why and how property rights to land in Buganda emerged and developed to their present status.

Chapter 5 therefore investigates the existing property rights in the pre-colonial period. In this chapter, we also justify our selection of Buganda as the case study.

Chapter 6 traces the emerging changes in the property rights institution in Buganda from 1900 to independence (the colonial period). The chapter then attempts, in light of the conceptual framework of this thesis, to answer the questions of why, and how, property rights to land in Buganda developed and changed during the colonial period.

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\(^{67}\) Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics : A Research Agenda," *Perspectives on Politics* 2, no. 4 (2004).
Chapter 7 considers the evolution of property rights to land in Buganda during the post-colonial period, that is, from independence in October 1962 to 2010, a year we have identified as the cut-off date for the scope of this thesis. It is the year in which the Land (Amendment) Act, No.1 of 2010, the current last amendment to the statutory law relating to land was passed. The chapter spells out the central proposition of the thesis that generally during this period, politics and consequently interest groups and veto players played a key role in the way in which property rights changed and developed and that relative price changes as predicted by extant theory on institutional change had a very minimal role. The chapter also tackles the challenges to both the implementation of Uganda’s Land Act and the resolution of Uganda’s Land issues.

Chapter 8 synthesises the findings in Chapters 5, 6 and 7 in answer to the research questions asked in this thesis; and also highlights the contributions of the research to knowledge including areas for further inquiry and policy implications. Finally, the chapter also addresses the limitations of the research.

1.8 Summary.

This chapter has laid the foundations for the thesis. It has explained the objective and delimitations of the study, introduced the research problem and specified the research questions. The research has been justified by showing its significance, the methodology was described, and the structure of the thesis was outlined. On these foundations, we can proceed with a detailed description of the research.
Chapter Two: The origins and evolution of property rights to land: A conceptual framework.

‘It is the theory that decides what can be observed.’

2.1 Introduction.

It is now widely acknowledged that well-defined and secure property rights contribute significantly to the performance of economies. Indeed, recent research suggests a strong positive relation between a country’s level of economic development and the security of its property rights. Notably, before economists such as Ronald Coase, Harold Demsetz, and Armen Alchian began writing in the 1960’s, most mainstream economists presumed the existence of such property rights and considered only the three traditional pillars of economic theory in their analyses namely, resource endowments, technology, and preferences. To them, the fourth pillar, institutions, could be ignored without seriously distorting the analysis. Although economists are keen on supporting appropriate institutional change, they do not include institutions in their analytical models. ‘It is a neat trick, but it cannot hide the fact that, in thinking about institutions, the(ir) analytical cupboard is bare (...). Yet, both historically and in
the modern world, particularly in developing countries, the taking of such property institutions as a given is oftentimes inaccurate and potentially misleading.9

Furthermore, research has shown that institutions matter in the economic performance of economies,10 and property rights are among the most important institutions in terms of economic development.11 In a novel analysis, Hernando de Soto,12 attributes the underdevelopment of Third World countries and former Communist nations to ill-defined and unenforced property rights which result in high transaction costs, and impede the development of impersonal exchange systems necessary for the creation of surplus value. De Soto argues that the progress of developing countries is not hindered by their peoples’ lack of capital. Rather, he asserts that the people in developing countries have more capital than is widely believed only that it is ‘dead capital’.13 The poor in the developing world own vast possessions – land, houses, and businesses but they hold them in defective forms and are therefore ‘dead capital’14 because they are not represented in a manner that allows production of additional value.15 ‘Dead capital’ can only be converted into ‘live capital’ by formalization of property rights.16 Thus de Soto concludes that formalization of property rights is the sine qua non for releasing economic development in Third World countries.

The system of private property rights to land found in modern Western economies is a result of centuries of economic, social, political, and legal change.17 Thus, property rights institutions are not static. They are subject to change and in fact change.18

In this chapter, we seek to elaborate an analytical-cum-conceptual framework which explains why and how the institution of property rights to land emerges and mutates over time in

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9 Feder and Feeny, supra n.5 p.135; Boudreaux, supra n.5 p.3
13 Ibid., p.16.
14 Ibid., p.6.
15 Ibid., p.16.
17 North, supra n.2; Feder and Feeny, supra n.5, p.135
18 Ibid; Schultz, supra, n.8, p.1114
order to explain how property rights to land emerged and developed in Uganda. In doing so, we ask the following questions: (1) why do property rights institutions emerge and change? (2) When do property rights change? (3) In what direction do property rights institutions change and what determines the path of change? (4) What is the process of property rights change?

2.2 Definitional Issues.

Before we set out on the exposition of our conceptual framework, we need to establish a clear understanding of certain terms used. Scholars regularly use the terms ‘evolution’, ‘property rights’, and ‘institutions’ as if their meanings were unambiguous and shared by all, which they are not, resulting in unnecessary confusion. So we shall clarify the meaning of those terms as used in this work. As any dictionary will confirm, ‘evolution’ is a term with several meanings. Generally, evolution refers to a process of gradual change and we have employed it in that manner in the title to this Chapter, as property rights have, in that respect, evolved from a situation of no property or communal property to the ‘full – blown property systems of modern times’. The word ‘evolution’ as used in the title is thus not related to the spontaneous and or evolutionary theory of property rights change.

2.2.1 What are Institutions?

The consensus on the importance of institutions to the performance of economies has not been matched by unanimity on its definition. The issue of an appropriate definition is far from settled. However, many authors adopt some variant of North’s definition which is the most commonly cited in the literature. North defines institutions as “the rules of the game in a society, or more formally, (...) the humanly devised constraints that shape human interaction”. Thus institutions may be understood, as:

sets of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed or constrained, what aggregations rules will be used, what procedures must be followed, what information must be or must not be provided, and what payoffs will be assigned to individuals dependent on their actions.

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20 Nabli and Nugent, supra, n.7, p.1334
22 North, supra, n.10, p.3
Institutions comprise formal rules such as laws and constitutions, informal constraints such as unwritten conventions, norms of behaviour and self-imposed codes of conduct, as well as their enforcement mechanisms.\textsuperscript{24} Formal rules often refer to those that are expressly stated or in written form and are recognized and enforced by the state while informal constraints are implicit.\textsuperscript{25} North observes that informal constraints ‘defy, for the most part, neat specification’\textsuperscript{26} but include ‘codes of conduct, norms of behaviour, and conventions’ as well as ‘extensions, elaborations and modifications of formal rules, ‘and ‘are a part of the heritage that we call culture’.\textsuperscript{27} The term "institutions" is sometimes used in the literature to refer to both "the rules of the game" as well as “the teams playing the game” namely organisations.\textsuperscript{28} In this Chapter, and throughout the thesis, we shall follow North\textsuperscript{29} and use the term in the first sense to refer to rules and not to organisations.\textsuperscript{30}

The function of institutions is to reduce uncertainty in human interaction\textsuperscript{31} by providing structure to everyday life.\textsuperscript{32} This is made possible by the stability of the institutional framework which is ‘accomplished by a complex set of constraints that include formal rules nested in a hierarchy, where each level is more costly to change than the previous one’.\textsuperscript{33} The hierarchical structure, descends ‘from constitutions, to statute and common laws, to specific by-laws, and finally to individual contracts’\textsuperscript{34}. The lower the level of rules in this hierarchy, the less general and easier to modify they are, and vice versa.\textsuperscript{35} The constraint set also includes informal constraints which are probably the most important source of stability in human interaction.\textsuperscript{36} They possess tenacious survival ability, because they become an integral part of habitual behaviour.\textsuperscript{37} Similarly, Ostrom distinguishes between three different levels of institutional rules namely, operational

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\textsuperscript{25} Kingston and Caballero, supra, n.21, p.154.  \\
\textsuperscript{26} North, supra, n.10, p.36  \\
\textsuperscript{27} Ibid; p.36-40  \\
\textsuperscript{28} Arild Angelsen, "The Evolution of Private Property Rights in Traditional Agriculture: Theories and a Study from Indonesia" (Bergen: CHR. Michelsen Institute, 1997), p.3.  \\
\textsuperscript{29} North, supra, n.10  \\
\textsuperscript{30} Ibid; p.4 North makes what he considers “a crucial distinction” between organizations (such as firms, universities, or political parties) and institutions. For the purpose of analysing overall societal change, he impliedly treats organizations as entities within which collective action and agency problems have been solved, so that he can abstract away from their internal governance and decision-making processes, and treat them as unitary actors. Therefore for North, organizations are “players” of the game, and as they pursue their objectives, they act as agents of institutional change.  \\
\textsuperscript{31} Douglass C North, "Institutions and Economic Growth: An Historical Introduction," \textit{World Development} 17, no. 9 (1989a): 1324.  \\
\textsuperscript{32} North (1990), supra, n.10, p.3  \\
\textsuperscript{33} Ibid; p.83.  \\
\textsuperscript{34} Ibid; p.47.  \\
\textsuperscript{36} North (1990), supra, n.10, p.83  \\
\textsuperscript{37} North (1989) supra, n.31, p.1324
\end{flushleft}
rules, collective-choice rules and constitutional-choice rules and argues that the costs of change are dependent on the set of rules, and are highest for modifications of constitutional-choice rules. 38 She further posits that ‘changes in deeper-level rules usually are more difficult and more costly to accomplish, thus increasing the stability of mutual expectations among individuals interacting according to a set of rules’. 39

2.2.2 Property Rights as an Institution.

Property rights are an important institution that regulates the behaviour of actors in an economy. 40 They shape the incentives of individuals, and are, therefore, critical for economic efficiency and growth. 41 Property rights as an institution can be better understood when placed in the context of the overall institutional structure of the society and economy. There are three basic categories of institutions 42: (1) the constitutional order, or ‘the rules for making rules’. 43 These are fundamental rules about how society is organized and are designed to specify the structure of property rights and control of the state; 44 (2) operating rules or institutional arrangements which are created under rules specified by the constitutional order. They specify terms of exchange within the framework of the constitutional rules. Property rights are key rules in this category. Other arrangements include statutes, common law, regulations, associations and contracts; (3) normative or moral behavioural codes alternatively referred to as ideology or culture. 45 These are codes of behaviour aimed at legitimizing the constitutional and operating rules and constraining behaviour. The Constitutional order is intended to be more costly to modify than operating rules and like cultural rules is more stable as it evolves slowly. 46

Feder and Feeny make an important observation that in developing countries where all the three categories of institutions are evolving; there is a high likelihood of disharmony existing among the various institutions. 47 For example, the constitutional order and formal laws may

39 Ostrom, supra n.23, p.52
41 Angelsen, supra, n.28, p.3
42 North (1981) supra, n.2, p.203 also see Feder and Feeny, supra, n.5, p.137.
44 North (1981) supra, n.2, p.203; Feder and Feeny, supra, n.5, p.137
45 Angelsen, supra, n.28, p.3.
46 Feder and Feeny, supra, n.5, p.137; North, supra, n.2, p.203
47 Feder and Feeny, supra, n.5, p.137 Angelsen, supra, n.28, p.3
guarantee private property rights and yet the requisite registration and enforcement systems may be grossly inadequate, inefficient and missing. Similarly, whereas the formal legal system may provide for alienability, transfer of land to outsiders of certain groups such as clans may be considered a breach of cultural norms.48

As a social institution, property rights ‘define or delimit the range of privileges granted to individuals of specific resources, such as parcels of land or water’49 and imply “a system of relations between individuals (…) [involving] rights, duties, powers, privileges, forbearance, etc. of certain kinds.”50 Contemporary legal scholarship broadly defines property rights as “sticks in a bundle” and clarifies that people have rights to a resource in relation to others rather than to the resource itself, and regard the main function of property law as allocating and enforcing these rights among competing users.51 Property rights to land should therefore be understood as a bundle of characteristics, formally and informally constructed, including exclusivity, inheritability, transferability, appropriability52 and systems for enforcement.53 “[T]hey link not merely a person to an object, but rather a person to an object against other persons.”54 They are enforced by the state, which in doing so, relies on a wide range of supporting mechanisms such as courts, police, financial institutions, the legal profession, land surveys, record-keeping systems, and titling agencies, in addition to the social legitimacy of property rights to land.55 Property rights institutions range from formal arrangements, including constitutional provisions, statutes, and judicial rulings, to informal conventions and customs regarding the allocations and uses of resources.56 To illustrate, private property rights to land are ‘a set of formalized rules governing the acquisition, inheritance, use rights and dispossession of land’.57 Such institutions critically influence resource –use decisions and, thereby, affect economic behaviour and economic

48 Feder and Feeny, supra, n.5, p.136
49 Mahoney, supra, n.40, p.111
52 The right to appropriate the stream of economic rents from use of and investments in the resource
55 Mahoney, supra, n.40, p.111
56 Mahoney, supra, n.40
57 Joireman, *Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development.* p.64-5.
performance. Thus, property rights are an institution in the sense that they are ‘humanly devised constraints that shape human interaction’. 59

2.2.2.1 Categories of property rights.

Property rights to land have been classified into four ideal categories namely, private, state-owned, communal, and open access. The main distinction in this categorization is the agent with the property rights- is it an individual, the state, the community, or no one? Private property is that which assigns exclusive rights to, inter alia, exclude others and regulate use of the resource to an individual or a de jure person such as a company. However, the state may impose certain limitations on these rights such as imposing zoning requirements thereby forbidding certain uses of the land. Further, the state, through eminent domain, can take private property from an owner. Yet, if private property rights are to be well protected, there must be few legal grounds for state expropriation, adequate compensation for the owner and a voluntary expropriation process. Encroachment by the state on private property rights is a serious violation because ‘land taking, even with compensation, is, next to military conscription, the most extreme exercise of unprovoked state authority.’ The fewer restrictions there are, the stronger are the incentives for individuals to invest in the land. Where adequate enforcement mechanisms are missing, private property rights may assume the characteristics of an open access regime.

State property is where the state or its extensions, such as local authorities and municipalities possess the property rights. This means that rights to the resource are vested exclusively in government which owns and controls use of the resource. The state may exclude anyone from enjoying a right to the land as long as it does so in accordance with the legal procedures for determining use of state-owned property.

58 Mahoney, supra, n.40, p.111.
59 North, (1990), supra, n.10 p.3
62 Giannoni, n.61
64 Musole, supra, n.61, p.56
65 Ibid.
67 Demsetz, supra, n.4, p.354
Under communal property, exclusive rights to land are assigned to an identifiable community who are able to exclude all non-members and to control and regulate its use by members under community norms or rules. However, where the group holding exclusive communal rights is so large that exercising control is impracticable, then the distinction between communal property and open access becomes debatable.

In an open access regime, no property rights exist either de facto or de jure and unrestricted use of the resource is available to all. Rights are left unassigned. This lack of exclusivity may lead to free rider problems and is a disincentive to investment, the need to conserve, and often results in degradation of scarce resources, hence the ‘tragedy of the commons’. Also, where private property rights are not considered legitimate or are ill-enforced, de jure private property becomes de facto open access.

Whereas these four categories may help to clarify the discussion on property rights regimes, they are the ideal. Real life regimes are likely to exist in overlapping combinations of these four categories with variations within each regime.

2.2.2.2 The Function of Property Rights

The conventional property rights approach assumes that outside the world of Robinson Crusoe, “[p]roperty rights are an instrument of society and derive their significance from the fact that they help a man form expectations which he can reasonably hold in his dealings with others.” According to economic theory, the function of property rights is to create incentives to use resources efficiently or stated differently, to guide ‘incentives to achieve a greater

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68 The term common property is sometimes used to refer to property that is classified as communal in the system used here, but it is also used to refer to open access situations. More generally, common property refers to situations for which exclusion is difficult and utilization involves rivalry. To avoid confusion, group ownership is therefore labelled as communal, rather than common property rights. For more on these distinctions, see Berkes et al, supra, n.66.


70 Krier, supra, n.19, p.145

71 Angelsen, supra, n.28, p.5

72 for example Ostrom, supra, n.23; Merrill, supra, n.69, p. S335.

73 G Hardin, “The Tragedy of the Commons,” Science 162(1968); Musole, supra, n.61, p.55-56.

74 Berkes et al, supra, n.66, p.91.

75 Demsetz, supra, n.4, p.347

internalisation of externalities’. Libecap suggests that property rights affect economic behaviour through incentives and they:

...delineate decision-making authority over economic resources, determine time horizons, specify permitted asset uses, define transferability, and direct the assignment of net benefits. Because they define the costs and rewards of decision making, property rights establish the parameters under which decisions are made regarding resource use. Property rights provide the basic economic incentive system that shapes resource allocation.

2.3 Why do property rights change?

Conventional neo-classical economic theory assumes fixed property rights. In fact, property regimes are dynamic and they change over time. There are several approaches to understanding property rights change, that is, why private property rights emerge or why property rights change from communal or open access to private property. Broadly, on the one hand, there are theories that posit that the origins and evolution of property rights are unintentional, spontaneous or evolutionary. On the other hand, there are those theories which have as their basic premise the argument that property rights are intentionally designed and changed by actors to serve their interests. In this thesis, we employ an institutional analytical framework based on the field of New Institutional Economics (NIE). Property rights are an institution in the sense that they are “humanly devised constraints that shape human interaction.” They are rules and therefore according to the usual definition, institutions. The advantage of looking at property rights as an institution is that we can use an institutional analytical framework to explain convincingly why and how property rights take the form that they do and change over time.

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77 Demsetz, supra, n.4, p.348; also see A B Carter, The Philosophical Foundation of Property Rights (London: Harvester, Wheatsheaf, 1989).
78 Libecap, (1986), supra, n.60, p.229
79 Mahoney, supra, n.40, p.111
80 Merrill, supra, n.69
81 Bardhan, supra, n.5 Bardhan, for example, identifies and distinguishes between the Marxist school, the property rights, transaction costs or Coase-Demsetz-Alchian-Williamson-North (CDAWN) School, and the imperfect information school. Angelsen, supra, n.28 identifies the Neo-institutional economics (NIE), Marxian theories, state versus local community approaches and the cultural changes school.
82 Krier, supra, n.19, p.145; Giannoni, supra, n.61, p.73
83 Ibid.
85 North, (1990), supra, n.10, p.3
Research in NIE emphasizes the pivotal role of rules in creating incentives for individuals and organizations, and conversely, the importance of individuals and organizations in determining the rules of the game. NIE is concerned with how institutions influence behaviour by modifying the choice set, and how institutions change over time. Perhaps the richest literature examining property rights as institutional structures lies within the New Institutional Economics, although, modelling the evolution of property rights, or institutional change more generally, is still among the least developed areas within NIE. Whereas conventional neo-classical economic theory assumes costless exchange and perfect information, NIE adds the concept of transaction costs in order to clarify and explain institutions and their change. “Transaction costs” are charges imposed on contracting parties by the process of exchange itself such as imperfect information and enforcement costs to prevent opportunistic behaviour. Institutions such as property rights significantly reduce transaction costs, and are therefore an imperative for efficient transactions.

According to North, his ‘theory of institutions is constructed from a theory of human behaviour combined with a theory of the costs of transacting.’ The rational choice framework for the study of human behaviour is maintained from neo-classical economics. NIE is essentially another extension of the more than a century old neo-classical research agenda, and may also be said to be in many ways a return to the political–economy origin of modern economics.

NIE is an umbrella for several distinct schools of thought. Bromley distinguishes between three approaches: (1) The property rights school, attributed to, among others, Coase and Demsetz; (2) the induced institutional innovation theory; and (3) the North approach.

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97 North, supra, n.10
98 Lawson-Remer, supra, n.51, p.7
102 Eggertsson, supra, n.88, p.248
103 Lawson-Remer, supra, n.51, p.7
104 Ibid; p.8.
105 North, (1990) supra n.10, p.27
106 Angelsen, supra, n.28, p.7.
107 North, supra n.51, p.7.
110 Demsetz,(1967), supra, n.4.
Eggertsson categorises NIE into "the naive model" and "the interest group theory of property rights", which partly corresponds with Bromley's first and third category, respectively.

'The naive theory of property rights' refers to some of the earlier attempts in the 1960s to explain the emergence of property rights without including social and political institutions in the analysis. Platteau designates this 'evolutionary theory of land rights'. Demsetz’s article "Toward a theory of Property Rights" is the classical paper on this theory, and the point of departure for almost all attempts to explain changes in property rights. He contends that societies adopt new property regimes when some external shock alters the costs and benefits of an existing regime such that it becomes less efficient than the one that replaces it. Benefits will normally exceed costs when a resource becomes scarcer. Scarcity will compel individuals to experiment with different rules in an effort to find a system that improves their welfare by enabling them to capture more of the value of the resource. Consequently, there is enhanced efficiency in the allocation of scarce resources as they are channelled to their highest-valued user.

"[T]he emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities... property rights develop to internalize externalities when the gains of internalization become larger than the costs of internalization. (...) the emergence of new private or state-owned property rights will be in response to changes in technology and relative prices."

Institutions are formed and modified in order to minimise transaction costs. Demsetz used the Montagnes of Canada’s Labrador Peninsula to illustrate his argument. Initially, the...
Montagnes treated hunting land as a commons open to all tribal members, who used it for various purposes, including hunting beaver for furs. However, the advent of the beaver fur trade changed this communal holding as it resulted in a sharp rise in the value of furs, leading to an increase in the externalities associated with open-access hunting. Consequently, the Montagnes, started marking off their hunting grounds and allocating to tribe members exclusive rights to hunt in certain places in order to encourage husbandry of the beaver and reduce competitive over-hunting. According to this theory therefore, if there is an abundance of land, we should not expect to observe private property rights.

Figure 2.1 below is an illustration of the evolutionary theory of institutional change presented in a shortened form.

![Diagram showing the evolutionary theory of institutional change]

Population Growth and Agricultural Commercialisation

- Increasing land Scarcity and land values
  - Increasing amount of litigation / disputes
    - Demand for more secure rights
      - Land titling and registration by the State
        - Enhanced Security
          - Access to credit
            - Willingness to invest
              - Improved ability to invest
                - Efficient cropping choices

Source: Figure adopted from Joireman.\(^{112}\)

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\(^{112}\) Joireman, supra, n.57, p.271
Clear from this model is that specification of land rights to enable access to credit and investment comes from within the local environment. Technical change or population growth, factors endogenous to society, are the impetus for change. The model is unidirectional, with property rights changing towards privatization and individualization of rights with state cooperation in titling and registration. Jean Phillipe Platteau sums up the majority position that:

the evolutionary theory of land rights assumes that a harmonious well intended mechanism exists whereby land arrangements more or less spontaneously evolve in a direction suited to the intensification of agricultural production and the preservation of soil fertility.

Demsetz’s approach has been described as harmonious and optimistic because it implies that over time, property rights will be reallocated in the direction of efficiency. It suggests that free markets have the ability to develop efficient institutions. NIE scholars of the property rights school have argued that the main reason for change is minimisation of transaction costs and efficiency. “It is as if it were being assumed that institutional innovation [takes] place in a perfectly competitive political arena guaranteeing that only efficiency-improving innovations would be selected.” Demsetz’s view seems to share a shortcoming common to functional accounts of institutional change in general. It assumes that demand generates its own supply. However, Libecap, and especially North, have provided historical perspectives that seem to challenge the earlier optimistic view of an inevitable evolution of property rights toward economic efficiency. ‘The awarding of a Nobel Prize in economics to Douglass North impliedly suggests that, at the least, part of the economics profession has accepted that the evolution of institutional environment change toward economic efficiency often fails.’ Eggertsson notes that ‘characteristic of this optimistic view, the formulation of decision making with regard to property rights is solely in terms of private benefits and private costs. The theory does not deal

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113 Joireman, supra, n.57, p.272
114 Ibid.
117 Mahoney, supra, n.40, p.127
120 Libecap, Contracting for Property Rights.
121 North, (1990) supra, n.10
122 Mahoney, supra, n.40, p.109
with the free-riding problems that plague group decision, nor is there an attempt to model political processes.\textsuperscript{123} This approach assumes away the crucial problems of collective action and of accounting for the role of the state.\textsuperscript{124} Demsetz and other property rights school proponents only considered the individual demand for property rights, and did not include coordination (free-rider) problems, the role of conflicting interest groups, or the role of the state in supplying institutions.\textsuperscript{125}

The ‘naïve theory of property rights’ employs only three variables: relative prices influenced by factor endowments, consumer preferences, and production functions (technology). The appeal of this theory lies in its fewer variables which are relatively easy to measure and quantify thus facilitating mathematical and statistical analysis instead of qualitative narrative.\textsuperscript{126} However, ‘efficiency in modelling is like any other, saving an input is only relative to output, and the question is whether the model can explain and predict.’\textsuperscript{127} It is noteworthy that more recently, Demsetz responded to criticism that his article Toward a Theory of Property Rights failed to explain how property rights emerge by positing that, he had not claimed to view changes in property rights ‘as an evolutionary process.’\textsuperscript{128} Rather, that he had only sought to suggest why property rights emerge by presenting a positive theory that property rights develop in response to costs and benefits\textsuperscript{129} and chose to ‘avoid the different, difficult problem of how property rights adjustments are actually made’.\textsuperscript{130}

Later work in the NIE tradition, particularly by Douglass North, has broadened and extended the naïve theory of property rights analysis to include the initially overlooked factors. He argues that:

\begin{quote}
[t]he simple fact is that a dynamic theory of institutional change limited to the strictly neoclassical constraint of individualistic, rational, purposeful activity would never allow us to explain most secular change(...) economic change has occurred not only because of the changing relative prices stressed in neoclassical models but also because of evolving
\end{quote}

\textsuperscript{123} Eggertsson, (1990) supra, n.88, p.250,254
\textsuperscript{124} Krier, supra, n.19, p.148; See, e.g., Banner, supra, n.116, p.S362.
\textsuperscript{125} Angelsen, supra, n.28, p.7-8.
\textsuperscript{126} Allan A Schmid, Theories of Institutional and Technological Interdependence (Michigan State University, 1995). \url{https://www.msu.edu/course/aec/810/Hayami-critique.html} (last accessed on 10/11/2013)
\textsuperscript{127} Ibid.
\textsuperscript{129} Ibid.
\textsuperscript{130} Ibid.
ideological perspectives that have led individuals and groups to have contrasting views of the fairness of their situation and to act upon those views.\textsuperscript{131}

Furthermore, that an adequate theory of institutional change would contain "a theory of property rights that describes the individual and group incentives in the system"; "a theory of the state, since it is the state that specifies and enforces property rights"; and "a theory of ideology that explains how different perceptions of reality affect the reaction of individuals to the changing 'objective' situation".\textsuperscript{132} Furubotn and Pejovich also observe that “a theory of property rights cannot be truly complete without a theory of the state.”\textsuperscript{133}

Figure 2.2 below shows North’s model of institutional change and draws upon several papers written by North\textsuperscript{134} and by Denzau and North.\textsuperscript{135}

\textbf{Source:} Figure adopted from Swallow.\textsuperscript{136}

\begin{footnotesize}
\begin{enumerate}
\item North (1981), supra, n.2, p. 58
\item Ibid; p.7-8
\end{enumerate}
\end{footnotesize}
In the bottom left corner are the demand variables: prices, technology, and culture. Changes in those variables can alter preferences for economic institutions and interest groups. Those preferences are filtered by mental models, the ‘internal representations that individual cognitive systems create to interpret the environment.’

Economic actors engage in production and exchange (transformation and transaction) within a given set of economic institutions, norms, and conventions. The level and distribution of income is one of the outcomes. North is also concerned with the feedback processes by which economic outcomes have impacts on relative prices, technology, and culture and on individual and shared mental-models. The feedback effects take the form of “information”; and North refers to the process by which that information influences prices, technology, and mental models as “learning.”

North maintains the importance of the individual demand for institutional change in his modified model and argues that, “the agent of change is the individual entrepreneur responding to the incentives embodied in the institutional framework [...]. Change typically consists of marginal adjustments to the complex of rules, norms, and enforcement that constitute the institutional framework.” Individuals grouped as organizations are agents of institutional change. [As] the organizations evolve, they alter the institutions through two main channels, one direct and the other indirect. Thus, North distinguishes between direct and indirect institutional changes which apply to formal and informal property rights institutions respectively. He contends that:

The sources of institutional change are changing perceptions sometimes reflecting changes in relative prices and/or changes in preferences [...]. As the organization evolves to capture the potential returns, it will gradually alter the institutional constraints themselves. It will do so either indirectly, via interaction between maximizing behaviour and its effect on gradually eroding or modifying informal constraints; or directly via investing in altering the formal rules.

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137 Denzau and North (1994) supra, n.135, p.4

138 North, (1990), supra n.10

139 Ibid; p.83

140 Ibid; p.5.

141 Ibid; p.8.

142 Douglass North, “The Contribution of the New Institutional Economics to an Understanding of the Transition Problem,” WIDER Annual Lectures
It is therefore important to distinguish between *de jure* (formal) and *de facto* (informal) property rights when trying to understand and explain property rights change. It has been observed in the literature that *de jure* and *de facto* property rights are affected differently.\(^{143}\) We examine the emergence and change of informal institutions in more detail in Chapter Three. It is the intentional decisions by actors that may change *de jure* attributes of the institution of property rights.\(^{144}\) The perception of political actors is the most critical variable in effecting *de jure* property rights. As their perceptions change in the face of socio-economic conditions, the actors make policy choices that will in turn affect the institution in one of three ways: strengthening the institution, weakening the institution, or having no effect.\(^{145}\) The *de jure* conditions of property rights are changed through a political process of policy reform.\(^{146}\) Formal institutions change as a result of political processes resulting from the interactions between interest groups and organizations and the interactions between these two kinds of groups and the rule makers. The outcome of these interactions will depend upon the transaction costs associated with institutional change and the bargaining power of the different interest groups and organizations. North defines transaction costs as the costs of measuring and enforcing the valuable attributes of goods, services, and performance.\(^{147}\) We deal with the political processes associated with formal institutional change in greater detail in Chapter Four.

North distinguishes between rule makers and rule enforcers in a state for example, parliament and the judiciary, respectively and explains that they may have different objectives which may or may not coincide with economic efficiency or growth. Political institutions determine the behaviour of rule makers and rule enforcers in the way that mental models determine individual behaviour.

North observes that organizations can directly lobby the state to obtain a change in formal property rights. North’s approach underscores the role of actors’ deliberate choices and notes that:

\(^{143}\) Giannoni, supra, n.61, p.81.

\(^{144}\) Ibid; p.73

\(^{145}\) Ibid; p.82

\(^{146}\) Libecap, supra, n.120, p.4

\(^{147}\) North, (1990), supra, n.10
To the degree that there are large payoffs to influencing the rules and their enforcement, it will pay to create intermediary organizations (trade associations, lobbying groups, political action committees) between economic organizations and political bodies to realize [sic] the potential gains of political change. The larger the percentage of society’s resources influenced by government decisions (directly or via regulation), the more resources will be devoted to such offensive and defensive (to prevent being adversely affected) organizations.\(^\text{148}\)

Since actors’ interests often diverge, direct change is undergirded by political conflicts. It embodies the outcome of conflicts between interest groups, according to each group’s bargaining power. North’s approach also highlights the role of the state among other actors, which rules in these conflicts, while at the same time being itself a self-interested agent of institutional change. The state can act to define property rights in its own interests and does so when ideology takes primacy in its agenda, for instance, in the wake of a revolution or a regime change.\(^\text{149}\)

The development of private land rights requires state involvement in several ways.\(^\text{150}\) The first significant step is the specification of rights in the law, then the survey, followed by registration and titling of land.\(^\text{151}\) This calls for a strong state with adequate control of its jurisdiction and resources. However, where the state lacks control because of, inter alia, rebel movements and poor infrastructure then ensuring the progression of private property rights may be beyond its reach.\(^\text{152}\) Feder and Feeny seem to concur and suggest that inadequacy of state resources is another variable affecting the nature of property rights in the developing world.\(^\text{153}\) They argue that in many areas of several developing countries, insecure and ill-developed property rights prevail, not because the factors which lead to the emergence of well-defined property rights namely ‘high population-to-land ratio(...) active or potential credit markets in which property rights to land could serve as collateral\(^\text{154}\) are absent, but because of inadequacy of state resources. The land administration office may employ deficient technology such as, handwritten record retrieval methods when microcomputers would be more efficient, inadequate human resource, and unsuitable storage facilities.\(^\text{155}\) The judicial and police systems
may be understaffed and, or underpaid, creating conditions for rent-seeking and an ineffective enforcement system.\textsuperscript{156}

Further Feder and Feeny assert that the inadequacy of public sector resources for reducing uncertainty in property rights is aggravated by an inflexible public institutional framework that makes it difficult for ordinary citizens to substitute and mitigate the effects of a lack of public infrastructure.\textsuperscript{157} In some countries, private land surveyors are not recognized and certified, or the facilities to train such surveyors do not exist. The verification of boundaries and the resultant improvement in ownership security is thus totally dependent on government land surveying, which is a function of public budgets. In some countries, the property rights legal framework may be excessively complex requiring various types of documents and affidavits, and thereby increasing the fixed transaction costs associated with enhancing the security of property rights, for example, requiring the involvement of expensive lawyers and substantial time demands from farmers.\textsuperscript{158} Such circumstances do not allow a change to optimum property rights institutions. Instead, one frequently finds an emergence of informal risk-reducing institutional arrangements which may be less effective than a well-functioning formal institution but are better than no institution at all.

Direct institutional change is slow and incremental.\textsuperscript{159} Actors do not change \textit{de jure} conditions of the institution of property rights easily because they rarely have the incentives or the bargaining power to change more than marginal aspects of institutional rules.\textsuperscript{160} Furthermore as earlier observed, change is incremental because of the stability of the institutional framework due to the ‘complex set of constraints that include formal rules nested in a hierarchy, where each level is more costly to change than the previous one.’\textsuperscript{161} The tendency is to reject abrupt change except for under extreme conditions such as revolutions or crises.

Although direct institutional change of \textit{de jure} property rights is the result of ‘purposive activity of human beings to achieve objectives,’\textsuperscript{162} it implies neither an effective control of institutional evolution nor efficient results for several reasons. Firstly, deliberate strategies of various actors interact and can yield unexpected results which do not coincide with any of their initial intentions.\textsuperscript{163} ‘The maximising efforts of entrepreneurs frequently have unanticipated

\textsuperscript{156} ibid
\textsuperscript{157} Feder and Feeny, supra, n.5, p.143
\textsuperscript{158} ibid; p.142
\textsuperscript{159} North, supra, n.10, p.89
\textsuperscript{160} ibid; p.89-90; Giannoni, supra, n.61, p.73.
\textsuperscript{161} North, supra, n.10, p.83
\textsuperscript{162} North, supra, n.142, p.7
\textsuperscript{163} Vincensini, supra, n.35, p.4 (last accessed 10/11/2013).
consequences." Secondly, owing to bounded rationality, imperfect information, imperfect political markets, and because institutional change is inclined to encounter systemic or political lock-ins, ‘institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to devise new rules.’ In a world of zero transaction costs, ‘bargaining strength does not affect the efficiency of outcomes; but in a world of positive transaction costs it does.’ Indeed, not many scholars can still contend that uninterrupted evolution of institutions would ensure economic efficiency. In fact, "It is absurd to argue that processes of institutional evolution 'optimize'," or as North succinctly noted, “the fact that growth has been more exceptional than stagnation or decline suggests that efficient property rights are unusual in history.” Institutional inertia is often observed because institutions tend to get deeply embedded in the socio-economic and cultural fabric of societies as they are created, inherited and maintained by human beings.

North argued that inefficient institutions may remain unchanged if they have the necessary support. De Janvry contends that dysfunctional institutions endure because of ‘path dependency, the Prisoner Dilemma or imperfect information about future gains.’ He explains that ‘in the first explanation, high sunken costs induced by past institutions make transition to what could be superior institutions socially unprofitable. In the second explanation, without cooperation, the cost of breaking an existing rule may be too high on individuals, and it is thus individually rational for socially sub-optimum institutions … to remain in existence.’ The third explanation is that ‘a bias for the status quo emerges from uncertainty in the distribution of benefits from change.’

Another attempt at modifying the optimistic model of property rights involves linking it to the interest-group theory of legislation and government which posits that ‘legislation is a good

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164 North, (1990), supra, n.10, p.78
165 Vincensini, supra, n.35, p.4.
166 North, supra, n.10, p.16
169 North (1981) supra, n.2, p.6
170 Markvart, supra, n.21, p.1
172 Ibid., 568.
173 Ibid.
demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare.'\textsuperscript{174} According to the theory:

all citizens are both demanders and suppliers of laws, but certain citizens share legislative goals with highly organized interest groups which provide them with an advantage over other citizens in the procurement of favourable legal rules. The basic thrust of the model is that legislatures use taxes, subsidies, regulations, and other political instruments . . . to raise the welfare of more influential pressure groups. Groups compete within the context of rules that translate expenditures’ for political pressures into political influence and access to political resources.\textsuperscript{175}

Eggertsson refers to this extension of the optimistic model as 'the interest-group theory of property rights’ and explains that it:

takes the fundamental social and political institutions of the community as given, and seeks to explain the structure of property rights, in various industries, in terms of interactions between interest groups in the political market. Property rights, which serve the narrow self-interest of special interest groups but cause substantial output losses to the community as a whole, typically are explained in terms of transactions costs, free-riding, and asymmetrical information.\textsuperscript{176}

Eggertsson concludes in line with North that there is compelling historical evidence to support the view that states do not normally supply property rights that ensure economic efficiency and growth.\textsuperscript{177} In fact, according to North, 'one of the most evident lessons from history is that political systems have an inherent tendency to produce inefficient property rights which result in stagnation or decline.'\textsuperscript{178}

Libecap argues that property rights are formed and enforced by political entities and that they reflect the conflicting economic interests and bargaining strength of those involved.\textsuperscript{179} In particular, Libecap explains that distributional conflicts present political risks to politicians, giving these politicians incentives to propose regulations that do not seriously upset status quo


\textsuperscript{176} Eggertsson, (1990), supra, n.88, p.275-276

\textsuperscript{177} Eggertsson, (1990), supra, n.88, p.275-276; North, (1990),supra, n.10; Mahoney, supra, n.40, p. 128

\textsuperscript{178} North, (1989a) supra, n.31. p.1321

rankings and that offer only limited relief from property rights economics inefficiencies due to common pool resource losses.\footnote{Ibid.}

A major premise of Libecap’s work and political economy, in general, is that the political process of defining and enforcing property rights is divisive because individuals always seek to maximize their private gains.\footnote{Libecap, supra, n.120, p.4-5} Libecap argues that because certain property rights arrangements can reduce transactions costs in exchange and production, and encourage investments to promote overall economic growth, such property rights have public goods aspects.\footnote{Libecap, supra, n.120} As with all public goods, though, there are economic hazards in attempting to change property rights such as shirking and uncooperative behaviour among the bargaining parties that will affect the institutions that can be established. In bargaining over creating or modifying property rights, the positions taken by the various bargaining parties, including private claimants, bureaucrats, and politicians, will be moulded by their private expected gains, as well as by the actions of the other parties.\footnote{See Mahoney, supra, n.40, p.112}

Property rights are the product of political negotiation, and therefore, they tend to benefit whatever interest group holds power.\footnote{Karthryn Firmin-Sellers, The Transformation of Property Rights in the Gold Coast: An Empirical Analysis applying Rational Choice Theory (Cambridge England and New York: Cambridge University Press, 1996).} Therefore, that to understand why a particular set of property rights characteristics are chosen and maintained, even if these characteristics are sub-optimal, one need only examine the preferences of the individual bargaining parties.\footnote{Libecap, supra, n.120, p.5} Libecap’s framework has three independent variables: shifts in relative prices, changes in production and enforcement technology, and shifts in preferences and other political parameters such as shifts in political influence of competing claimants. The predictions of his model are that (i) when prices increase, institutional change will occur as the exploitation of the common resource becomes so great that the losses are large; (ii) the greater the number of bargaining partners or the more heterogeneous, the more difficult the reform and (iii) the more skewed the
landholdings the greater the pressure for redistribution. Moreover, because today’s choices are constrained by yesterday’s decisions, history matters.

There are several challenges in applying Libecap’s model to understand property rights emergence and change. First, his framework ‘assumes that the bargaining parties must see their welfare improved or at least made no worse off in order for them to support institutional change, and each party has an incentive to seek as large a share of rents under the new arrangement as possible.’ It therefore remains unclear what can be predicted, if those bargaining, for example in a legislature, or advocating for a particular institutional change have no private gain from the reform, but are concerned with social conditions. Secondly, the model assumes that institutional changes are all intentional. The ‘interest group theory of property rights’ does not seem to have much explanatory power for the existence and change of informal property rights. Thirdly, it explains when actors will decide to move from communal to private ownership. It does not explain a move away from private. For example, can we assume that land that was private will become communal when prices go down? Fourth, it fails to recognize the role of the state. Whereas Libecap recognises that property rights are determined by the political process and that political institutions are important in defining the context for their change, he leaves the state in the background and out of his discussion.

Ruttan and Hayami also made a notable application of the NIE approach to developing countries, mainly within the property rights school. Their "induced institutional innovation" approach focuses on changes in resource endowments, technical change, and growth in product demand. They argue that these factors shape the demand for institutional innovation. Although they recognise the importance of the supply of institutional arrangements, they do not adequately integrate them in their analysis. David Feeny represents a further extension of this work and focuses more explicitly on the supply factors within a demand and supply framework of institutional change. He asserts that institutional supply is dependent on the concurrence of elite desires, government agendas and changing relative prices. Demand for

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186 Giannoni, supra, n.61, p.76.
187 Mahoney, supra, n.40, p.111 Libecap, supra, n.120
188 Libecap, (1989b) supra, n.120, p.13.
189 Giannoni, supra, n.61, p.79.
190 Ibid.
192 Ruttan and Hayami, supra, n.99
193 Feeny, (1993), supra, n.43.
194 Angelsen, supra, n.28, p.8.
property rights change may occur, generated either endogenously through population changes or agricultural commercialization but without harmony in elite and government cooperation there will be no change in property rights institutions.\footnote{Joireman, supra, n.57, p.272.} Although Feeny’s work has been commended as ‘a first step in the elucidation of a wider theory,’\footnote{Joireman, supra, n.57, p.273.} it has been criticized for failing to give an indication of how these factors intervene or when we might expect the different factors to be impediments and when we might expect all the variables to come together and provide a supply of institutional change. Although Feeny’s theory is not falsifiable, it offers little predictive value.\footnote{Joireman, supra, n.57, p.273.}

Proponents of the "induced institutional innovation" theory also accept that efficient institutions may not manifest either because the overall national interest diverges from economic efficiency, or the interests of elite government officials diverge from the economic interests of society.\footnote{For example, Vernon Ruttan, Yujiro Hayami, David Feeny Feeny, (1988) supra, n.118} Feeny provides an example from Thailand in which these two divergences slowed the development of irrigated rice.\footnote{Feeny, (1988) supra, n.118} The supply of institutional change therefore depends upon the costs of such change and the capacity and keenness of the political establishment to set up new institutions.\footnote{Swallow and Kamara, supra, n.136, chapter 12} In Feeny’s words, ‘the supply of institutional change depends on the capability and willingness of the political order to provide new arrangements.’\footnote{Feeny, (1988) supra, n.118, p.182}

Firmin-Seller’s studied the transformation of property rights in colonial Ghana and not only attributes institutional change to politics but also explicitly recognises the role of the state in influencing the specification of property rights.\footnote{Kathryn Firmin-Sellers, “The Politics of Property Rights,” American Political Science Review 89, no. 4 (1995). Firmin-Sellers, supra, n.183.} She asserts that central to the analysis of property rights change is the need to identify the conditions under which rulers act as well as the political institutions through which they ensure their property rights assignments. This is because state rulers often manipulate political institutions to achieve their own goals. Like Libecap, Firmin-Seller recognizes that actors within the society also have a vital role in the definition and enforcement of property rights. She also argues that the creation of property rights institutions can be coercive too. This is largely because people rely on the coercive authority of the state to overcome the distributional conflicts over the precise definition of property rights. This
presupposes a strong state but therein lies a dilemma. Any state strong enough to provide these valuable public goods is also strong enough to confiscate the wealth of all its citizens.  

Jean Phillipe Platteau attempts to explain the progression of land rights in Sub-Saharan Africa. He appraises the theories of North, Demsetz and Coase and other evolutionary theorists. Platteau identifies the symptoms of imminent property rights change such as increasing litigation as the traditional system of tenure tries to adapt to the changing economic environment. His effort to apply the extant theory of changing property rights in the developing world is noteworthy. Yet, Platteau neglects the political forces that may inhibit a change in property rights as well as state agendas, risk management and flexible institutional development.

The first question ‘why do property rights change’ has been answered effectively by Douglass North in his studies of institutions and institutional change over time as well as by many other neoclassical institutional economists who have concluded that institutions change over time in response to a relative price change, or a change in preference or tastes which lead one or both parties in a transaction to perceive that they could be better off under alternative contractual and institutional arrangements. Thus, the engine of change in NIE is new economic opportunities. ‘It is the possibility of profits that cannot be captured within the existing structure that leads to the formation of new (or the mutation of old) institutional arrangements.’ The sources of this creation of uncaptured profit under existing arrangements can be due to changes in several parameters. Changes in relative prices is the most common explanation, for example, as a result of changes in relative resource endowments including population growth which historically is deemed to be the single most important source of relative price changes. When a resource such as land becomes scarcer, and therefore more valuable, as reflected in relative prices, competition for it makes it worthwhile to spend more resources to create and protect the property rights to that asset. Technologies, both for production and enforcement,


204 The writings of Douglas North reflect the clearest and most widely acknowledged expression of the conventional views of institutional change(with his definition of institutions being the most cited)

205 Sometimes included in the term “ideology”: Angelsen, supra, n.28, p.8

206 Bardhan, supra, n.5, p.6


208 Ruttan and Hayami(1984), supra, n.99; Libecap,(1989a)supra, n.181, p.16;North,(1981),supra, n.2; North(1986) supra, n.88; Eggertsson,(1990),supra, n.88; Feder and Feeny, supra, n.5, p.243.


210 Bardhan, supra, n.5; p.6
and changes in the costs of information are also considered major sources of change. \(^{211}\) Problems related to free or easy riding (moral hazard) will also direct this specification and securing of rights towards increased privatization.

However, property rights changes do not always manifest in response to relative price changes. There are two possible variations to this causal model. \(^{212}\) The first variation occurs when relative prices change, but institutional changes are delayed or do not manifest at all, because of vested interests that prevent proper institutional adjustment. \(^{213}\) The second alteration to the theory comes about when no relative price change occurs but institutional change is imposed from above. \(^{214}\) Institutional change from above is a change in the rules of the game implemented by the state to alter an institutional structure so that it corresponds with the state’s ideology or goals. \(^{215}\) Institutional change from above can be aimed at pre-empting relative price changes and the transaction costs that may occur before institutional change occurs or it can be completely independent of any relative price change motivated entirely by ideology or the agenda of the state. \(^{216}\) Colonialism, which coincided with the commercialization of agriculture is an example of institutional change from above and is another important variable when considering property rights change as it affected most of the developing world and the whole of Africa with the exception of Ethiopia and Liberia. \(^{217}\) The influx of British, French, or Portuguese settlers and the development of an imposed formal – legal structure modified the economic incentives in a society because of the expropriation of land resources that colonialism necessarily brought. This seems to be the likely explanation for the emergence of private property rights in some countries, such as Uganda, where private property rights were established not as a result of native demand but rather by the action of the colonial government.

It is also important to distinguish between *de jure* (formal) and *de facto* (informal) property rights when trying to understand and explain property rights change. This is because as we have shown, *de jure* and *de facto* property rights change for different reasons. It is the intentional decisions by actors that may change *de jure* attributes of the institution of property rights. The perception of political actors is the most critical variable in effecting *de jure* property

\(^{211}\) Angelsen, supra, n.28, p.8 ; Bardhan, supra, n.5, p.6.
\(^{212}\) Joireman, supra, n.57, p.304
\(^{213}\) Ibid.
\(^{214}\) Ibid.
\(^{215}\) Ibid; p.70; also as noted by North, (1981) supra, n.2
\(^{216}\) Joireman, supra, n.57, p.304
\(^{217}\) Ibid; p.293
rights. The de jure conditions of property rights are changed through a political process of policy reform.

2.4 The timing of institutional change: When do property rights change?

Theories of institutional change tend to follow the proposition that institutional modification is a result of changes in relative prices. Although this accounts for much of the institutional change that occurs, there is a lot missing in the discussion of the timing and direction of institutional change.  

Feeny suggests that a transformation in property rights is not guaranteed following a change in relative prices. This position is reiterated by Gary Libecap, who studied the timing of institutional change and noted that vested interests in the status quo distort the timing of institutional change: ‘distributional conflicts inherent in any new property rights arrangement, even one that offers important efficiency implications can block or eventually constrain the institutions that can be adopted.’ Interference with the furtherance of institutional change can be so strong that an immediate change in institutions may not follow a change in relative prices.

Formal rules may change in relatively short spaces of time while informal constraints (embodied in customs, traditions and codes of conduct), being part of habitual behaviour, possess tenacious survival ability and resistance to change. Therefore, whereas informal institutional change may follow relative price changes in the long run, say after 100 years, it may not do so in the short term.

North also acknowledges that there may be a time lag between individual demand for change, and the actual outcome. First, institutions have important collective good characteristics; therefore, well known problems of free riding, collective rationality and group behaviour are critical. Second, the state, which has the ability to resolve this difficulty, has its own interests. Libecap observed that the state does not always act to minimize costs and maximize economic value. The state may, for instance be interested in maximising tax revenues, and create property rights institutions that constrain the behaviour of market actors in ways that

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218 Joireman, supra, n.57, p.303
220 Libecap, (1989b) supra, n.120, p.121.
221 Joireman, supra, n.57, p 273
222 Douglass C North, “Institutions , transaction costs and economic growth,” Economic Inquiry 25, no. 3 (1987).
224 Angelsen, supra, n.28, p.8
225 Ibid.
226 Libecap, supra, n.120
undermine economic growth. Also political elites are self-interested and may want to maximise their benefits of office. North further observed that:

[...] the revenue that can be raised by rulers may be greater with an inefficient structure of property rights that can, however, be effectively monitored, and therefore taxed, than with an efficient structure of property rights with high monitoring and collection costs. Rulers can seldom afford efficient property rights, since they would offend many of their constituents and hence become more insecure. That is, even when rulers wish to promulgate rules on the basis of their efficiency consequences, survival will dictate a different course of action, because efficient rules can offend powerful interest groups in the polity.

Socially inefficient institutions may be created or maintained by the rulers because the existing institutions serve their interests. Third, existing institutions, which are critical in determining both the individual demand for institutional change as well as in solving collective action problems, may prevent socially desirable changes. As Papadakis observed, “where you get to depends on where you are coming from, and some destinations you simply cannot get to from here.” The institutions which precede any change in relative prices influence the effects of any change in factor scarcity:

Fundamental institutional change is a process that has very high fixed costs. As a result, fundamental change will not occur incrementally to adjust to the changing environment. Rather, change will come only after significant departure is made from the optimal institutional structure. Moreover, at most points in time, the property rights structure that prevails will be highly dependent on the previous property rights structure even if such a structure was inefficient. Thus, a society may be caught in a low efficiency institutional trap.

2.5 The Direction of Change in Property Rights Institutions.

Property rights institutions whether formal or informal, change over time in response to changes in environmental conditions. In the past, most studies of institutional change have been devoted to questions of why institutions change with little focus on how they change or in what direction they may change. Demsetz’s theory, for example, said essentially nothing about the
form that developing property rights are likely to take, other than to observe that whether a society adopts private property or state-owned property may partly depend on the “community’s tastes” for collectivism. In this section of the chapter we shall consider the direction of change in property rights.

Extant models of institutional change have contributed much to our understanding of changing property rights over time, and they give a clear picture of why institutional change occurs. However, they are not entirely accurate in predicting its direction. Most scholars of property rights change assume a linear development of property rights from communal towards greater specification and ending in private property in response to a changing environment. Although the linear model may be valid in some instances, as in explaining the progression of property rights in Western societies, it is contradicted by examples from the developing world where either communal or state property persists or a mix of private, communal and state property is witnessed. A more accurate position seems to be that there are multiple directions to property rights change.

In fact, Posner contends that, in many situations, communal property could be the optimal outcome for people responding to increased resource scarcity. He explains that as a result of ignorance and uncertainty on the one hand and efficiency gains on the other, communal rights could be the norm in primitive societies rather than the exception. Furthermore, Posner argues that most of these communal arrangements will involve small kinship groups, amongst whom, a variety of social institutions will emerge in response to resource scarcity. Some of these institutions could be communal responses, such as gift-giving, the sharing of bountiful harvests, reciprocal exchange, and interest-free loans. He maintains that in primitive societies many of these arrangements are more efficient since communal property provides more insurance against hunger. While his proposition is basically an exposition of the argument that communal rights will emerge out of individual desires for greater

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234 Merrill, supra n. 69, p.5333 (quoting Demsetz, supra, n. 4, p.350)
235 Joireman, supra, n.57, p. 273
236 ibid; p.274
237 ibid; p. 269
238 In Uganda for example, there is a mix of private, state and communal.
240 ibid; p.5-6
241 ibid.p.10-19
insurance against hunger, Posner demonstrates that private property is not the necessary outcome where there is increased resource scarcity.\textsuperscript{242}

Thus, the path of property rights change is not always towards greater specification. Joireman theorises that responses to changes in relative prices can follow multiple trajectories depending on the type of resource base that exists, state agendas, the influence of non-state actors as well as the types of pre-existing institutions that are in place.\textsuperscript{243} Any of these factors can cause the moving of property rights away from privatization towards common property, state property or other restrictive property arrangement.\textsuperscript{244}

The resource base of the area experiencing changing prices can influence the direction of property rights change. Pingali and Binswanger observe that the rate and direction of technical change are influenced by the land and labour features of an economy.\textsuperscript{245} Different resource features create peculiar modes of production and divergent paths of institutional change.\textsuperscript{246} Each production system is a contributing factor to the institutions that develop based upon the regulation of scarce resources in that environment.\textsuperscript{247} These institutions adjust and develop as production opportunities change. To illustrate, farmers in arable lands tend to engage in cultivation rather than pastoralism.\textsuperscript{248} An arable farmer who wants to enhance productivity may use fertilizers or try to prevent soil erosion by planting trees. These are investments that pay off in both the short and long term. Therefore, whereas an arable farmer may welcome a titling scheme that would guarantee his rights to the land, a pastoralist may not necessarily be impressed. A pastoralist may invest by increasing his herd. Consequently, he would need a larger area to support the additional flock. In this case, the privatization of land would assume a reduction in the available area for the pastoralist and would therefore, stymie his wealth accumulation.\textsuperscript{249} Thus, the end result of natural, evolutionary progression of rights may vary from one community to another depending on their respective resource base.\textsuperscript{250}

The natural progression of property rights therefore is not always towards privatization. Where the value of production, frequency of use and probability of improvement are low, property rights will more than likely change in the direction of communally regulated tenure or


\textsuperscript{243} Joireman, supra, n.57, p.290-292.

\textsuperscript{244} Ibid. p.304.


\textsuperscript{246} Joireman, supra, n.57, p.285.

\textsuperscript{247} Ibid. p.286.

\textsuperscript{248} Ibid. p. 286.

\textsuperscript{249} Joireman, supra, n.57, p. 286.

\textsuperscript{250} Ibid. p. 286-287.
government controlled administration. This variation in patterns of institutional innovation suggests that the conventional model of institutional change progressing towards private rights in a manner similar to that of Western Europe may not be a correct assumption based on the limited experience of purely agricultural societies.

The political agenda of the state is another critical factor in influencing the direction of institutional change because privatisation of property must be regulated through the state and land titling effected through state organs. As a result of this pivotal role in the progression of property rights towards privatization, the state itself may hinder or foster institutional innovation. Indeed the state can and does influence the allocation of property rights and the direction of institutional innovation in two distinct ways: (1) through its own ideological agenda, and (2) through the mediation of interest group politics.

Regime change that leads to fundamental change in government is one factor that may transform the ideological agenda of the state and its institutions. Historical examples in the developing world may be cited where property rights have moved from those approximating private rights to a more communal regime as a result of a change in state ideology. Tanzania and Mozambique transited to a communal system of land rights after their independence and Ethiopia after the revolution of 1974. The transformation of property rights in all these cases was engendered by the conversion of the ideological agenda of the respective states to a kind of Socialism followed by a transformation of the agricultural system from traditional to cooperative. In each instance, endogenous institutional change did not proceed along a natural path. A Socialist government as might be expected may prefer either state property or communal property. In either case, the state may intervene and stop any transition to privatization. Few scholars studying institutional change consider these types of regime changes or ‘institutional change from above’ in their theoretical arguments.

A state comprises politicians and bureaucrats with definite goals and political debts which gives the state an agenda of its own which may or may not coincide with economic

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251 ibid. p.289.
252 Ibid.
253 Ibid. p. 276.
254 Joireman, supra, n.57, p.276.
255 Ibid. p.295
256 See the Freehold Titles (Conversion) and Government Leases Act, 1963.also see Joireman, ibid; p.297-300 for Tanzania’s experience in detail.
257 Joireman, supra, n.57, p. 278.
258 Ibid.; p.279.
259 Joireman, supra, n.57, p. 295
efficiency. It may, therefore, be incorrect to assume, as the evolutionists do, ‘that a state will automatically intervene to specify property rights, award title and adjudicate disputes.’ There are several reasons that may explain a state’s styming of endogenous property rights change towards privatization and as a corollary why a state may opt not to title land. Firstly, if titling is a result of donor pressure such as the World Bank, the government, may not be keen on the implementation. Secondly, if land titling is supported by a politically weak group within the country or by a group of people or a region where there is opposition to the government, land titling may not be effected and may even be actively repressed. Thirdly, where a politically strong group protests against land titling, the state may decide not to facilitate land titling or even be lax at protecting private rights. A group may be politically strong as a result of either its heavy representation within the state hierarchy or because of its political importance in ensuring the sustenance of the government.

Two identifiable directions of property rights change have been observed where the state has intervened. In some societies, the state has been involved in moving property rights towards communal tenure, as witnessed in the great social revolutions in Russia and China as well as in Tanzania, Ethiopia and Mozambique. In other instances, like in Uganda, the state, in that particular case, the colonial government, intervened and privatized rights to land where they had previously been communal.

The impact of donor pressure or policy changes linked to aid is another factor influencing the direction of institutional change in developing countries. Reliance on external aid for a large percentage of the domestic budget has been a characteristic of all developing countries in Africa, Latin America and Asia. In Africa, reliance on external aid in the past half century has been increasing. Consequent to this growing reliance coupled with decreasing growth, donor agencies, particularly, the World Bank and the International Monetary Fund (IMF) introduced structural adjustment programs under which aid is tied to policy reforms and released in tranches as reforms are implemented. Initially, macroeconomic adjustments such as currency devaluations and trade deficits were the focus of donor concern. However between 1985 and 1995, the World

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261 Ibid.
262 Ibid.
263 Ibid.
264 Ibid: p.278.
265 Joireman, supra, n.57, p.70
266 Ibid: p.70-71 and p.278
267 Ibid: p. 71
268 Ibid: p. 300
269 Ibid.
Bank in particular changed its policy stance and became interested in the microeconomic foundations of economies, particularly with the allocation of land rights.\textsuperscript{270}

Studies such as Pingali and Binswanger show that privatization increases productivity.\textsuperscript{271} Such policy studies are taken very seriously by the Bank following its new policy stance and it can exert pressure on African governments to implement policy recommendations. Considering that donor agencies are very influential because of reform- tied aid, it means that there is now another factor affecting the allocation of land rights within developing countries.\textsuperscript{272}

The trajectories of property rights change we have considered in this section are not considered in most extant models and are usually ignored by property rights scholars because they seem to represent more of a regression than development in property rights. Yet they clearly show that a linear progression of property rights takes place only under specific circumstances. Deviant cases should therefore be recognized and discussed to understand the direction of property rights change particularly in developing countries.

\subsection*{2.6 How do property rights institutions change}

New institutional economists have underscored the important role that institutional change plays in determining economic development but have given relatively little consideration to the dynamics of institutional change, the actual process by which property rights institutions mutate.\textsuperscript{273} As Foss and Foss commented, ‘[h]ow systems of property rights change have [sic] also been a neglected issue, because of the underlying comparative-static method in the property rights approach.’\textsuperscript{274} Our understanding of the processes by which property rights change is therefore still weak and there is relatively little empirical study of the process of property rights change.\textsuperscript{275}

We identify, in the literature, two broad categories of processes of institutional change that may be used to explain how property rights emerge and change.\textsuperscript{276} The first category comprises theories in which:

\begin{itemize}
\item \textsuperscript{270} Ibid; p.301
\item \textsuperscript{271} Pingali and Binswanger, supra, n.244
\item \textsuperscript{272} Joireman, supra, n.57, p. 302
\item \textsuperscript{273} Feeny, (1988), supra, n.118 Giannoni, supra, n.61, p.72. Libecap, supra, n.120, p.2.
\item \textsuperscript{275} Sorensen, supra, n.89, p.473-75 available at \url{http://usj.sagepub.com/content/48/3/471.full.pdf}, (Last accessed 10/11/2013).
\item \textsuperscript{276} Krier, supra, n.19, p.145; Kingston, supra, n.21, p.153
\end{itemize}
institutions are purposefully designed and implemented in a centralized way, either by a single individual (such as, when a king issues a royal decree) or by many individuals or groups interacting through some kind of collective - choice or political process in which they lobby, bargain, vote, or otherwise compete to try to implement institutional changes which they perceive as beneficial to themselves, or to block those they view as undesirable.277

In this category, property rights are the ‘product of intentional undertakings: property is ‘designed’.278 The second category consists of theories of ‘evolutionary’ institutional change which view property rights as an unintended consequence of uncoordinated actions of individual agents and thereby arising spontaneously.279 The evolutionary theory of property rights posits that private property emerges within society from the bottom up, in response to underlying economic and social forces.280

The latter category might also be described as an "invisible hand explanation"281 for the transformation of property rights which ‘explains what looks to be the product of someone’s intentional design, as not being brought about by anyone's intentions.”282 Adam Smith referred to this years ago in The Wealth of Nations when he spoke of a marketplace where every individual "intends only his own gain," yet is ‘led by an invisible hand to promote an end which was no part of his intention."283 What Demsetz and other evolutionists neglect to specify is the mechanism by which the underlying economic and social forces they identify as the impetus for the development of private property ultimately are translated into property rights.284 Demsetz, for example, in his article simply implied that ‘interacting persons’ somehow agree spontaneously to establish private property.285

In defence of the evolutionary change theory, game-theorists have attempted to demonstrate that private property may emerge spontaneously within society.286 However, these game theoretic explanations fail to provide ‘a generalizable, positive explanation for the

277 Kingston, supra, n.21, p.153
278 Krier, supra, n.19
279 Ibid
280 Wyman, supra, n.119, p.120; Demsetz, (1967), supra, n.4, p.350
281 Wyman, ibid, p.121 and Krier, supra, n.19, p.145-146

284 Wyman, supra, n.119, p.121
285 Demsetz, supra, n.4, p.350
286 See, e.g. Roberp.1315, 1320–21, 1321 , 1365–66 for an account of the evolution of property rights similar to Demsetz’s but using positive economic theory.
emergence of private property because they typically are premised on strong assumptions, often assuming away, for example, the fact that private parties typically interact in the presence of a state. They also assume ease of interpersonal communication which is not true in contemporary societies with high levels of market exchange. Even in societies of the past, it is unclear whether there were sufficient opportunities for repeat play to enforce a private property regime, given the limitations in communication infrastructure.

The evolutionary approach seems to have two limitations. ‘First, its explanatory power depends on a cost-benefit relationship which is likely to prevail only when resources are relatively abundant.’ As Hume observed, ‘the temptation of one man to interfere with the possession of another is less conspicuous, where the possessions (...) are few and of little value as they always are in the infancy of society.’ Thus, ‘scarcity jeopardises the convention based de facto property rights system in the absence of third party enforcement which the ‘invisible hand’ explanation does not provide.’

The second limitation of the evolutionary approach is that it cannot explain anything beyond simple property rules because the ‘asymmetries on which it depends must be crude in order to be effective.’ We recall Demsetz’s example of the Montagnes, and considering the subtle distinctions that existed in their rules regulating trespass. Leacock stressed that trespass meant one thing only, namely an intrusion arising ‘when hunting for meat or fur to sell.... [A] man finding himself in need of food on another’s land may kill the beaver-even all the beavers in a lodge-although he cannot kill them to sell the fur.’ It is clear that a perverse incentive was created by this narrow prohibition on trespass. Tribe members could use their own hunting territories to hunt beaver for sale and use their neighbours’ hunting territories to hunt beaver for private consumption. It is unlikely that these rules could have developed simply by means of a convention based on possession. And this is true even in modern property systems like that of the common law, with various types of possessory estates. Complicated systems depend to a considerable degree on a process of intentional design.

287 Wyman, supra, n.119, p.122
288 For further insights of the potential of game-theory in explaining the emergence of private property, see Eggertsson, supra, n.88, p. 299.
289 Krier, supra, n.19, p.156
291 Krier, supra, n.19, p.156
292 Krier, supra, n.19, p.157
293 Demsetz, (1967), supra, n.4, p.351-353
295 Krier, supra, n.19, p.156
296 ibid; p.157
Scholars of the intentional design school depart from the evolutionists’ premise that private property is created endogenously within society and instead suggest that it is the outcome of a political process.297 However, they remain greatly influenced by Demsetz and tend to present the political process as one where rights are rearranged through voluntary contracting between affected parties working similarly to market ordering.298

Comparing the dynamics of a political system to those of the market overlooks the fundamentally different decision making rules in both and the dissimilar conditions for institutional change.299 Levinson, in a slightly different context underscored the difference between governments and private firms and asserted that unlike the latter, governments respond to votes and not to dollars.300

Whereas directly affected parties must consent to the rearrangement of rights through market transactions, many directly affected parties may not be consulted personally when rights are rearranged through political processes. 301 Therefore, in investigating the process of change, it is important to analyse the expected distribution of the benefits and costs of private property among the influential interest groups who are likely to be consulted,302 since the political process can proceed even without unanimity. The different decision-making rules operating in the political process also question the conventional wisdom concerning the requisite variables in rearranging property rights, such as low measurement costs, excessive levels of resource utilization, and small numbers of homogeneous resource users.303 Moreover, recognizing the significance of political decision-making rules underscores the need to examine these rules closely in any particular context as variations in them may affect the success of rearranging rights. In particular, the more the collective-choice rules tend toward mandating the unanimity of the affected parties to alter rights in the market, the more difficult it may be to rearrange rights

297 Wyman, supra, n.119, p.122; see Libecap, (1989a), supra, n.181 p. 6, 7; Robert P Merges, "Intellectual Property Rights and the New Institutional Economics," Vanderbilt Law Review 53(2000), 1857, 1868 ("What Demsetz omitted, of course, was politics. Only governments can grant property rights."). Eggertsson, supra, n.88 ( underscores effects of ignoring political considerations when explaining property rights changes);  Libecap,(1989b), supra, n.120 ( property is determined through a political process);

298 Wyman, supra n.119, p.123; See e.g. supra, n.181, p.4-28; ibid; p. 11-12 alludes to proposed changes in property rights being Pareto superior when he argues that "the bargaining parties must see their welfare improved or at least made no worse off"; Libecap, (1989b), supra, n.120 p.7, 10 defines contracting as "private, intragroup negotiations" and lobbying of "government officials").

299 Wyman, supra, n.119, p. 123.

301 Wyman, supra, n.119, p.123.
303 Ibid; p.124.
We examine the political process of formal institutional change more closely in chapter four.

In many real-world processes of institutional change, both evolutionary and deliberate design processes operate simultaneously, and it will often be difficult to neatly separate the two. However, in many cases, at a given moment, one of the two will probably be dominant. North combines the intentional design and evolutionary approaches and offers one of the few existing analyses of institutional change explaining the possible mechanisms, their characteristics and their determinants. He distinguishes between ‘direct institutional change’ and ‘indirect institutional change’. To North, ‘direct institutional change’ refers to the process of change of formal rules through a political process as a result of deliberate, although boundedly rational actions by organizations, prominent among which is government influenced by interest groups and individual entrepreneurs.

Indirect institutional change on the other hand relates to informal rules which change spontaneously through an evolutionary process of cultural transmission, and play a key role in institutional change because they change slowly and cannot be changed deliberately. North explains that informal rules evolve alongside, and as extensions of, formal rules. Following a change of formal rules, the informal rules which ‘had gradually evolved as extensions of previous formal rules’ survive the change, so that the result ‘tends to be a restructuring of the overall constraints – in both directions – to produce a new equilibrium that is far less revolutionary.’

Consequently, in North’s perspective, the process of institutional change is overwhelmingly incremental. It is an accumulation of many small changes rather than occasional large changes. Actors do not change de jure conditions of the institution of property rights easily. The tendency is to avoid abrupt change except in exceptional circumstances such as revolutions. This does not mean that change is not happening, but rather that it is incremental.

The process of institutional change is also path-dependent because individuals learn, organizations develop, and ideologies form in the context of a particular set of formal and
informal rules. These organizations then may attempt to change the formal rules to their benefit, and over time this in turn may indirectly affect the informal rules. In general, there are multiple equilibria and no guarantee of an efficient outcome. Bounded rationality leading to unintended outcomes or inertia caused by pre-existing informal rules can prevent the implementation of an efficient institutional change.

2.7 Conclusion.

Economic development requires the creation of sound political, economic and legal institutions, in particular, secure and functional property rights. Nobel laureates such as Ronald Coase and Douglass North insist on the importance of well-specified and secure rights to property for economic growth. Hernando de Soto also offers a novel analysis of the cause of underdevelopment in countries of the third world and former communist nations and notes that it is the formation of capital underpinned by a formalised property rights regime, that has resulted in the development of the Western nations and yet is largely absent in the third world. However, North rightly observes that:

\[ \text{[e]ven though we know the kind of conditions that would make poor countries better in terms of formal institutional rules and enforcement, we do not know how to get them. The reason why we do not know how to get them is that we do not know the process of change.} \]

We ‘cannot understand the process of change by starting from standard economic theory and moving on from there’. This approach seems to be one of the advantages of NIE as Kenneth Arrow explained:

Why did the older institutionalist school fail so miserably, though it contained such able analysts as Thorstein Veblen, J. R. Commons, and W. C. Mitchell? I now think that . . . [one of the answers is in the] important specific analyses . . . of the New Institutional Economics movement. But it does not consist of giving new answers to the traditional questions of economics-resource allocation and the degree of utilization. Rather, it consists of answering new questions, why economic institutions emerged the way they did.

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314 Ibid: chapter 9
315 Ibid: p.80–81, 136
316 Boudreaux and Paul Dragos, Paths to Property: Approaches to Institutional Change in International Development: p.15.
317 Boudreaux and Aligica, supra, n.11, p.30
318 De Soto, supra, n.12
319 North, "Understanding Institutions." at p.9 ; available at http://books.google.co.uk/books?id=enkIrKwEc&oi=fnd&pg=PA7&q=why+do+institutions+change&ots=5C30xOvMv5&sig=2HHe2PHmRyGvhrcooNEz3FbmQY#v=onepage&q=why%20do%20institutions%20change&f=false (last accessed on 10/11/2013)
320 Ibid.
did and not otherwise; it merges into economic history, but brings sharper [microanalytic] . . . reasoning to bear than had been customary.\textsuperscript{321}

We agree with North that what is needed is a fresh start.\textsuperscript{322} That we need to begin with the way in which societies changed over time to enable an understanding ’of how institutions, formal and informal, evolve, how they interact with how the stock of knowledge changes, how they interact with how demographic features change and how the three of them together are continually affecting the way in which political, social and economic systems evolve.’\textsuperscript{323} Admittedly, this is a huge undertaking. Fortunately, Barzel provides a more manageable and pragmatic approach when he departs from the fresh start idea as follows:

It is tempting to try to trace the pattern of property rights holding that exists today back to its origins to figure out how and why it came about. Such an effort, however, would be futile.... In order to gain a toehold on the evolution of property rights, one must start in a world where some rights are already in place,(...) Given that some rights already exist, it is possible to explore the evolution of such rights with respect to changes in economic conditions and legal constraints.\textsuperscript{324}

Moreover, property began in pre-historic times, and therefore, no one can really prove what actually happened, as a matter of historical truth. Our objective then should be to identify a plausible explanation that is logically intact and consistent with what we know about human development.\textsuperscript{325}

We have considered two different ways of explaining the emergence and change in property rights. One attributes property to intentional design, the other to unintended consequences. Juxtaposed, the picture is pretty clear. The great advantage of the intentional-design approach is that it can, in principle, account for the creation and enforcement of property rights from A to Z, for every detail of any property regime from the beginning right up to now.\textsuperscript{326} The great disadvantages of the approach are that it involves the difficult task of accounting for the origins and actions of the designer and implies a degree of human rationality that probably had not yet developed by the time the first primitive property rights emerged. Furthermore, this approach has difficulty explaining changes in informal rules (such as social norms) which evolve in a spontaneous decentralized manner.\textsuperscript{327} Although it has been largely ignored in the literature on

\textsuperscript{321} Arrow, "Reflections on the Essays," p.734.
\textsuperscript{322} North (2000), supra, n.319, p.9
\textsuperscript{323} Ibid
\textsuperscript{325} Krier, supra, n.19, p.146
\textsuperscript{326} Ibid; p.157.
\textsuperscript{327} Kingston, supra, n.21, p.168.
the change in property rights, the unintended-consequences approach avoids these difficulties, but at the price of three others. It copes poorly with the historic fact of resource abundance as we have seen and cannot explain *de jure* property rights or the development of complex property systems. In addition, evolutionary theories tend to neglect the role of collective action and the political process. Demsetz also recognizes this shortcoming and in a later article asserts that ‘a right- defining and conflict-resolving institution, such as the court system, the legislature, or some community authority, is inevitably part of any property right system.’\(^{328}\) This short review demonstrates how the strengths and weaknesses of the two approaches match up. What the first approach cannot do, the second does and vice versa.\(^{329}\)

Furthermore, *de jure* attributes of the institution of property rights are changed by the intentional decisions of actors. This does not mean that the *de facto* or informal attributes reflect these intentions. Instead *de facto* property rights are more likely to be the consequence of the designer’s cognitive limits and unintended consequences. That is why a framework must incorporate both intentional and unintentional design. A theory that depends on one explanation would be incomplete.\(^{330}\)

These observations are a clear indication that no single approach adequately explains the emergence and change in property rights. Our framework in this thesis is therefore a combination and modification of the two approaches which we shall employ in explaining change in the institution of property rights to land in Uganda.

Following North, we recognise that the processes of change of *de jure* and *de facto* property rights institutions differ. Thus we have shown that we need a two-part framework; the first part explaining the process of *de jure* property rights change (‘direct institutional change’) and the second part explaining *de facto* property rights changes (‘indirect institutional change’). The origin of the institution of property rights is established through the formal definition of a constituting or foundational document, such as a constitution. From that foundational moment the institution evolves through the political process. For the *de jure* conditions, the perception of political actors is the variable with the most influence. On the other hand, *de facto* conditions are largely susceptible to the unintended consequences of the *de jure* changes and the law of limited cognitive ability that is impeded by a weak bureaucratic capacity. They are the conditions that

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\(^{329}\) Krier, supra, n.19, p.157.

\(^{330}\) Giannoni, supra, n.61, p.73.
reflect the actual distribution or allocation of those rights. Change, therefore, may be caused intentionally or unintentionally, although most de jure changes are intentional.

We can surmise that, firstly, property rights development does not always happen when we expect it to. Other factors such as vested interests and government reluctance can interfere. Secondly, even if property rights mutate in response to relative price changes as predicted, it may not be towards greater specification. Thus, the assumption that institutional change is linear and in the direction of private property is not necessarily valid. We can generally conclude that relative price changes only lead to institutional change when that change coincides with the interests of the state and powerful groups in society.

We therefore adopt a framework where new variables are incorporated into the theory of property rights change as well as the weight of history (path dependence). By path dependence we mean the inclination of events towards a set trend where what existed yesterday largely determines what happens today and what is likely to occur tomorrow. These include the objectives of political actors and interest groups within a society, the primary influence being the role of the state and may even include mitigating variables such as the type of resource which is involved, the role of culture and ideas in conditioning the institutional changes which occur. Generally, the incorporation of political factors into the model of changing property rights leads to a less parsimonious, but more accurate description of the progression of land rights in developing countries in particular. It more closely resembles the process of property rights change in the developing world. As Nathan Rosenberg remarked, institutional changes are sometimes ‘driven by nationalist, religious or imperialist motives so intense as to sacrifice economic gain.’ Although we can identify the role of each of these variables, we can neither ascertain the exact influence of each nor appreciate ex ante how particular political pressures will affect state decisions. This is because we do not know how interest groups and state agendas will interact on a particular issue. However, we should be able to make an educated guess regarding the impact of the political variables based on 1) the importance of the interest group whether external or internal to the state and 2) the importance of the issue to the interest group.

333 Joireman, supra, n.57, p.275.
Chapter Three: The Emergence and change of Informal institutions and their interaction with Formal institutions.

“We all know that norms of behaviour, conventions and codes of conduct are critical to the way in which societies work. But we are far from understanding how they work and how they evolve through time, or what makes them work well or poorly.”

3.1 Introduction

Institutions are variously defined by scholars and the issue of an appropriate and unanimous definition is far from settled. However, many authors adopt some variant of North’s definition\(^2\) that institutions are “the rules of the game in a society, (...) the humanly devised constraints that shape human interaction.”\(^3\) These rules can be either formal or informal.\(^4\)

It is increasingly being recognized, that formal institutions alone do not shape human behaviour, but that much of what goes on can be explained also by informal institutions.\(^5\) In fact the notion that overall institutional quality depends on formal and informal institutions may be traced back to the writing of John Stuart Mill in 1848. He observed that, ‘much of the security of person and property in modern nations is the effect of manners and opinion […] and of] the fear of exposure rather [than] the direct operation of the law and the courts of justice.”\(^6\) Indeed, informal rules have long been of interest and many scholars draw a distinction between formal and informal institutions. Some even argue that informal institutions may be the more important of the two, as a source of stability in human interaction.\(^7\) In North’s works, equal importance is

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\(^1\) North, "Understanding Institutions.” p.8
\(^2\) Kingston and Caballero, "Comparing Theories of Institutional Change." p.154
\(^3\) North, Institutions, Institutional Change and Economic Performance: p.3.
\(^5\) North, supra, n.1, p.8; Indra de Soysa and Johannes Jütting, “Informal Institutions and Development: Think Local, Act Global?,” in International Seminar on Informal Institutions and Development- What do we know and what can we do? (OECD Development Centre and Development Assistance Committee – Network on Governance, 2006). p.2; Douglass C North, Institutions, Institutional Change and Economic Performance (Cambridge University Press, 1990)., p.101 “Many Latin American countries adopted the U.S. Constitution (with some modifications) in the nineteenth century, and many of the property rights laws of successful Western countries have been adopted by Third World countries. The results, however, are not similar to those in either the United States or other successful Western countries. Although the rules are the same, the enforcement mechanism, the way enforcement occurs, the norms of behaviour, and the subjective models of the actors are not [the same]”. Kingston and Caballero, supra, n.2, p.167
attached to both informal and formal institutions. He says that, ‘formal rules [...] make up a small (although very important) part of the sum of constraints that shape choices; [...] the governing structure is overwhelmingly defined by codes of conduct, norms of behaviour and conventions.’ North posits that people in the Western world tend to think of life being ordered by formal rules, when in fact their actions are guided more by informal constraints. Yet, these informal institutions, although important, are an ‘underdeveloped part of the story.’ They are often taken as exogenous and excluded from the analysis. Consequently, they have not been rigorously conceptualized and are rarely theorized into mainstream studies of institutions which largely focus on formal institutions.

The term ‘informal institutions’ has been applied broadly and diversely in the literature to include culture, corruption, personal networks and a wide range of legislative, judicial, and bureaucratic norms thus creating serious conceptual ambiguity. It is therefore essential that we elaborate a more precise definition of informal institutions. This Chapter is an exposition of our framework for studying informal institutions. From a conceptual perspective, we try to explain our meaning of the term ‘informal institution’. We then set out the patterns of formal-informal institutional interaction: complementary, accommodating, competing, and substitutive based on the Helmke–Levitsky typology. In the theoretical context, we examine two issues that have been minimally explored in the literature on informal institutions: the question of why and how informal institutions emerge, and the sources of change for informal institutions. A final section explores some of the practical challenges inherent in research on informal institutions, including issues of identification, measurement, and comparison.

3.2 The concept of informal institutions.

We begin with an attempt to explain the meaning of the term ‘informal institution’. We distinguish informal institutions from formal institutions and from other non-institutional, informal patterns and behaviour.

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9 North, Institutions, Institutional Change and Economic Performance.
10 Ibid.
13 Helmke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda." p.726; Seyoum, "Informal Institutions and Foreign Direct Investment." p.918
14 Helmke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda.
15 Ibid. p.727
3.2.1 Formal versus Informal Institutions.

Many scholars do not make their intended distinction between ‘formal’ and ‘informal’ institutions sufficiently clear. Additionally, many authors distinguish between “formal” and “informal” institutions in different and confusing ways. Some identify formal institutions with the legal and informal institutions with the non-legal that is, not recognised by law, even where they may be in writing. They distinguish between statutory rights which they deem “formally recognized rights” and customary rights otherwise called “traditional rights”. This distinction is losing importance, particularly in Africa, where formal legal recognition is increasingly being given to customary rights. This differentiation, however, raises the issue of whether, if “formal” means “legal,” then “informal” should mean illegal in addition to meaning non-legal.

Conventionally, informal institutions tend to lack official recognition and protection. In some cases, informal property rights may be illegal, that is, held in direct violation of the law. For example, where squatters occupy a parcel of land in contravention of an eviction notice or where there is unlawful conversion of agricultural land to commercial purposes. In other cases, informal institutions may be ‘extra-legal’ or non-legal, that is, not contrary to the law, but not recognised by the law. Customary land tenure among the rural indigenous communities in some countries may be classified as such.

Another approach views the formal - informal distinction as one of explicit versus tacit rules. The term ‘formal’ is often construed as rules that are openly codified, and are expressly acknowledged and enforced by government. The origins of formal institutions can easily be traced to a piece of legislation or to an official pronouncement by the state. Conversely informal rules are implicit in that they are usually unwritten and that they emerge and are enforced outside the scope of government. North refers to informal institutions as ‘typically unwritten codes of conduct that underlie and supplement formal rules.’

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17 ibid.p.11. Kingston and Caballero, supra, n.2, p.154
19 Ibid.
20 Ibid.
23 Kingston and Caballero, supra, n.2, p.154; Estrin and Prevezer, supra, n.12 p.5
24 North, Institutions, Institutional Change and Economic Performance.p.4
Yet some other authors employ a state-societal distinction, based on governmental or non-governmental dichotomisation of institutions. This state–societal divide treats government sanctioned rules such as constitutions, laws, and regulations as formal, while civic, religious, kinship, ethnicity, and other social rules are considered as informal. According to this view, formal institutions are related to the law enacted by the state and may include official pronouncements and administrative orders or fiats. The informal institutions of society on the other hand are ‘traditions, customs, personalised trust, strong social ties, affective commitment, relational contract, clan control, religious beliefs, moral values, culture,’ and norms.

Still others distinguish between informal institutions, which are self-enforcing, and formal rules, which are enforced by a third party, usually the state. Max Weber defines law as ‘externally guaranteed by probability that coercion, to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specifically ready for that purpose.’ Informal institutions on the other hand are ‘non legal rules or obligations that influence individual decisions despite the lack of formal legal sanctions.’ They rely on social norms, which are often framed as codes of behaviour, to enforce rules and are thus said to be enforced endogenously by the members of a particular community. Their enforcement characteristics are ‘self-enforcement mechanisms of obligation, expectations of reciprocity, internalized norm adherence (standard operating procedures) … boycotting, shaming, threats and the use of violence.’ The self-enforcement mechanisms may include sanctions such as alienation from the community, loss of reputation, ostracism (shunning) by family and community members, verbal disapproval and opprobrium or negative gossip.

Still another strand in the literature posits that the major difference between informal and formal institutions is that the informal rules develop spontaneously while the formal constraints are centrally designed and enforced. Whereas formal institutions are created and

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enforced by government, informal institutions remain in the private sphere and are not part of a
government decreed and enforced legal system.\textsuperscript{34}

We have at least five important distinctions, not one. This is not surprising given North’s
insightful observation that informal institutions ‘defy, for the most part, neat specification.’\textsuperscript{35}
Although the distinctions of formal- informal institutions overlap, each conceptualization above,
fails to cover important informal institutions. For instance, although informality takes place
beyond the confines of the law, the informal is not necessarily against or in violation of the law.
Informal institutions do not necessarily refer to illegality.\textsuperscript{36}

Furthermore, the tacit versus explicit distinction of informal and formal institutions is
flawed in that it may be understood to equate the former with all behaviour that is not covered
under the written down rules.\textsuperscript{37}

In trying to dichotomise formal and informal institutions, the state-societal distinction
fails to account for a variety of informal institutions such as informal rules that govern behaviour
within state organisations (e.g. bureaucratic norms) or official rules that govern non-state
organisations such as religious orders, political parties, and interest groups in corporations.\textsuperscript{38}
Many institutions within the state, from bureaucratic norms to corruption are informal, while the
rules governing many non-state organizations such as corporations are widely considered to be
formal.\textsuperscript{39}

Although the self-enforcing definition of informal institutions is analytically useful, it has
been discounted by some scholars. It does not recognise that informal rules may be externally
enforced such as by clan and mafia bosses.\textsuperscript{40} Darden gives examples of state enforcement of
informal arrangements where organised or institutionalised corruption is used as ‘... a means
through which state leaders buy compliance from subordinate officials – i.e. an informal contract
- and also provides the basis for control through systematic blackmail and the threat of selective
enforcement of the law.’\textsuperscript{41} The self- enforcement definition of informal institutions also does not
allow for the possibility of informal third party enforcement for example, where people seek the
intervention of elders or respected personalities to help them resolve land related conflicts. Thus,
the nature and location of enforcement criterion is not entirely conclusive in distinguishing
between formal and informal institutions.

\textsuperscript{34} Williamson and Kerekes, supra n.25 p.8; Claudia R Williamson and Carrie B Kerekes, “Informal Institutions Rule:
\textsuperscript{35} North, Institutions, Institutional Change and Economic Performance.p.36
\textsuperscript{36} Elena Panaritis, Prosperity Unbound: Building Property Markets with trust (Palgrave: Macmillan, 2007).p.3
\textsuperscript{37} Gretchen Helmke and Steven Levitsky, “Informal Institutions and Comparative Politics: A Research Agenda,” 307
(2003).p.10
\textsuperscript{38} Olsson, “A Microeconomic Analysis of Institutions.”
\textsuperscript{39} Helmke and Levitsky, supra n.13 p.727
\textsuperscript{40} Ibid.
\textsuperscript{41} Keith Darden, “Graft and Governance: Corruption as Informal Mechanism of State Control,” (2003).p.33
To overcome the limitations of the above definitional approaches, we follow Helmke and Levitsky and define informal institutions as: ‘socially shared rules [and norms], [that shape human behaviour], usually unwritten [and therefore inaccessible through written documents] that are created, communicated, and enforced outside of officially sanctioned channels.’ Informal institutions are defined in much of the literature as informal, non-legal obligations. Informal institutions are widely accepted as legitimate even though they are usually un-codified. Informal institutions ‘have never been consciously designed’ but are still ‘in everyone’s interest to keep.’ They are rules in use rather than just rules on the books, or what Ostrom terms ‘rules in force.’ While formal institutions define the ‘blueprint for behaviour,’ informal institutions define the actual behaviour of players.

Informal institutions are rules based on implicit understandings and exist in the shared subjective knowledge of a society. Informal institutions are upheld by mutual agreement, or by relations of power or authority, and rules are thus enforced endogenously. The enforcement of informal rules may be by means of sanctions such as expulsion from the community, ostracism by friends and neighbours, or loss of reputation. Informal rules may also be understood as ‘extensions, elaborations, and modifications of formal rules, [outside the official framework]; socially sanctioned norms of behaviour, [attitudes, customs, taboos, conventions, and traditions]; and internally enforced standards of conduct.’

Such informal institutions might include the private mechanisms that exist to secure property, such as agreements about defining plot boundaries, maybe by using physical landmarks and living human witnesses, by having those agreements drawn and witnessed by lawyers or local administrative officers, identifying and enforcing individuals’ claims, and protecting the community from the threat of eviction by the government. De facto property rights may also include subdivisions done on registered land but not reflected in the register.

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42 Helmke and Levitsky, supra n.13
45 ibid.
49 ibid.p.3
52 Pejovich, supra, n.33 p.166-67
53 M. North, Institutions, Institutional Change and Economic Performance.p.40; also see Jutting et al., Informal Institutions: How do Social Norms help or hinder Development?
54 Williamson and Kerekes, supra n.25 p.12
56 Panaritis, Prosperity Unbound: Building Property Markets with trust.p.181
The recognition of informal institutions is usually limited to the members of the community or region within which they emerge. Informal institutions guide the members’ everyday interactions and shape their way of life.57 Further examples may include land rights that are not properly licensed or registered and may also refer to land that is bought, sold, owned or leased without registering the transaction.

A further important clarification in this Chapter is the distinction between de jure institutions which we equate with formal institutions and de facto institutions which we treat as synonymous with informal institutions. De facto property rights institutions refer to the rules that actually apply and constrain individuals in their use of, and transactions in land. De facto rights originate among resource users without government recognition while de jure rights are legally recognized and enforced by the government.58 The concept of de jure and de facto is also related in the legal literature to the difference between possession (the de facto exercise of a claim) and ownership (the de jure recognition of one).59

3.2.2 Informal institutions versus culture, informal organisations and other behavioural regularities.

Some scholars equate informal institutions with cultural traditions.60 Pejovich defines informal institutions as:

traditions, customs, moral values, religious beliefs, and all other norms of behaviour that have passed the test of time. Informal rules are often called the old ethos, the hand of the past, or the carriers of history...Thus, informal institutions are the part of a community’s heritage that we call culture.61

North also argues that informal institutions ‘are a part of the heritage that we call culture.’62 Knowles and Weatherston have also likened informal institutions to what others have labelled social capital or culture.63 However, though some informal institutions are undoubtedly rooted in cultural traditions, many others such as legislative norms have little to do with culture. Noteworthy is that some informal institutions are not trans-generational as Pejovich implies. Informal institutions are not synonymous with culture; they have a narrower scope and are defined in terms of shared expectations rather than shared values. Shared expectations among parties may or may not be based on broader societal values.64

57 Williamson and Kerekes, supra n.25 p.12
59 Giannoni, "The Evolution of Property Rights in Argentina 1853-1949."p.69
60 Helmke and Levitsky, supra n.13 p.727
61 Pejovich, supra, n.33 p.166
62 North, Institutions, Institutional Change and Economic Performance.p.37
63 Knowles and Weatherston, "Informal Institutions and Cross- Country Income Differences."p.22
64 Seyoum, "Informal Institutions and Foreign Direct Investment."p.922; Helmke and Levitsky, supra n.13 p.727
It is important not to treat informal institutions as a residual category because they are not synonymous with all other informal behavioural regularities. Although informal institutions respond to an established rule or guideline similar to a behavioural regularity, their breach engenders some kind of external sanction, unlike the latter. For example, removing one’s hat in church is an informal institution, whereas removing one’s coat in a restaurant is simply a behavioural regularity. The latter, unlike the former is in response to physical discomfort and not a social norm likely to elicit social disapproval. In practice, it is often difficult to distinguish informal rule-bound behaviour from other informal behavioural regularities. Public graft is another example of informal behaviour which is not necessarily an informal institution. Where graft is embedded in widely shared expectations of the community and where failure to comply with the practice is perilous in terms of potential costs, corruption may indeed be an institution. However, where graft is neither externally sanctioned nor embedded in shared expectations, it is a behaviour pattern but not an informal institution.

Informal institutions also differ from informal organisations. Institutions are the underlying rules of the game while organisations such as family farms, micro credit schemes, clans and mafias are the ‘players of the game’ and therefore not institutions. They can be agents of institutional change. However, their activities may contain codes and rules of behaviour that could be considered informal institutions.

3.3 How do formal and informal institutions interact?

We must now address the relationship between formal and informal institutions. Whether informal institutions are substitutes or complements to formal institutions in the process of economic development is an unresolved issue in the literature. An overview of scholarly work identifies two distinct views on the interaction between formal and informal rules. Proponents of one view consider informal institutions as being problem-solving because they enable social interaction and coordination and improve the efficiency or performance of

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66 Ibid; p.10
67 Seyoum, “Informal Institutions and Foreign Direct Investment.” p.922; Helmke and Levitsky, supra, n.38 p.10
68 Helmke and Levitsky, supra n.13 p.727
69 Helmke and Levitsky (2003) supra n.38 p.10
71 Helmke and Levitsky, supra n.13 p.727
72 “North, Institutions, Institutional Change and Economic Performance; Seyoum, “Informal Institutions and Foreign Direct Investment.” p.922
73 Karen E Young, “Enforcing Liberalism: Political Advisory networks and new Economic Institutions Case Studies of Bulgaria and Ecuador” (The City University of New York 2009), p.21
75 Estrin and Prevezer, supra, n.12; Kingston and Caballero, "Comparing Theories of Institutional Change."
complex formal institutions.\textsuperscript{76} The other view considers informal institutions as essentially problem-creating, such as through corruption, that they undermine markets, and other formal institutions.\textsuperscript{77} In fact, this view considers informal institutions as nothing more than a source of corruption and inefficiency, requiring management and control. However, recent studies seem to suggest a slightly different situation, where informal institutions at times co-exist, overlap, complement, or conflict with formal institutions.\textsuperscript{78} Drawing on the work of Helmke and Levitsky, we argue that informal and formal institutions may interact in four ways: complementary, accommodating, competing or conflicting and substitutive and that the nature of this interaction depends on two features.\textsuperscript{79}

The first is the effectiveness of formal institutions. Where \textit{de jure laws exist} and are well enforced, then formal institutions can be said to be effective. Additionally, effective formal institutions are those that actually constrain or enable actors’ choices. In this case, actors believe non-compliance will be sanctioned. Conversely, where the \textit{de jure} laws are not properly enforced owing to factors such as judicial inefficiency or corruption, or where they are simply ignored by the authorities then those formal institutions are said to be ineffective. Informal institutions can exist in a context of effective formal institutions where good rules exist and are enforced, or in a context of either non-existent \textit{de jure} rules or existent but non-enforced rules.\textsuperscript{80} However, the nature of their interaction will vary in the different circumstances.

The second feature on which the interaction typology depends is whether the goals of formal and informal institutions are compatible or conflicting. When following informal rules produces similar results expected from formal institutions, the goals of the formal and informal institutions are compatible, while, when following informal institutions leads to significantly different outcomes, the goals of the formal and informal institutions are conflicting.

\textsuperscript{76} Indra de Soysa and Johannes Jutting, "Informal Institutions and Development - What do we know and what can we do?," (OECD); Jutting, "Institutions and Development: A Critical Review."
\textsuperscript{77} Helmke and Levitsky(2003) supra n.38 p.10
\textsuperscript{78} Schlager and Ostrom, "Property-Rights Regimes and Natural Resources: A Conceptual Analysis."
\textsuperscript{79} Helmke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda."
\textsuperscript{80} Estrin and Prevezer, supra, n.12 p.6
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<th>Outcomes</th>
<th>Effective Formal Institutions</th>
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<td>Compatible goals</td>
<td>Complementary</td>
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<td>Conflicting goals</td>
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Informal institutions are complementary to formal institutions where they co-exist with effective formal institutions, and where the goals of formal and informal institutions are compatible.\(^8^2\) Complementary informal institutions do not violate the formal rules.\(^8^3\) Instead, they create and strengthen incentives to comply with the formal rules that might otherwise exist only on paper. They address gaps and exigencies that are not dealt with in the formal rules thereby assisting them to function more effectively.\(^8^4\) Complementary informal institutions include the many norms, routines, and operating procedures that allow economies, bureaucracies and other complex organizations to function effectively.\(^8^5\) Coherence between formal and informal norms simplifies the task of defining and enforcing acceptable behaviour.\(^8^6\) As Ensminger explains, complementarity between informal and formal institutions is desirable because ‘[w]hen formal systems are imposed upon a society with which they are out of accord, self-enforcement may erode and externally engineered incentives may fail to yield the predicted results.’\(^8^7\)

Accommodating informal institutions shown in the lower left corner of Table 3.1 exist in situations where formal institutions are effective but the goals of formal and informal institutions

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\(^8^1\) This typology is taken from Helmke and Levitsky, supra n.13 p.728
\(^8^2\) Helmke and Levitsky, "Informal Institutions and Comparative Politics : A Research Agenda."
\(^8^3\) Ibid.
\(^8^4\) Ibid.
\(^8^5\) Helmke and Levitsky(2003) supra n.38 p.12
Such informal institutions ‘create incentives to behave in ways that alter the substantive effects of formal rules, but without directly violating them.’ The recruiting practices of many universities are a good example of accommodating institutions. The letter of the law is followed to the extent that formal selection committees are constituted; they meet, review applications and interview candidates. However, they violate the spirit of the law because prior to all these formalities, the committees have already agreed informally on the outcome. The reality is that often, departments tend to recruit each other’s students.

Thus, accommodating informal institutions are a second-best option for actors who dislike the results produced by the formal rules and yet are unable to change, openly violate or directly challenge the formal rules. Hence, although accommodating informal institutions do not necessarily boost performance or ensure efficiency, they create stability by weakening the need for change. Accommodating informal institutions may therefore be described as ‘palliatives that delay necessary reform’ of the formal institutions. Norms of lax enforcement that help in coping with laws that are politically difficult to change given particular economic realities, such as demand for migrant labour, may be classified as such. Another example is the operation of a large scale shadow economy in countries with well-developed property rights systems but also high levels of business taxation and regulation.

Competing informal institutions shown in the lower right side of Table 3.1 are usually observed where formal institutions are weak and ineffective and where the goals of the formal and informal institutions diverge. Competing informal institutions structure actors’ incentives in ways that are incompatible with the formal rules: to follow one rule, actors must violate another. These institutions are allowed to prevail either because states do not feel the need to enforce the formal laws hence ignoring them or they lack the capacity for effective enforcement the costs of which are too high. Sautet observes that when formal institutions are in conflict with the underlying informal norms of a people, the formal rules will be too costly to enforce.

Competing informal institutions may include ‘corruption networks such as mafias, clientelism or various forms of clan-like networks, arbitrary inspection teams which can extort rents and work on a differently functioning system of power and incentives from those actors

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90 de Soysa and Jutting, “Informal Institutions and Development - What do we know and what can we do?.”
91 Helmke and Levitsky, “Informal Institutions and Comparative Politics : A Research Agenda.”
92 Brent Barton, “Informal Legal Systems in Latin America,” in The Institute of Latin American Studies Student Association Conference (University of Texas2004).
93 Estrin and Prevezer, supra, n.12 p.8
94 Helmke and Levitsky supra n.13 p.729
95 Ibid.
96 Jutting et al., Informal Institutions: How do Social Norms help or hinder Development? p.36
operating within formal institutional frameworks. In doing so they can undermine those formal institutions and would tend to diminish or reduce their performance. Pejovich observes that ‘when formal rules conflict with the prevailing informal rules, the interaction of their incentives will tend to raise transaction costs and reduce the production of wealth in the community’ owing to the proliferation of noncompliant behaviours such as ‘tax evasion, corruption, bribery, organized criminality, and theft of government property’.

The literature on legal pluralism reveals that, the imposition of European law led to multiple legal systems in many post-colonial states. In most cases, indigenous and inherited European legal systems embody discrete principles and procedures. This means that those who follow customary law of necessity violate state law. Thus, many formal laws protecting women, for example, may exist while customary laws contravene these rights in practice. Social norms that discriminate against certain people such as foreigners, women or the poor contrary to formal law are a good example of competing informal institutions. In many African countries with conflicting land laws, widows may be kicked off matrimonial land by in- laws according to social norms even where formal statutory law may entitle these widows to land as part of their late husband’s intestate property. Where both customary and statutory rights to the land exist, confusion over which set of laws has primacy is a critical issue. The law may give a portion of intestate property to a surviving spouse but custom may not recognise this ownership by women. In this case, social and customary norms which are informal institutions would be competing against formal property institutions.

Finally, informal institutions as shown in the upper right side of Table 3.1 are substitutive when formal institutions are ineffective, that is, where formal institutions are not routinely enforced, and state structures are weak but the actor goals in both categories of institutions are compatible. Substitutive informal institutions are used by actors to achieve outcomes that formal institutions were created, but failed, to actualise. The results from substitutive informal institutions are comparable to those expected from formal rules. Thus, although they undermine the existing formal rules, substitutive informal institutions produce results that are compatible, but not achievable with formal institutions. Since substitutive institutions usually improve performance and pose little threat to formal institutions, they are usually encouraged by state

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98 Estrin and Prevezer, supra, n.12 p.9
99 Pejovich, supra, n.33 p.171
100 [Feige, 1997 p.73p.3.]
103 Helmke and Levitsky, “Informal Institutions and Comparative Politics : A Research Agenda.”p.729
104 Ibid.p.729
105 Estrin and Prevezer, supra, n.12 p.8
authorities. Informal credit markets, insurance schemes and informal neighbourhood associations that organise to prevent crime or collect garbage are good examples of substitutes for formal markets or state entities that ordinarily provide such services.

In post–soviet Russia, managers circumvent formal procedures such as ‘arranging privileged conditions for loans, postponing payments, jumping of the queues, speeding up bank operations, or settling business disputes’ by relying on an extensive network of relationships that are based on informal norms of reciprocity such as ‘You help me, I help you.’ Similarly, networks with bureaucrats and firms are informal institutions that largely substitute formal rules and regulations in China for obtaining goods, resources and accessing market information. Such informal institutions also help private firms where property rights and contract laws are ineffective and arbitrary enforcement of business regulations prevails.

Examples may also be found in the property rights institutions of many African countries. Because formal property institutions such as land registries lack credibility are expensive and slow, they are usually avoided. Parties resort to their own mechanisms to help them achieve the results they cannot attain under the formal institutions. The requirement to register land and related transactions thereon and keep the register updated and current is a formal institution. However people subdivide, sell, bequeath the land and do not update the register. Parties make agreements for, *inter alia*, sale or lease of land before a lawyer or local council official but do not go ahead to register the transaction in the land registry meaning that the certificates of title relating to the land in issue are not updated. Here the objective of the formal institution to keep the register updated and hence reduce transaction costs, allow certainty and give owners improved access to credit, is undermined by the informal institutions although the other goal of facilitating a land market is achieved.

Others distribute or sell land of deceased persons without formally acquiring title under the probate procedures laid down in the law. Land is subdivided among sons without acquiring legal title to the plots. Further, once the fathers who are the registered proprietors of land die, the succession claims are often not registered. This implies that in many instances, titles remain registered in the names of deceased persons. They do not register changes in title upon sale of the land. For instance in Kiambu District in Kenya, it is reported that in the early 1960s, after four years of full registration, more than 3000 titles remained registered in the names of deceased persons.

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106 Jutting et al., *Informal Institutions: How do Social Norms help or hinder Development?* p.36
107 Ibid. p.36
persons. Although these kinds of institutions contradict and undermine formal institutions, they substitute for formal institutions by providing solutions to the problems of social interaction, coordination, enforcement and dispute settlement.

Thus, when informal institutions replace formal institutions, they serve as substitutes and sometimes serve as templates for formal institutions. Informal rules may generate precedents and prevalent practices that are then formalized for efficiency’s sake. For example in Uganda, the informal land practices of tenants who had occupied and improved land without challenge by the registered owner for twelve years prior to the enactment of the 1995 Constitution were eventually recognised in the Law as *bona fide* occupants.

The typology of informal institutions is useful in helping us to improve our understanding of the relationship between formal and informal institutions and to determine whether informal institutions support or undermine formal institutions. However, it is possible for a particular informal institution to belong to more than one category. For example, indigenous laws may conflict with, converge with, or apply instead of state law. Further, the way that informal institutions are categorised may differ depending on a scholar’s analytical perspective. Clientelism, for instance, is often considered a competing informal institution, yet it may also be seen as substitutive, because clientelist networks substitute for the state in some situations. The practice of parties selling and buying land outside the formal property system and without paying of requisite stamp duties and fees, as well as updating the register may be considered a competitive informal institution yet such informal rules and procedures actually substitute for formal institutions where land registration and administration procedures are expensive, unclear and time-consuming.

It is noteworthy that informal institutions are not easily categorised as functional or dysfunctional. They ‘often have ambiguous, double-edged, and even counter-intuitive effects’ particularly in developing countries. For example, although substitutive informal institutions such as informal sub-divisions and transactions in land or Chinese social networks subvert formal rules and procedures, they may help achieve outcomes such as facilitating a land market, reduction of

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113 Ibid.

114 Helmke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda." p.16

115 Ibid.

116 Ibid.

117 Ibid.

118 Ibid.p.15
transaction costs or security for investors that the formal rules were designed to, but failed to achieve.

In summary, formal and informal institutions coexist in both the developed and developing worlds. The rich and the poor, the weak and the powerful rely on informal and formal institutions to varying degrees to facilitate transactions. Generally, informal 'institutions are relatively more important in poor countries and small, traditional communities where formal institutions are less developed and the reach of formal law and state power relatively weak'.

We can also conclude that complementary and accommodating informal institutions are typically found in advanced industrial economies with developed stable institutional settings, while substitutive and competing informal institutions are prevalent in environments of formal institutional weakness and instability, commonly found in developing and transition economies.

3.4 Explaining the emergence and change in informal institutions.

In this section, we examine the question of why and how informal institutions emerge and change which admittedly is an onerous endeavour. North observes that, 'while the formal institutions may be altered by fiat, the informal institutions are not amenable to deliberate short-run change and the enforcement characteristics are only very imperfectly subject to deliberate control.' Thus, the mechanisms of creating formal institutions are generally public and official. Those who create the rules namely the executive, legislature, judges, political parties, or interest groups are relatively easy to identify.

In contrast, the rule-making process in informal institutions is less transparent and the key actors and mechanisms are more difficult to identify. Consequently, although a large number of studies have acknowledged the existence and effects of informal institutions, there remains considerable uncertainty as to how informal institutions emerge and change. North, a pioneer in the field and one clearly interested in the effects of informal institutions on social and economic trajectories, observes that the majority of institutions are informal yet he provides no

119 de Soysa and Jütting, “Informal Institutions and Development: Think Local, Act Global?” p.8
120 Helmke and Levitsky (2003) supra n. 38 p.15
121 ibid.p.16
122 North, Understanding the Process of Economic Change, p.157
124 Chris High, Mark Pelling, and Gustav Nemes, "Understanding Informal Institutions: Networks and Communities in Rural Development." in Transition in Agriculture, Agricultural Economics in Transition II (Institute of Economics, Hungarian Academy of Sciences, Budapest, Hungary2005); Helmke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda." p.16
125 North, Institutions, Institutional Change and Economic Performance, chapter 5
adequate explanation of how they arise and change.\textsuperscript{126} This uncertainty may explain why informal institutions are often taken for granted in many studies \textit{and} the common belief among scholars that informal institutions change relatively slowly.\textsuperscript{127}

North and others such as Williamson, tend to treat informal institutions as culturally derived and as relatively permanent, changing only slowly if at all.\textsuperscript{128} This overlooks the fact that not all informal institutions are culturally derived. Whereas some informal rules have strong cultural foundations and a resilient nature, many others have a limited time span and a weak or non-existent relationship with culture.\textsuperscript{129} Similarly, whereas some authors have described informal institutions as essentially immutable or taking centuries to change, others have noted that at least some kinds of informal institutions can change quickly.\textsuperscript{130} These divergences may be explained by the fact that informal institutions take various forms. They emerge for a variety of reasons, and in several different ways.\textsuperscript{131} Firstly, we consider the ‘why’ of informal institutional emergence and change and in doing so; distinguish between reactive and spontaneous informal institutions. Secondly, we attempt to identify the possible sources of informal institutional change. Thirdly, we explain the process of change while trying to identify the ‘who’ in the process. Finally, we highlight the challenges associated with research on informal institutions such as issues of identification, measurement, and comparison.

\subsection*{3.4.1 Why informal institutions emerge: Reactive versus spontaneous origins.}

Reactive informal institutions are those that are endogenous to formal institutional structures.\textsuperscript{132} They emerge in direct response to incentives created by the formal rules. Tsai calls them adaptive informal institutions because they represent creative responses to formal rules that actors find too constraining and he describes them as ‘regularized patterns of interaction that emerge in reaction to constraints and opportunities in the formal institutional environment.’\textsuperscript{133} Further, Tsai differentiates between long standing informal practices such as customs, norms, values, and traditions that are usually culturally derived and that often constitute common definitions of informal institutions from reactive informal institutions which

\textsuperscript{129} Ibid.
\textsuperscript{130} Kingston and Caballero, “Comparing Theories of Institutional Change.”
\textsuperscript{131} Helmke and Levitsky(2003) supra n.38 p.17
\textsuperscript{132} Ibid.
‘appear in the context of new opportunities ... as informal coping strategies that derive from shorter-term considerations of convenience, efficiency, and possibility.’

Spontaneous informal institutions on the other hand originate independently of formal institutions and in fact often precede them. Although spontaneous informal institutions coexist and interact with formal rules, they develop in response to incentives that are unrelated to those rules. Examples include indigenous institutions such as customary land tenure.

3.4.1.1 Why do reactive informal institutions emerge?

Reactive informal institutions may emerge due to several reasons, all of which are related, and in response, to the existing formal institutions. Firstly, formal rules are sometimes enforced capriciously by public officials in a discriminatory manner which leaves room for their discretion and thereby creates uncertainty for market actors. Public officials may opt for selective enforcement, where they use formal rules for extortion and impose selective pressures on economic actors. For example, under the Soviet regime, most common conduct was prohibited by formal law, but enforced arbitrarily and capriciously at the discretion of those in authority. The norm of behaviour was non-compliance with the rules yet penalties were imposed rarely and selectively, at the whim of the privileged elite that held effective power. Control of the actors by these elites was based on breach of the formal rules. Actors were often under the threat of punishment for the commission of economic crimes while the favoured ones were granted use rights over scare resources. Consequently, economic actors may bargain with the public officials on terms and conditions of the implementation of formal rules. Thus reactive informal institutions may emerge as coping strategies devised by local actors to evade the restrictions, uncertainties, unfairness, ambiguities and ineffectiveness of formal institutions.

Secondly, formal rules are usually associated with high costs of compliance, both in terms of time and money, a situation which compels economic agents to devise means of systematically avoiding them. In South Africa for example, only conveyance attorneys, may legally transfer
title to property.\textsuperscript{144} This exclusivity allows them the liberty to charge high fees for their services and these costs may be excessively burdensome for some parties.\textsuperscript{145} In addition, titles may only be transferred if sellers can prove that they have paid all local taxes that are owed to the municipality and all arrears of service fees.\textsuperscript{146} Many residents are years in tax arrears and cannot pay the amounts owing to transfer their title legally.\textsuperscript{147} Formal transfer is, therefore, too costly for many and so they opt to transfer property informally.\textsuperscript{148} In Uganda, it takes 12 procedures, 52 days and costs of 1.9 per cent of the asset value to legally and formally transfer property.\textsuperscript{149} The quoted costs are the official costs required by law. In practice, the actual costs are much higher owing to the need to make unofficial, non- documented payments.\textsuperscript{150} Economic agents therefore find ways of circumventing the rigours of the formal rules. McAdams also posits that when resolving disputes, the costs of engaging informal arrangements may sometimes be lower for actors than the costs of employing formal rules.\textsuperscript{151} He supports this view with reference to Lisa Bernstein’s analysis showing that American merchants generally prefer to resolve their disputes without recourse to the expensive legal system,\textsuperscript{152} and to Ellickson’s research on how ranchers in Shasta County, California, employ informal rules for settling disputes involving cattle trespass and boundary fences without the legal regime.\textsuperscript{153}

Thirdly, reactive informal institutions may also emerge as a second best option for actors who prefer, but cannot, achieve a formal institutional solution. This usually happens in malfunctioning states with ineffective formal institutions.\textsuperscript{154} Tripp explains that in Tanzania, actors depended on their own resources to create their own informal institutions where the state failed to meet their needs.\textsuperscript{155} Thus, while informal institutions express popular agency and resistance against corrupt and inefficient states, they are not necessarily seen as superior to good states with effective formal institutions.\textsuperscript{156}

\textsuperscript{144} Karol Boudreaux, “Paths to Property: Creating Property Rights in Africa,” in Mont Pelerin Regional Meetings (Nairobi, Kenya 2007). p.29
\textsuperscript{145} Ibid.
\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid.
\textsuperscript{151} McAdams, supra n.44 p.342-45; Pejovich, supra, n.33 p.170-71
\textsuperscript{153} McAdams, supra n.44 p.345; Robert C Ellickson, “Of Coase and Cattle: Dispute Resolution Among Neighbours in Shasta County,” (Yale Law School 1986).
\textsuperscript{154} Chavance, “Formal and Informal Institutional Change: The Experience of Postsocialist Transformation “.
\textsuperscript{156} Kate Meagher, “Introduction: special issue on ‘informal institutions and development in Africa’,” Africa Spectrum ‘Informal Institutions and Development in Africa’
Thus, reactive informal institutions may emerge to improve the performance of formal institutions when the latter are incomplete or problematic. In this case, actors create reactive informal institutions to fill in gaps, reduce transaction costs, mitigate negative effects, and add flexibility and speed. Further, where formal institutions are deemed unfair or illegitimate by some economic agents, reactive informal institutions may emerge to challenge or substitute for them with the view to transform or even eliminate them. Many bureaucratic, legislative, judicial, and procedural norms are reactive informal institutions.

3.4.2. What are the sources of change for informal institutions?

Formal Institutional Change seems to be the most evident source of informal institutional change and it often manifests as either change in ‘formal institutional design’ or ‘formal institutional strength.’ The former refers to a change in the rules which may modify actors’ incentives by changing the expected outcomes associated with the formal rules while the latter refers to the effectiveness of formal institutions, which may affect the confidence of actors that the formal rules will be enforced. The effect of formal institutional change predictably differs among reactive and spontaneous informal institutions. Reactive informal institutions which emerge in direct response to incentives engendered by formal institutions are especially amenable to formal institutional change. When the government changes the formal institutions, part of the informal institutions lose their value, because they were tailor-made for the old formal setup.

This is because a change in either the rules or their enforcement changes the incentive structure and directly affects the relative costs and benefits of complying with the informal rules. In these cases, informal institutional change may be quite rapid.

By contrast, change within spontaneous informal institutions tends not to correlate with formal institutional change. This may be explained by the fact that spontaneous informal institutions are the product of incentive structures outside the formal rules and are therefore less
likely to respond to formal institutional change.\textsuperscript{168} Nevertheless, an increase in the effectiveness of formal institutions may impinge on competing spontaneous informal institutions by raising the costs of their compliance. Stronger enforcement dampens actors’ incentives to abide by the informal rules.\textsuperscript{169} Notably, informal institutional change in these circumstances is likely to be slower than in the case of reactive informal institutions.\textsuperscript{170}

Furthermore, the effect of formal institutional change may vary among the four different types of informal institutions identified in the typology in Table 3.1.\textsuperscript{171} Complementary and accommodating informal institutions are likely to be especially amenable to changes in the content of formal rules because they usually exist in an environment of effective formal institutions.\textsuperscript{172} Consequently, a reform of the formal rules may be predicted to alter the deficiencies or undesired effects that these informal institutions had been designed to address.\textsuperscript{173} This may create incentives for actors to either abandon or reform the existing informal rules.

Substitutive informal institutions, on the other hand, are more likely to change when formal institutions are strengthened by improving their enforcement.\textsuperscript{174} This is because substitutive informal institutions are created to achieve objectives which formal institutions were designed, but failed, to achieve. Enhanced enforcement of formal institutions may therefore dampen the actors’ motivation to follow informal rules.

Finally, change in competing informal institutions may result from changes in either the content or the enforcement of formal institutions.\textsuperscript{175} On the one hand, competing informal institutions often persist because formal institutions are weakly enforced. Strengthening enforcement raises the cost of complying with competing informal institutions, which then initiates the disintegration of those institutions.\textsuperscript{176} On the other hand, competing informal institutions are created by actors who pursue goals that are inconsistent with expected formal institutional outcomes.

\subsection*{3.4.3 Why do spontaneous informal institutions change?}

Formal institutions are certainly not the only source of informal institutional change. Indeed, as alluded earlier, spontaneous informal institutions emerge independently of formal institutions and are often unresponsive to formal institutional change.\textsuperscript{177} This observation

\begin{thebibliography}{100}
\bibitem{168} Ibid.
\bibitem{169} Ibid.
\bibitem{170} Ibid.
\bibitem{171} Ibid.p.21
\bibitem{172} Ibid.
\bibitem{173} Ibid.
\bibitem{174} Ibid.
\bibitem{175} Ibid.
\bibitem{176} Ibid.
\bibitem{177} North, \textit{Institutions, Institutional Change and Economic Performance}.p.45; Helmke and Levitsky(2003) supra n.38 p.19, 22
\end{thebibliography}
necessarily leads one to question the causes of change in spontaneous informal institutions. Scholars who regard informal institutions as spontaneous, ‘deep rooted, primordial’ institutions which are primarily a product of culture posit that the aetiology of their change is embedded in the evolution of societal attitudes and values. This kind of informal institutional change may be predicted to be slow and incremental owing to the glacial pace of cultural shifts. Further, the process of spontaneous informal institutional change is likely to be decentralised and extremely lengthy because informal rules ‘do not possess a centre which directs and co-ordinates their actions.’

We acknowledge that spontaneous informal institutions emerge and change differently from reactive informal institutions and that it is important to understand how spontaneous informal institutions change. However, in this thesis, we shall limit our detailed analysis only to the emergence and change of reactive informal institutions which seem to be the most prevalent in our case study - Buganda.

3.5 How informal institutions are created: The process.

Having tried to identify the sources of change, it is now important to identify the mechanism by which informal institutions are created. This process is likely to vary among the different kinds of informal institutions. In some cases, informal institutional emergence may be a decentralized, bottom-up process where a large number of actors coordinate around a particular rule through established focal points, repeated interaction, or bargaining. Decentralised emergence may, for example, be observed in the Shasta County cattle ranchers’ use of norms to resolve disputes involving animal trespass and property boundaries. In other cases, informal institutional creation may be ‘an historically contingent process in which informal structures are the (often unintended) product of a set of particular conflicts and compromises that are later reinforced or “locked in” through a process of path dependence.’ Helmke and Levitsky rightly observed that:

[w]hether informal institutions are viewed as a product of decentralized coordination, bargaining, elite crafting, or historical contingency, the key point is that explanations of their emergence must place actors, interests, and the mechanisms by which the rules are created and communicated—in short, politics—at the center [sic] of the analysis.

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181 Lauth, "Informal Institutions and Democracy." p.24-5.
188 Ibid.p.19.
3.5.1 How do adaptive informal institutions emerge?

Formal institutions comprise several constraints and opportunities intended to limit the range of officially permissible behaviour and they may motivate actors to develop non-official operating arrangements.\(^{189}\) Additionally, formal institutions characterised by 'overlapping jurisdiction, inconsistent and sometimes unrealistic mandates create opportunities for actors to adjust, ignore, or evade discrete portions of formal institutions.'\(^{190}\) Although many of these non-official arrangements may initially appear peculiar, unique and isolated, over time, with repetition and diffusion, they may evolve into adaptive informal institutions which violate existing formal institutions.\(^{191}\) However, for this process to progress successfully, at least the primary custodians of formal institutions need to be complicit in allowing the repeated evasion of the formal institutions.\(^{192}\) They may do this by deliberately misconstruing the requirements of the formal institutions that they are meant to promote. As Tsai observes:

Such bureaucratic deviance is more likely to be found in situations (1) where different formal institutions have conflicting mandates (a situation that facilitates ignoring one set of rules in order to comply with another); (2) where policy implementation is relatively decentralized; and (3) where local officials have convergent interests with local citizens in a particular policy area (for example, promoting local economic growth, hiding revenues from higher levels of government, protecting local industry, bending rules to attract external investment, and so on).\(^{193}\)

Thus, adaptive informal institutions are more likely to emerge and flourish in jurisdictions where the interests of the enforcers of formal institutions and the creators of informal institutions converge,\(^{194}\) and this is most likely to happen when there is a divergence between the original intentions of formal institutions and the perceived needs and interests of local actors as in the case of emergence of substitutive informal institutions.\(^{195}\)

3.6 Challenges for Research.

In this Chapter, we have argued that formal institutions do not tell the whole story; therefore, informal institutions can and should be incorporated into mainstream institutional analysis. Yet, in both theoretical and practical terms, bringing informal institutions into institutional analysis presents research challenges unknown in the study of formal institutions.\(^{196}\) In this final section, we highlight some of these challenges.

\(^{189}\) Tsai, "Changing China: Private Entrepreneurs and Adaptive Informal Institutions." p.118
\(^{190}\) Ibid.p.125
\(^{191}\) Ibid.p.126
\(^{192}\) Ibid
\(^{193}\) Ibid.p.123.
\(^{194}\) Ibid.p.126
\(^{195}\) Ibid.p.123.
\(^{196}\) Helmske and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda."p.24
The first challenge is that of identifying informal institutions.\(^{197}\) According to North: it is much easier to describe and be precise about the formal rules that societies devise than to describe and be precise about the informal ways by which human beings have structured human interaction. (...) they defy, for the most part, neat specification.\(^{198}\)

Whereas formal institutions are easy to identify because they are written down and officially sanctioned, identifying the informal rules of the game which are usually unwritten is far less straightforward. Informal rules and norms are very elusive as they are often hard to observe or almost invisible.\(^{199}\) The amorphous nature of social norms and conventions makes them substantially more difficult to define, identify and analyse.\(^{200}\) Informal institutions are harder to identify: partly because their rewards (and penalties) are less well articulated and partly because they may be highly specific and idiosyncratic responses to the conditions of a determined social group (more than for society as a whole).\(^{201}\)

A nation’s constitution and Land Statutes for instance, can lay out the land tenure system and tell us whether land in a particular country belongs to the citizens or to the state, but those documents cannot tell us about the pervasiveness of overlapping land rights, the number of unregistered land transactions, land squatting practices, the existence of conflicting customary land rights or even the inefficiencies of and corruption in the land administration and registration systems.

The endeavour to identify informal institutions should therefore ideally cover three aspects. First is the need to specify the shared expectations of actors about the actual constraints they face.\(^{202}\) Doing this is helpful in distinguishing between informal institutions and other behavioural regularities.\(^{203}\) Second is the need to determine the community to which the informal rules apply.\(^{204}\) Unlike formal rules whose scope of applicability is defined by the written laws, the jurisdiction of informal rules is often more difficult to ascertain.\(^{205}\) The community to which the informal institutions apply may be a village, a nation, an ethnic or religious group, an interest group such as absentee landlords or even an organisation such as the legislature.\(^{206}\) Third, researchers need to identify the mechanisms by which the informal rules are communicated and enforced. This is because unlike formal institutions whose enforcement

\(^{197}\) Ibid. p.25.

\(^{198}\) North, supra n.3 p.36.


\(^{202}\) Helmhke and Levitsky, supra n.13 p.733

\(^{203}\) Ibid.

\(^{204}\) Helmhke and Levitsky, "Informal Institutions and Comparative Politics : A Research Agenda."

\(^{205}\) Helmhke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda."p.26

\(^{206}\) Ibid.
mechanisms are easily identified, the means of informal institutional enforcement are often subtle, hidden, and sometimes even illegal in nature.

Helmke and Levitsky aptly summarised the position:

These tasks are not easy to carry out in practice. Hence, it is not surprising that nearly all of the existing work on informal institutions takes the form of either abstract theory (N=0) or inductive case studies (N=1). Because an understanding of the shared expectations and enforcement mechanisms underlying a particular informal institution requires substantial knowledge of the community within which that institution is embedded, there is probably no substitute for intensive fieldwork in informal institutional analysis. Detailed case studies provide essential building blocks for comparison and theory-building. 207

3.7 Conclusion.

Research in New Institutional Economics identifies formal and informal institutions. This may be an upshot of almost unanimous recognition by scholars that formal institutions alone do not shape human behaviour, but that much of what goes on can also be explained by informal institutions. 208 In fact, both types of institutions exist in every society although the nature and extent of influence of each type varies from society to society. North states that in most societies, the majority of institutions are informal. 209 This is particularly true for many developing countries where formal legal institutions play a minimal role in the lives of most citizens, particularly those living in rural areas. 210 Many states do not have the capacity to protect property rights, and even when state capacity is present, formal rules are not always enforced. 211 Indeed, Williamson explains that informal rules provide the background within which formal institutions are embedded. 212 When not properly embedded, formal rights become impossible to implement and enforce. 213 Eggertsson points out that ‘the primary weakness of the economics of institutions is its limited understanding of the amalgam of formal and informal rules and their attendant enforcement mechanisms.’ 214

Yet despite the recognition of the importance of informal institutions, research within ‘the New Institutional Economics operates at two levels,’ 215 namely levels 2 (formal rules:

207 Ibid.
209 North, supra n.3, chapter 5 p.36
211 Ibid.
212 Williamson, supra n.11 p.596
215 Williamson, supra n.11 p.610
constitutions, laws, and property rights) and 3 ('institutions of governance'), while informal institutions which are level 1 institutions are somewhat neglected. They are effectively taken as exogenous and excluded from the scope of the analysis. Eggertsson also points out that, ‘the weakness of property rights analysis is its limited understanding of informal institutions, how they evolve and how they relate to formal institutions.’

Scholars suggest that this neglect is not a matter of a lack of recognition of informal institutions, or even a lack of appreciation of them. Rather, several challenges are cited as reasons for this disregard. The first is that informal institutions are difficult to identify measure and quantify. They have certainly not played a role in most economic analyses because of their elusiveness. The second underlying difficulty seems to be that the domain of the informal is either considered too complex to take into account or that informal institutions are seen as nothing more than a source of corruption and inefficiency. The third difficulty seems more deep-seated, and may be attributed to the limitations of the characteristic analytical and methodological tools that economists tend to employ.

The challenge associated with the study of informal institutions notwithstanding, it seems to be an agreed position that ‘[…] a society’s institutions are a complex in which informal, implicit institutional features inter-relate with formal, explicit features in creating a coherent whole.’ Formal and informal institutions do not operate in isolation from one another. They are both parts of the overall institutional architecture. In effect formal and informal institutions are not the independent variable but rather two components of the same dependent variable. They have different relevance to given decisions by given actors, and can act to modify one another in particular situations.

Informal institutions are not just a simple extension of formal limitations. They may be complementary to formal institutions, but they may also contradict them and in this way limit their efficiency. Indeed informal institutions at times co-exist, overlap, complement, or conflict with formal institutions. Drawing on the work of Helmke and Levitsky, we have argued that

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216 Kingston and Caballero, supra, n.2, p.167
217 Williamson, supra n.11
219 de Soysa and Jütting, "Informal Institutions and Development: Think Local, Act Global?"p.2
220 High, Pelling, and Nemes, "Understanding Informal Institutions: Networks and Communities in Rural Development."p.2
221 Ibid.p.5
223 High, Pelling, and Nemes, "Understanding Informal Institutions: Networks and Communities in Rural Development."p.5
224 Giannoni, "The Evolution of Property Rights in Argentina 1853-1949."p.70
225 High, Pelling, and Nemes, "Understanding Informal Institutions: Networks and Communities in Rural Development."p.5
227 Schlager and Ostrom, "Property-Rights Regimes and Natural Resources: A Conceptual Analysis."
informal and formal institutions may interact in four ways: complementary, accommodating, competing or conflicting and substitutive.

Further, informal institutions do not match automatically to changes in formal institutions. In fact the need to better understand informal constraints is highlighted by the fact that unlike reactive informal institutions which change in response to changes in formal institutions, spontaneous informal institutions that are culturally derived will not change immediately in reaction to changes in the formal rules. As a result the tension between altered formal rules and the persisting informal constraints produces outcomes that have important implications for the way economies function.\(^\text{228}\) Additionally, since changes in informal institutions require learning processes which may be time-consuming, it is usually much easier to change formal institutions than informal ones.\(^\text{229}\)

Thus, whereas some authors have described informal institutions as essentially immutable or taking centuries to change, others have noted that at least some kinds of informal institutions can change quickly.\(^\text{230}\) We have shown in this Chapter that these divergences may be explained by the fact that informal institutions take various forms; emerge for a variety of reasons, and in several different ways.\(^\text{231}\)

\(^{228}\) North, supra n.3 p.45
\(^{229}\) Tsai, “Changing China: Private Entrepreneurs and Adaptive Informal Institutions.”p.118
\(^{230}\) Kingston and Caballero, supra, n.2, p.155
\(^{231}\) Helmke and Levitsky(2003) supra n.38 p.17
Chapter 4: The political process of formal institutional change.

4.1 Introduction.

In Chapter 2, we saw that formal institutions change as a result of political processes resulting from the interactions between interest groups and organizations and the interactions between these two kinds of groups and the rule-makers.\(^1\) The outcome of these interactions depends upon the transaction costs associated with institutional change and the bargaining power of the different interest groups and organizations.\(^2\) The bargaining power of the different interest groups will depend on their relationship with the rule makers and the extent to which they can influence them in changing the legislative status quo. Recognising the significance of political decision making rules therefore, underscores the need to examine these rules closely in any particular context as variations in them may affect the success of rearranging rights.\(^3\)

Veto player theory, pioneered and exposited by George Tsebelis,\(^4\) is able to capture the overall incentive structure of the policy-making capacity of governments,\(^5\) is useful for understanding formal institutional change, and can help us to open the ‘black box’ of political decision making.\(^6\) The theory can be applied to a single country or used as a comparative framework for several countries,\(^7\) as it is argued to be consistent for ‘comparisons across regimes, legislatures and party systems.’\(^8\)

Every new piece of legislation is a departure from previous legislation or the status quo. The basic premise of the veto player approach, therefore, is that in order to change the legislative status quo, a certain number of actors referred to as veto players have to agree to the proposed change.\(^9\) These veto players, the key explanatory variable for stability or flexibility of legislation, are “individual or collective actors whose agreement\(^10\) is necessary for a change of the status

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\(^2\) Ibid. no page (last accessed 11/11/2013).

\(^3\) Wyman, "From fur to Fish: Reconsidering the Evolution of private property," p.124.


\(^8\) Tsebelis, "Decision Making in Political Systems : Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartyism,"p.292

\(^9\) Veto Players: How Political Institutions Work,p.2

\(^10\) The internal approval of collective actors is established by majority vote. "Decision Making in Political Systems : Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartyism,"p.302
An example of an individual veto player is a president; examples of collective decision makers include legislative chambers and political parties. In principle, the veto players vary across countries and even within countries. In the American system, for instance, the president is a veto player because his assent is needed for a bill to become law unless two-thirds of the House and the Senate over-ride his veto, while in Germany, the president is not a veto player because he is expected to sign all legislation unless he regards it as unconstitutional.

According to this approach, ‘the policy stability of a political system depends on three characteristics of its veto players: their number, their congruence (the difference in their political positions) and their cohesion (the similarity of policy positions of the constituent units of each veto player).’ As the number of veto players in a system increases, policy stability, that is the preservation of the legislative status quo, increases as well because the agreement of all the veto players needed for a change will be more difficult to secure the larger the number of players and the greater the ideological distance between them.

Although many veto players in a given political system are collective veto players meaning that they are composed of several individuals, the analysis based on individual veto players can be extended to collective veto players deciding by majority rule. The decisional rules in force in each collective veto player affect the final legislative outcome. Tsebelis explains that:

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\text{[t]he difference between a parliament that decides by (any possible) majority and one where a stable majority of n members always prevails, is that the first is a collective veto player (none of the individual members is a veto player since none is necessary for a majority), while the second is a combination of n veto players (all n players are necessary for the majority).}
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Consequently, the status quo in a legislature with a stable political majority is more difficult to change than in one where different coalitions are possible.

The veto is important in policy-making because it allows certain political actors to refuse a change in policy. Some scholars have noted that the ability or inability to veto is important for

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11 Tsebelis, Veto Players: How Political Institutions Work, p.19
12 Tsebelis, supra, n.8 p.290
13 Article 1 Section 7 United States Constitution
understanding what policies get elected, what laws get enacted. The veto is a negative power, the power to say no to change such as the power to stop a property rights reform bill from becoming law. When actors hold a veto they can decide whether policy is changed or not and as such, may have some influence in what way the policy is changed by restricting the set of acceptable alternative policies.

4.2 Types of Veto Players.

Tsebelis identifies two major categories of veto players: institutional and partisan. Institutional veto players are those actors whose consent to legislation is required by the constitution or by law such as by statute. Thus, if the constitution identifies some individual or collective actors that need to agree for a change of the legislative status quo, they are definitely institutional veto players. They may include presidents, legislatures, courts, or other organizations. In a presidential system the institutional veto players are usually the president and parliament or the two chambers of parliament in bicameral systems. In parliamentary systems the parliament is an institutional veto player.

Partisan veto players on the other hand are actors who, without any legally derived veto can effectively veto policy change. They are actors who by virtue of their political importance or because of a position they hold may be able to prevent change, even if this ability is not based on any legal right. Tsebelis describes them as being “generated by the political game” and they have a veto over the legislative process, not because it is legally required, but because their support is politically required to change the legislative status quo. For example, the consent of political parties who form the government and have a majority in the parliament is needed in parliamentary systems to enact new legislation. A single party which enjoys majority control of parliament and commands loyalty from its members could also act as a veto player.

A significant difference between institutional and partisan veto players is that whereas according to the constitution, the agreement of institutional veto players is a necessary and

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22 Ibid.p.204
24 Tsebelis, supra, n.8 p.302
27 Ibid.
28 Ibid.p.204
31 Ibid.
sufficient condition for policy change, the agreement of partisan veto players is, strictly, neither necessary nor sufficient.\textsuperscript{32}

4.3 Additional Categories of veto players.

Although institutional and partisan veto players constitute the core of Tsebelis’ theory, he acknowledges that there are several other categories of veto players.\textsuperscript{33} He justifies his deliberately narrow focus by explaining that whereas the other categories of veto players may or may not exist in particular political systems, institutional and partisan veto players exist in every democratic society.\textsuperscript{34} Consequently, whether one adopts the narrow or wider categorization of veto players would depend on the kind of study one is engaged in.\textsuperscript{35} The wider definition of the term ‘veto player’ therefore, which also takes into account the wider categorization is any player who can block the adoption of a policy or legislation either directly or indirectly.

Tsebelis seems to propose the narrower concept of institutional and partisan veto player for large n-studies.\textsuperscript{36} In these cases, the additional categories of veto players that are less frequently observed in political systems ‘essentially cancel out and become background “noise”’.\textsuperscript{37} However, where a scholar is engaged in a case study, it becomes all important to identify and examine all the relevant veto players.\textsuperscript{38} Accordingly, the less frequent veto players, the additional categories of veto players, can constitute a veto player and must enter the analysis.\textsuperscript{39}

The other categories of veto players that Tsebelis alludes to include courts,\textsuperscript{40} specific individuals such as influential ministers and army officials, central banks, the army or military, and powerful interest groups.\textsuperscript{41} These additional veto players may be further categorized according to the range of their decision making powers.\textsuperscript{42} Thus, while the actors categorised as institutional and partisan are veto players in all decision-making procedures, the others are

\begin{itemize}
  \item \textsuperscript{32} Tsebelis, supra, n.8 p.302
  \item \textsuperscript{33} Tsebelis, “Veto Players and Law Production in Parliamentary Democracies: An Empirical Analysis.”(1999); Tsebelis, supra, n.8 p.306
  \item \textsuperscript{34} “Veto players and institutional analysis.”p.447.
  \item \textsuperscript{35} Hallerberg, supra, n.14 p.23
  \item \textsuperscript{36} He states: “[…] while the number of veto players may vary by issue or over time, these variations will cancel each other out when applied across several issues for sufficiently long periods of time” (Tsebelis 1995a: 308). He fails, however, to specify the length of this period of time and it remains unclear whether comparisons with high n-cases then lead to arbitrary results, since the period of the analysis is not long enough to even out statistical effects.
  \item \textsuperscript{37} Hallerberg, supra, n.14 p.23
  \item \textsuperscript{38} Hallerberg, supra, n.14 p.23; Tsebelis, supra n.8 p.308
  \item \textsuperscript{39} Hallerberg, supra, n.14 p.23
  \item \textsuperscript{40} In some cases Tsebelis speaks of “courts”, in others of “constitutional courts” or simply of the “judiciary.” In his article on veto players and institutional analysis (2000: 465) he clearly states, “If a court makes a constitutional interpretation, then it has to be considered another veto player.” However, he remains imprecise and seems to stretch the term “courts” beyond the realm of constitutional interpretations.
  \item \textsuperscript{41} Tsebelis, “Veto players and institutional analysis.”(2000).p.447; Tsebelis, supra n.8 p.306
  \item \textsuperscript{42} Michael Stoiber, “Different Types of Veto Players and the Fragmentation of Power,” in Annual Meeting of the Midwest Political Science Association (Chicago Illinois2006).p.5
\end{itemize}
restricted to some policy-areas. Following Stoiber, we refer to this type as the ‘case-by-case veto player.’

Constitutional courts are a more institutionalized example of case by case veto players because their veto power is specified by the constitution. Although their express approval for a change of the status quo is not required, they have the judicial power to block a politically finalised decision. The need for the agreement of the courts prior to the passing of certain legislation is tantamount to adding another chamber to the legislative process. Examples of similar veto players include constitutionally required super majorities, and referendums.

4.3.1 Indirect veto players.

Another type is the indirect veto player referred to as such because it can only exercise its veto power indirectly through another actor. Indirect veto players can only have a lasting influence through ‘direct’ veto players. Some scholars refer to this kind of actor as a conditional veto player, whose influence is limited because its involvement depends on the decision of another veto player. Indirect veto players may be described as non-elected actors who may influence policy – making and legislation, and may include interest groups, labour unions, non-governmental organisations, lobbyists, the church, courts, grass root movements, activists, media organisations and even the international donor community. The indirect veto player is an important category and some observers have identified its kind such as interest groups and the media as the real “veto players” with which contemporary governments in western democracies must contend.

In fact, indirect veto players such as interest groups, strictly speaking, do not satisfy the criteria for a veto player as narrowly construed by Tsebelis because first their approval for legislation is neither legally needed nor necessary in many political situations and second owing

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43 Ibid.
44 Tsebelis, supra, n.8 p.306
45 Stoiber, supra, n.42 p.5
46 Stoiber, supra, n.42 ; Tsebelis, supra, n.8 p.306
47 Stoiber, supra, n.42 p.5
48 Tsebelis, supra, n.8 p.307
49 Tsebelis, supra, n.8
50 Klinger, supra, n.6 p.146
51 Merkel, supra, n.7 p.18
52 Stoiber, supra, n.42 p.3
53 Klinger, supra, n.6 p.146
to the nature of their indirect influence in the law-making process. Yet, it is exactly these kinds of actors that can develop major potential for blocking far-reaching reforms.

Indirect veto players may have special ties to veto players enabling them to influence these players. The means of political influence for indirect veto players is direct lobbying which involves bargaining with political elites. In fact, actors can be described as indirect veto players if they succeed in convincing at least one of the veto players to act on their behalf. Indirect veto players such as interest groups can therefore indirectly veto legislative change if they succeed in effectively winning over at least one veto player, persuading that player to become an agent for their specific interest, to put it on the legislative agenda, support it and build a minimum winning coalition.

To do this, interest groups have to persuade veto players of an at least partial congruence with their policy preferences. Whether and how this can be done may depend on the levels of corporatism and clientelism prevalent in a given political system, on the networking of political and particular actors as well as on the timing and sequencing of attempts at influence, as there are more and less opportune moments and constellations for any reform initiative. Given this arrangement, specific actors may emerge with a range of strategies to become indirect veto players and to have their policy preferences integrated with those of the veto player.

4.3.2 Unofficial Veto Players.

This category refers to actors who employ extra institutional veto power to block change of the legislative status quo in a political system. Although this category of veto players does not have an official capacity to veto change, they can nevertheless use their unofficial veto power to block change. Such actors may include a mobilised public.

Under many authoritarian and semi-authoritarian regimes the public can only engender change through the overthrow of the regime or other similar, related drastic and draconian measures. However, where a regime is pressured by sections of the public not to change the status quo, it may actually respond to this demand in order to maintain its tenure. In Indonesia,
President Suharto was greatly pressured by the public not to change the policy status quo by cutting aid to the poor. When he failed to comply with the demand, the public used its veto power to remove him from office through social movement pressure and public unrest. These kind of unofficial veto players exist more commonly in the developing world than in the developed democracies of the West. Thus, a veto players’ argument that depends solely on the de jure political institutions in the developing nations may not suffice.

4.4 How do we count veto players?

Determining the number of veto players in a given political system is relatively straightforward once the definition of veto players has been clarified. In order to ascertain the number of veto players in a given political system, one needs to start by counting the institutional veto players whose number can be easily ascertained by taking a look at the constitution of a given country. The next step is to identify and count the potential partisan veto players of which the institutional veto players are composed, and this can be done by concentrating on the political conditions inside each institutional veto player because they determine the partisan veto players of a political system. The number of partisan veto players is specified endogenously by the party system and the government coalitions of each specific country. For example, the constitution might specify that the laws have to be adopted by the government and the two chambers of bicameral legislature acting by simple majority. In this situation, there are three institutional veto players. However, we note that these are not individual actors and must therefore identify the conditions under which their composite parts such as cabinet members or parliamentarians can exercise their institutional veto power collectively. If political parties are able to discipline their members, the question is how many parties are needed to form the necessary majority in parliament and form the government. The number of veto players in a political system can differ not only across time but also policy field. A central bank for example might be a veto player in monetary policy but lack veto power in other fields. A government might rely heavily on the political support of a major trade union, for instance, giving it de facto veto power on government policy and thus increasing the count of partisan veto players in that political system.

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63 Ibid.
64 Ibid.
66 Tsebelis, supra, n.8 p.304
67 Ibid; p.305
68 Warntjen, “Veto Players.”(2010) p.2
Noteworthy too is that institutional veto players cannot simply be added to the partisan veto players in order to determine the effective number of veto players. For instance, in cases where there are identical partisan majorities in both chambers they have to be counted as one veto player. In cases where the majorities in parliament are congruent with the parties in government they will be absorbed and only the number of partisan veto players is relevant. Tsebelis calls this situation where some veto players may be redundant, for example because they have identical policy positions the ‘absorption rule’.

Further, party discipline must be taken into account when counting veto players. If we expect the members of a given party to collectively behave in a certain way and not to defect, we can count the control of this political party in both the legislature and the executive as one veto player. However, where party discipline is lacking and the members of the political party tend to vote their own way, meaning that the president cannot count on members of his own party to vote along with the agenda set by him, it is then appropriate to consider the legislature and the executive as two separate veto players.

Where the counting of veto players is being done in a small study involving small numbers or a case study, then at this point, it becomes necessary to count the indirect veto players and the unofficial veto players.

4.5 Conclusion

We have argued that ‘much of institutional change can only move forward when it is approved by legislators, judges, regulators or the executive.’ In this Chapter, we have identified these and other actors as veto players. In addition, the political science literature suggests that the more veto players there are in the political system, the more credible and stable are its policies but also the more difficult and time consuming it is to initiate and pass reform. Indeed:

a political system where statutes must pass through a variety of filters, each motivated by somewhat different incentives and interests, is one where (1) statutes are hard to enact, (2) statutes that are enacted will tend to have compromises, logrolls, and delegations, and (3) once enacted statutes are hard to repeal.

Other scholars have suggested that, particularly in weak democracies, the ‘absence of multiple veto players in countries often means that some groups in society are less represented than they

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69 Merkel, supra, n.7 p.3
70 Tsebelis, supra, n.8 p.310
71 Ibid; p.307
73 North, Understanding the Process of Economic Change p.62
otherwise would be. Nevertheless, Tsebelis’ veto player approach helps us to understand the cause for legislative impasse; why legislative reform may sometimes pass or fail and which factors determine the possibility of policy and legislative change. Veto player theory is a neo-institutionalist theory, as it holds that policy outcomes can be explained by the preferences of the actors involved and the institutions governing the decision-making process. It is also a rational choice theory of politics, as it assumes that actors maximize their utility.

As we conclude, we deem it appropriate to make a note of caution. Whereas in developed democracies it is true that the agreement of veto players to change in the status quo is critical to reform because the institutions that enforce the law are well established and there is a relatively clear link between legislative change and implementation, in developing nations, veto players’ agreement to legislative and policy change is not the only potential obstacle to reform. Ensuring the effective implementation of genuine reforms and blocking passage of corrupt legislation also remain major challenges.

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76 Philip Keefer, “When do Special Interests Run Rampant? Disentangling the Role in Banking Crises of Election, Incomplete Information, and Checks and Balances.,” in Regulation and Competition Policy (The World Bank Development Research Group, 2001).p.4
77 Klinger, supra, n.6 p.145
78 Warntjen, “Veto Players.”(2010)
80 Ibid.
Chapter 5: Land Tenure in Buganda during the Pre-Colonial Period.

5.1 Introduction.

Land-tenure reform has been said to be an important precondition for economic development, and that it should be an objective of government policy.\(^1\) Hence Uganda’s 1995 constitution contained significant and fundamental provisions relating to land and vested land in the citizens of Uganda. Later, in 1998, Parliament passed the Land Act Cap 227, which, *inter alia*, regulated the existing diverse and overlapping land relations. More recently, in January, 2010, an Act to enhance the security of occupancy of tenants on registered land was enacted after protracted, heated and controversial public and parliamentary debates. Uganda is now in the process of introducing freehold tenure as the uniform tenure\(^2\) based on the age-old argument that customary land tenure is one of the principle obstacles to agricultural and economic advancement and that, therefore, individual titles to land are the way forward.\(^3\)

We explained in Chapter One (1.5) that owing to the centrality of land in the economies of nations, we focus on property rights to land in this study. In Uganda, land is a key asset constituting 60 % of the total assets owned by a typical household\(^4\) and with more than 43 % of Gross Domestic Product (GDP), 85 % of export earnings and 80 % of employment being generated from land use.\(^5\) It thus is clear that land is a sensitive issue. Any land tenure reform, therefore, has implications for economic and agricultural development.

Uganda as a territory is a creation of colonialism and its history may be traced to ‘the Anglo-German Agreement of July 1890, whereby Britain obtained within her sphere of influence the territory north of the parallel of latitude 1\(^\circ\) S. which included almost the whole of what is now Uganda.’\(^6\) Later in 1894, the Kingdom of Buganda, then known as Uganda together with the territories of Busoga, Bunyoro, Ankole and Koki was declared a British Protectorate.\(^7\) In 1900, the Uganda Agreement was concluded between the British Colonial government and the Buganda

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\(^2\) According to p.22 Ministry of Lands Housing and Urban Development, "The Uganda National Land Policy (Final Draft).” It is clear that public policy regards freehold as the property regime of the future, to the extent that current law provides for conversion from leasehold tenure or customary tenure to freehold.’


\(^5\) See Ministry of Lands Housing and Urban Development, "Drafting the National Land Policy, Working Draft 3," (Kampala Uganda: Ministry of Lands, Housing and Urban Development, 2007), 3.2.2. 47.


Native government and it is this which has been said to be the genesis of the bulk of the land issues in present day Uganda.\(^8\)

The historical chapters 5, 6 and 7 are organized chronologically and in them we demonstrate the application of this dissertation’s theoretical framework to the Buganda case. For us to clearly appreciate the process of emergence and change in the property institutions in Buganda, it is important that we map out the evolution of land tenure. We are then in position to ascertain and explain why and how property rights to land in Buganda emerged and developed to their present status. North observed that it is difficult to understand the process of change by starting from standard economic theory and moving on from there.\(^9\) Rather, we need to begin with a study of the way in which societies evolved in time to enable an understanding of why and how institutions, formal and informal evolve. However, we acknowledge that tracing property rights to their very origins is an enormous and difficult task because property began in pre-historic times, and therefore, no one can really prove what actually happened, as a matter of historical fact. Therefore, for the sake of practicability, we start at a point in time, the pre-colonial period in Buganda. We recognise that the pre-colonial era is outside the scope of this study as it is prior to 1900, the starting point for this study. However, an overview of rights in that period is useful as a starting point when at least some rights were in place. Given that some rights already exist, it becomes feasible to explore the evolution of such rights.

In this chapter therefore, we examine the property rights to land in Buganda during the pre-colonial era and move from there in subsequent chapters to try and understand the reasons for, and the process of change in property institutions relating to land in Buganda from 1900 to 2010. The following two chapters six and seven of this thesis attempt to analyse the history of land tenure reform in Uganda from 1900 to independence (the colonial period) and from 1962 to 2010 (post-colonial period) respectively, in light of the conceptual framework presented in the preceding chapters two, three and four, and are an exposition of the evolutionary process by which customary systems of land holding were superseded by others thought to be more conducive to economic development.\(^10\)

5.2 Land Tenure in Uganda: The Pre-Colonial Period.

Although this work focuses on the years 1900 to 2010, a brief review of traditional land relations in the preceding era is invaluable for a better appreciation of land tenure and management in the period covered by this thesis.

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The Land tenure system in the pre-colonial communities of Uganda was basically customary and may be broadly categorized as follows: first and most common to kingdoms in the interlacustrine region was land holding based on feudalism. Under this system, ‘chiefs exercised political control over all who settled within the area of their domain’ and had the rights of allocation and control over land. Owing to the abundance of land at the time, people were the most critical factor of production and chiefs were anxious to control them. Thus security of tenure for settlers on the land depended upon continuous loyalty to those chiefs evidenced by the payment of tribute in the form of produce, and services.

Second, was land holding outside the interlacustrine region within the sedentary communities. This was based on territorial control of an area by kinship groups such as families and lineages. Among the pre-colonial Iteso communities, it was the clan leader or extended family head that had authority over the area which usually coincided with the administrative boundaries of the village. Members of a given clan or extended family accessed land rights either through ‘inheritance, gift or by breaking new ground.’ Lawrance referred to the land rights among the Iteso as ‘nearly amounting to full ownership’ because save for the right to alienate the land, they enjoyed most of the common rights associated with full ownership such as ‘the right to cultivate, to excavate, to build, to bury the dead, to cut trees, to lend, to subdivide and to bequeath the land or any part of it.’ Thus the Iteso held individual rights to land although it appears radical title vested in the community as a corporate entity. Strangers among the Iteso could acquire rights in land similar to those of the local people after a considerable period of time within which they were considered to have been absorbed in the community. They also had to undergo certain initiation rites which included providing beer and food for the clan leaders upon their first harvest and being presented to the Land Authority by an Iteso person who could vouch for their good character. Otherwise, the most pervasive interests in land

11 Morris and Read, supra n.6 p.353; The term interlacustrine is used for the kingdoms lying between Lakes Victoria, Edward and Albert namely Buganda, Bunyoro, Toro and Busoga
12 Morris and Read, supra n.6 p.353
13 Chiefs were referred to by specific or different names in the various kingdoms.
15 Batungi and Ruther, supra n.10 p.117
16 These included the Iteso, Bagisu and the Bakiga; see Morris and Read, supra n.6 p.358-9
17 Batungi and Ruther, supra n.10 p.117; Morris and Read, supra n.6 p.358
18 Morris and Read, supra n.6 p.358; J C D Lawrance, The Iteso: Fifty years of change in a Nilo-Hamitic tribe of Uganda (London: Oxford University Press, 1957); p.244.
19 Morris and Read, supra n.6 p.358
20 Lawrance, supra, n.18 p.244
21 This is the right to sell or rent the land according to ibid; p.244
22 Ibid.
24 Morris and Read, supra n.6 p.358
enjoyed by strangers in Teso land were non-inheritable user rights, which could be withdrawn by the land authority upon conviction of, *inter alia*, witchcraft and theft or in the event of the stranger leaving the land.\(^{25}\)

Third, was the land holding system outside the interlacustrine kingdoms among the purely pastoral peoples of Uganda such as the *Jie* from Karamoja district. Among the *Jie*,\(^{26}\) there was an absence of specific individual or group rights to pasture. Grazing lands were commonly accessed by all members of the tribe.\(^{27}\) As Morris aptly explained, ‘traditionally, a herd may be moved by the owner anywhere at any time as search is made for grass or water and there is no traditional basis of control by extended family, clan or settlement.’\(^{28}\)

In all the land tenure arrangements in pre-colonial Ugandan communities, radical title to land was always vested in the community as a corporate entity and not in the political and social organs through which the territory was controlled and land rights allocated.\(^{29}\) Time and space constraints do not permit a detailed exposition of the land tenure system in all the pre-colonial communities of Uganda. In this thesis therefore, we shall focus on land tenure in the Kingdom of Buganda. We explained our reasons for selection of Buganda as the case study in Chapter One (1.5).

### 5.3 Land Tenure and Management in Pre-Colonial Buganda.

In Pre–colonial Buganda, the Kabaka was considered the source of all power,\(^{30}\) an ‘absolute monarch whose will was law,’\(^{31}\) a ‘symbol of order and meaning’\(^{32}\) for the Baganda. He exercised control of his kingdom through a hierarchy of chiefs who held office solely at his discretion. Buganda was originally divided into 10 counties each administered by a territorial chief known as *Omukungu* on behalf of the Kabaka.\(^{33}\) The number of counties was continually increased and had reached 20 by the advent of colonialism.\(^{34}\) Further, the *Kabaka* ensured personal control in the counties through the *Batongole*\(^{35}\) who were outside the formal kingdom.

\(25\) Lawrance, supra, n.18 p.244-50; Morris and Read, supra n.6 p.358-9
\(26\) This account is according to Philip H Gulliver, *The Family Herds: A Study of the Pastoral Tribes in East Africa, the Jie and Turkana* (Routledge & Kegan Paul, 1955).
\(27\) Morris and Read, supra n.6 p.359
\(28\) Morris and Read, supra n.6; Gulliver, *The Family Herds: A Study of the Pastoral Tribes in East Africa, the Jie and Turkana*.
\(31\) Morris and Read, supra n.6 p.5
\(35\) This is plural for *Mutongole*, meaning King’s officer, favourite, territorial chief.
hierarchy and directly answerable to him. The Kabaka also exercised a less direct form of control over the Bataka through his right of confirmation of appointment. Land was nominally controlled by the Kabaka while individual plots were conferred upon peasants by local chiefs. Neither the Kabaka nor the Chiefs could either mortgage or sell land in the Counties.

West explained that:

the relationship between the Kabaka and the chiefs and between chiefs and the people was political rather than tenurial. If the Kabaka was deemed to ‘own’ all the land, that was only because he ‘owned’ the whole kingdom and everything in it; his rights of ownership were not restricted or specifically related in any way to land.

The Kabaka’s symbolic power was much greater than his definite political or legal rights.

Prior to Colonialism, the customary tenure in Buganda kingdom had evolved into the following land rights:

- Obutaka (clan land rights);
- Obutongole (rights of Kabaka and his chiefs);
- Obwesengeze (individual hereditary rights); and
- Kibanja (peasant rights of occupancy), that is an ordinary person’s right of undisturbed possession of a parcel of land.

The Obutaka were fertile agricultural lands owned by the 40 clans of Buganda. Each clan ‘claimed as its own the hill on which its original ancestor was believed to have settled; this was the residence of the head of the clan and its members could claim the right of burial there.’

The Obutaka also served as residential home for the clan members.

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38 Plural for Mutaka, meaning guardian of clan lands, lineage head.
41 Batungi and Ruther, supra n.10 p.120
Clans were the basis of social organization in Buganda largely designated by the name of an animate object, such as, the lion, buffalo, lung fish or grasshopper clan.\textsuperscript{48} At the head of each clan was the Mutaka, a title which may be interpreted as the ‘father of the soil’, the clan land was known as butaka and of this the Mutaka was recognized as the guardian for the use of his clan folk and representative of their common interests. However, the powers of land allocation enjoyed by the Bataka were based on their possession of a ‘kind of paternal sovereignty rather an articulate right of property.’\textsuperscript{49}

The clan ancestors’ claim to Obutaka was rooted in either the original grants by the king or unchallenged occupation for more than a generation. The burial of 3 to 5 generations upon any land would create a prescriptive right of the head of the occupying family to that land, and a branch would thus be established having its own clan land and Mutaka.\textsuperscript{50} The original home of the clan and the head Mutaka by whom it was held were at all times revered and respected by all clan members who even brought their disputes to the Mutaka for resolution. Such land is now usually referred to as having been held in butaka tenure.

The Obutaka were inheritable. When a Mutaka died, his rights of control over the land passed to his personal successor, who was selected by the members of the branch from among themselves subject to confirmation in appointment by the Kabaka.\textsuperscript{51} The Obutaka were inalienable meaning that land itself did not have value; it was the productive effort of the land occupiers which gave value to the land.\textsuperscript{52} The early kings were careful not to interfere with the Butaka institution which was deeply embedded in the life of the Baganda. Instead, they patronized the system by assuming the role of the father of all clans, and every newly chosen Mutaka sought the confirmation of his appointment from the king. Indeed, it is no coincidence that the Luganda word for land is ttaka, while the traditional second name for the Kabaka is Ssabataka (leader of the clans),\textsuperscript{53} reflecting ‘the antiquity of the link between the clans, the Kabaka and land ownership’\textsuperscript{54} in Buganda.

Obutongole were territorial estates over which the Bakungu and Batongole exercised non- assignable and non - inheritable rights of administration subject to the authority of the

\textsuperscript{48} Thomas, “An Experiment in African Native Land “ 237.


\textsuperscript{50} Thomas, supra, n.38 p.237

\textsuperscript{51} Thomas, supra, n.38

\textsuperscript{52} James, \textit{Land Tenure and Policy in Tanzania}. Batungi and Ruther, supra, n.10 p.120

\textsuperscript{53} Or chief of the Clan leaders

\textsuperscript{54} Green, “Ethnicity and the Politics of Land Tenure Reform in Central Uganda,” p.373.

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Kabaka. Upon the death of a mukungu or mutongole, the land would revert to the Kabaka for re-allocation. The emergence of this tenure may be explained as follows:

Not content [...] with the appointment of their own supporters as territorial rulers, later Kabakas took to giving out land to their own favorites as fiefs in return for some such duty as raising soldiers, collecting firewood or performing ritual services. These estates were known as bitongole (sing., kitongole) and their holders as batongole.

The Bakungu and Batongole allocated inalienable rights to settle on and cultivate those lands otherwise known as usufructuary rights to the bakopi or basenze, generally referred to as peasant cultivators. These usufructuary rights were inheritable and could thus be passed on to a mukopi or musenze’s personal successor upon his death. The peasant cultivators were always under perpetual obligation to respect and obey their chief, to render military service as well as assist him in the building of roads and houses. In addition, the batongole and Bakungu exacted tribute in kind in the form of bark cloth, food crops and calabashes of beer. Thus, although the chiefs exercised dominion over the peasant cultivators on these Butongole estates, it may be said that the chiefs ‘owned’ the people and not the land itself. The Butongole estates were not subject to tax or tribute to the Kabaka. Sometimes, these estates would be carved out of Butaka land, but such action was usually the arbitrary act of a despotic King.

Generally, the security of butaka lands was respected and clearly superior to that relating to Butongole tenure.

Obwesengeze were grants in form of one landholding or small estate to an individual chief or peasant by the Kabaka himself. These were private and permanent rights as they could be inherited. They represented a minor fraction of land in Buganda kingdom. The Obwesengeze estates also served as Obutaka in as far as they served as residential homes and burial grounds for specific families and lineages.

Bibanja were small landholdings occupied by peasants (bakopi and basenze) and were located on Obutaka, Obutongole and Obwesengeze estates. Bibanja were ancestral customary rights, which depended on correct social and political behaviour as demanded by the semi-feudal

57 Plural for Mukopi meaning peasant, person not of chiefly status, hence by extension one who does not own mailo land
58 Plural for Musenze meaning settler, a non-kinsman, a cultivating tenant
60 Ibid.
61 Ibid., 12.
62 Mukwaya, supra, n.34 p.11
63 Thomas, supra, n.38 p.238
64 Ibid.
65 Mukwaya, supra, n.34 p.12
67 Mukwaya, ibid; p.12
68 Plural for kibanja
system of governance. Every peasant had a right to the occupation and use of the land he occupied and therefore he did not have to live in constant fear of eviction. If for some reason a chief or clan leader wanted the peasant to move from his kibanja, the peasant would be promptly offered another suitable kibanja. However, the peasant was obliged to give free labour, tribute of beer, and food crops to his chief or clan head as well as military service, and this was one of the reasons why the peasant would remain in possession of his Kibanja on succession.

5.4 Conclusion

Thus a review of the state of land tenure in Buganda prior to colonialism reveals that ownership of land in the sense in which we understand it today was not recognized. Rather, various individual rights to possess, control, use or access land subject to supervision by chief, clan or community were recognized. Although the land in Buganda was vested in the community, it was ultimately subject to disposition by the Kabaka in his capacity as Ssabataka (‘father of the soil’) and points to an absence of any system of strictly communal ownership. The existing land tenure systems as we have seen all had a ‘form of an individual ownership, but devoid of any conception of land as a negotiable instrument.’ Further, in pre-colonial Buganda and in the other traditional communities of what is now Uganda, the security of rights in land was guaranteed and protected by the very people under whom the initial rights were acquired. Irrespective of whether rights were created by kinship, principles of residence, service to a higher authority or mere political allegiance, the question of insecurity of tenure did not arise as long as those social relations were maintained.

1900 is the start year for our period of study. The land rights existing in the pre-colonial period therefore are our starting point in trying to understand the why and how of property rights emergence and change in Buganda. The tenure nomenclature notwithstanding, we observe that during this period, land was relatively abundant, commoditization of land was not known and it seems access to use rights on land was available to whoever needed it. The occupants of the land enjoyed security of tenure as long as they fulfilled their social obligations to their chiefs. Land tenure in pre-colonial Buganda points to an absence of property in land and more to a kind of feudalism, a unique concept of landlordism, where the chiefs ‘owned’ the people living on

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69 Mukwaya, supra, n.34 p.14
70 Mukwaya, supra, n.34
71 Ibid.
72 James, Land Tenure and Policy in Tanzania; HWO Okoth-Ogendo, Land policy development in East Africa: A survey of recent trends (Oxfam, 1999)
73 Batungi and Ruther, supra n.10 p.120
74 Thomas, supra, n.38 p.237

their land, distinct from the English concept of landlordism, where landlords owned the land itself.\textsuperscript{75}

\textsuperscript{75} West, \textit{Land Policy in Buganda}. 
Chapter Six: Land Tenure and Management in Buganda during the Colonial Period: 1900-1962.

6.1 Introduction

Although Buganda was declared a British Protectorate in 1894, there were no immediate changes to and interference with land tenure arrangements. This may be explained by the fact that initially, Britain’s interest in Uganda was not settlement but control over the head waters of the Nile, the lifeblood of Egypt. In addition, war and other civil disturbances characterized the early years of the protectorate and hindered the development of progressive administration by the Commissioner and his staff. The office of British Commissioner was held by nine different people between 1893 and 1899 and none of them succeeded in settling the disturbed state of the country.

There were the continual threats of Kabalega, the King of Bunyoro; religious strife among the Protestants, Catholics and Muslims as they struggled for influence, resulting in power fluctuations between the different religious groups, constant redistributions of chieftainships and large scale movements of population as the peasants followed their lords in their changing fortunes; the flight of Kabaka Mwanga of Buganda, who was expelled by his subjects in 1888, regained the throne in 1890, only to be finally exiled in 1899 after leading a failed rebellion against the British between 1888 and 1893; the Muhammadan insurrections; fighting on the eastern borders of Buganda against the Nandi and Tugen in 1897 and in the same year, the mutiny of the Sudanese troops used as mercenaries by the British. Consequently, the annual cost of British occupation of Uganda which Sir Gerald Portal had estimated at 20,000 pounds had risen to over 300,000 pounds by 1899 and coupled with the construction of the

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1 Gardner Thompson, Governing Uganda: British colonial rule and its legacy. (Fountain Pub Ltd, 2003); Batungi and Rüther, “Land Tenure reform in Uganda. Some reflections on the formalisation of customary tenure.” p.116; Apart from the desire to protect the source of the Nile, the British colonization of Buganda was partly motivated by the latter’s agricultural potential as a place where raw cotton needed by the British textile mills would be produced.

2 The period 1894-1900


Uganda railway, the maintenance of the British protectorate had cost the British taxpayer almost 6 million pound sterling by the close of the century. It was in these circumstances that Sir Harry Johnston was appointed to Uganda as Special Commissioner on 1st July 1899. His instructions were to restore stability to Buganda, establish a more systematic policy of administration and devise means of making the British administration in the Protectorate self-supporting. Upon his arrival in December 1899, Sir Harry Johnston started his duty by negotiating an agreement that would not only streamline the relationship between the Kabaka’s Government and the Protectorate Government thereby establishing indirect rule in the protectorate but one that would also deal with the issue of land settlement. Such settlement was expected to provide security of tenure which would underpin the Kingdom's economic growth. He opted for negotiation because Buganda already had a semi-feudal system with a well-established government with which discussions could be held.

In this chapter, we trace the emerging changes in the property rights institution in Colonial Buganda in a historically chronological manner, that is, dealing with the changes in the sequence of their emergence. We end by attempting, in light of the conceptual framework of this thesis, to answer the questions of why, and how, property rights to land in Buganda developed and changed during the colonial period.

6.2 The 1900 Uganda Agreement. Following Kabaka Mwanga’s final flight in July 1899, his young son Daudi Chwa, who was hardly one year old, was installed as king. Three chiefs were appointed to act as Regents for the infant king, and they together with other chiefs formed the native council, or “Lukiiko”, and continued to conduct the native government.

The negotiations between Johnston, the British Special Commissioner, the Regents of the infant king and principal chiefs of Buganda culminated into the Uganda Agreement of 1900.

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10 Thomas, supra, n.8 p.234-5
12 Morris and Read, supra, n.3 p.14-15
13 West, supra, n.11 p.16; Thomas, "An Experiment in African Native Land ". p.235; Fortt, "Land Tenure and the Emergence of Large Scale Farming," p.67.
14 Morris and Read, supra, n.3 p.15
15 Ibid.
16 Batungi and Ruther, supra, n.1 p.117
17 The term “Uganda” is from Swahili and means “Land of the Ganda”. Originally, (and as used throughout the 1900 agreement) this term applied only to Buganda kingdom. As British colonial control expanded outwards from this central territory, the term was retained for the whole Protectorate. The central territory was distinguished from the wider colony by using its indigenous name of Buganda
18 Thomas, supra, n.8 p.236
19 Ibid.
20 Kabaka Mwanga had by this time been deposed and his infant son Daudi Chwa proclaimed Kabaka.
Government was in the hands of the three ministers of Buganda known as Regents.
hereinafter referred to as the ‘1900 Agreement’) which established the basis of the relationship between the British and Native government.21 The legislative, judicial and administrative functions of the King and his native council, the Lukiiko were defined and a land settlement was provided for.22 The agreement was signed by the regents of the infant king and leading chiefs ‘on behalf of the Kabaka (King), and the chiefs and people of Uganda,’ on 10th March, 1900.23

Although the greater part of the agreement concerned political matters and only Articles 15 to 17 dealt with land,24 it is generally agreed to be the genesis of individualized property rights in Uganda and a tenure system in Buganda distinct from the rest of Uganda.25

The land settlement in Buganda kingdom was based on area rather than the value of land.26 According to Article 15 of the 1900 Agreement, the entire land of Buganda estimated at 19,600 square miles was distributed amongst the Kabaka, the royal family, chiefs and the Protectorate Government. The Kabaka, members of the royal family and high ranking chiefs were allocated 958 square miles either as private or official estates, 1,000 chiefs and private landowners were to receive 8 square miles each totalling 8,000 square miles, 92 square miles were allocated to three Missionary Societies, 50 square miles were allocated to the Government of Buganda and 1500 miles were calculated to be forest reserves. The remaining estimated 9,000 square miles which was uncultivated land was vested in Her Majesty’s Government and was referred to as Crown land. When claiming waste and uncultivated ground as crown land, Johnston had in mind his objective of making Uganda financially viable.27 He envisaged large scale plantation agriculture under European control being introduced in these areas,28 and anticipated that crown land would ‘place at the disposal of the Uganda Administration a very important source of future revenue.’29 A survey of land in Buganda after the 1900 Agreement showed that the total area of land had been overestimated and as the deficit fell on the British Government’s share this was reduced to 8307 square miles.30

Sir Harry Johnston sent a copy of the signed agreement to the Foreign Office, where it was noted that the land settlement under the 1900 Agreement required the issue of title deeds and consequently an elaborate cadastral survey, to which the Foreign Office acquiesced was put

21 West, supra, n.11 p.16
22 The term Lukiiko was used in a wide sense to embrace not only the legislature but also the executive Government of Buganda
23 Thomas, supra, n.8 p.235
24 Fortt, supra, n.6 p.66
25 West, supra, n.11 p.27
26 Batungi and Ruther, supra, n.1 p.118
27 Fortt, supra, n.6 p.66
28 Richards et al. supra, n.7
29 Dispatch to Foreign Office, 12 March, 1900 quoted in West, supra, n.11 p.59
in place before the end of 1900, within a few months of signing the Agreement. Some time was spent in establishing a trigonometric framework and actual demarcation of estates started in 1904. A lot of effort was made to employ the cheapest and most suitable methods for a country of dense bush and high grass. The boundaries were made by customary labour organised by the Buganda government, and ‘surveyed as plane table traverses controlled by triangulation’. The survey cost per square mile was about £7 per square mile, and nearly doubled after the First World War.

The 1900 Agreement transformed the Obutongole into official estates while Obwesengeze were transformed into private estates both of which were to be held by the beneficiaries in absolute ownership. The relationship between political officials and peasants was also altered from a political lord- subject relationship to a landlord- tenant economic relationship. Although the mailo owners permitted the peasants to retain possession of the plots they were occupying, the 1900 Agreement effectively converted them from customary land users into legal tenants on private property. This fact alone laid the ground for the genesis of overlapping rights on the same piece of land, which is a defining characteristic of land disputes and relations as evidenced by evictions and a land use impasse between land lords and tenants in contemporary Uganda.

Peasants were freed from political obligations to those controlling their land and were instead exposed to economic forces relating to its use. They had to pay ground rent (busulu) and tribute on produce (envujo) for the cash crops they grew. It appears that the Baganda negotiators and signatories to the 1900 Agreement did not realize that the kiganda concept of landlordism, where the chiefs ‘owned’ the people living on their land, was replaced with the English concept of landlordism, where landlords owned the land itself. The resultant pseudo freehold tenure, later known as mailo, ended up as a western form of landlord-tenant system with absolute individual ownership. However, this freehold tenure was understood differently in Uganda. Whereas in England a freehold estate was a fundamental part of the system of divided

31 Thomas, supra, n.8 p.240-41; Henry Wooliscroft West, The mailo system in Buganda (1965). Batungi and Ruther, supra, n.1 p.118
32 Thomas, “An Experiment in African Native Land”.
33 Ibid.
34 Ibid.
35 Batungi and Ruther, supra, n.1 p.121
37 Winnie Bikaako and John Saenkumba, “Gender, Land and Rights: Contemporary Contestations in Law, Policy and Practice in Uganda ” (The Women and Land Studies).
38 Ibid.
40 Ibid., p.279.

41 This term refers to the way things are done by the Baganda.
42 West, supra, n.11
rights of ownership, which permits more than one party to have rights in the same plot of land and so involves both rights and obligations, in Uganda, it denoted absolute ownership free of obligations to others.\textsuperscript{43}

It is generally admitted that the 1900 Agreement did not accurately interpret the existing system of tenure in Buganda.\textsuperscript{44} It appears that those who framed the land settlement under the 1900 agreement assumed that they were merely conferring in a permanent form the ancient rights and privileges possessed by the allottees of the square miles.\textsuperscript{45} In reality, they soon found that the rights they conferred on individuals constituted a fundamental change in the traditional system.\textsuperscript{46} Thomas and Spencer go so far as to say that ‘it perpetrated a grave injustice upon the overwhelming majority of the Buganda people.’\textsuperscript{47}

The 1900 agreement also gave rise to the issue of the ‘lost counties’. As punishment to Bunyoro Kingdom for having resisted colonialism and as a reward to Baganda chiefs for assisting the British to defeat Bunyoro’s resistance, the counties of Buyaga and Bugangaizi which were originally part of Bunyoro kingdom were transferred by the British colonialists to Buganda. Many Baganda were given chunks of land in Bunyoro as mailo land.\textsuperscript{48} This created a situation where Baganda chiefs owned land in Bunyoro occupied by Banyoro people aggrieved by the loss of their counties. In 1964, a referendum was held and the people in Buyaga and Bugangaizi, the lost counties, voted to become part of Bunyoro again, forming the district of Kibaale. Noteworthy, however, is that despite the fact that the people of Buyaga and Bugangaizi were returned to the administrative control of the then Bunyoro Kingdom, the issue of ownership of land in the area was disregarded meaning that the mailo land system remained with Baganda absentee land owners. This came to be known as the issue of the ‘lost counties’ and the implications of this arrangement still exist to-date. Our scope of focus in this thesis being Buganda, we shall not pursue the issue of property rights in the ‘lost counties’.

The Buganda Possession of Land Law 1908,\textsuperscript{49} (hereinafter referred to as the ‘Land Law, 1908’) drafted with the assistance of the British Government,\textsuperscript{50} passed by the Lukiiko (Buganda Parliament) and approved by the British Governor used the term ‘Mailo’ to describe the estates.

\textsuperscript{43} McAuslan, “A narrative on land law reform in Uganda.”
\textsuperscript{44} C K Meek, \textit{Land Law and Custom in the Colonies} (London ; Newyork; Toronto: George Cumberlege Oxford University Press, 1946).p.136.
\textsuperscript{46} Ibid.
\textsuperscript{47} Thomas and Spencer, “ A History of Uganda Land and Surveys, and of the Uganda Land Survey Department.”p.33.
\textsuperscript{48} West, supra, n.11 p.31
\textsuperscript{49} Revised Laws, 1951, vol. viii p.1219 under title ‘The Land Law’
\textsuperscript{50} Thomas, supra, n.8  p.242
allocated to the Baganda under the 1900 Agreement.\textsuperscript{51} It also defined, for the first time, the conditions of Mailo tenure which had not been provided for by the 1900 Agreement.\textsuperscript{52} Under this Law, the maximum area of mailo land which could be held by an individual was limited to 30 square miles, except where one possessed it as a result of inheritance.\textsuperscript{53} However, with the written consent of the Lukiiko and the Governor, an individual could acquire more land. Further, while a mailo owner could freely transfer his land by sale, gift or will to another person of the Protectorate,\textsuperscript{54} he could not transfer it either in perpetuity or by lease to a person not of the protectorate, a church, religious or other society unless he obtained special permission of the Lukiiko and the Governor.\textsuperscript{55} The intention of the Act in this respect was to prevent widespread alienation of land to well-organized and wealthy non-Africans which would leave Africans deprived of their land.\textsuperscript{56} Further, this law served the protectorate Government’s interest of making the purchase of unoccupied crown land a more attractive proposition.\textsuperscript{57} However, any Muganda peasant with financial capability could become a landowner through the purchase of his kibanja from the landlord at open market value and he would then receive a mailo land title. Therefore, in Buganda kingdom, land acquired economic value with effect from 1900 when the Uganda agreement was signed.\textsuperscript{58} Where a mailo owner died intestate without heirs, the land vested in the Governor and the Lukiiko to deal with as trustees for the people of Buganda.\textsuperscript{59} The English law of easements was to apply to mailo land meaning that the rights of public use of the established roads and water supplies were preserved.\textsuperscript{60} Provision was made for the resumption of land for public purposes. The owner of mailo land was not compelled to give a chief any portion of the produce of his land, either in kind or in cash.\textsuperscript{61} This Law also provided that all transactions in mailo land must be in writing and the fees are the same as for transactions elsewhere in Uganda.\textsuperscript{62} In summary, the effects of both the Agreement and the Land Law were, first, to grant in perpetuity, proprietary rights which were no longer associated with political functions on a small section of the population, the then office-holders; and secondly, to free the peasants from all obligations to the land-owner except those incidental to the relationship

\begin{footnotes}
\item[51] Fortt, supra, n.6 p.68
\item[52] West, Land Policy in Buganda: p.34; Thomas, “An Experiment in African Native Land.” p.242
\item[53] Buganda Possession of Land Law s.2 (a).
\item[54] S.2(b)
\item[55] S.2(c); Batungi and Ruther, supra, n.1 p.121; Morris and Read, supra, n.3 p.351; Fortt, “Land Tenure and the Emergence of Large Scale Farming,” p.69.
\item[56] Ibid., p.68-9.
\item[57] West, supra, n.11 p.133
\item[58] Batungi and Ruther, supra, n.1 p.121
\item[59] Buganda Possession of Land Law s.5
\item[60] Morris and Read, supra, n.3 p.47
\item[61] s.2(h)
\item[62] s.2(j) Buganda Possession of Land Law.
\end{footnotes}
between tenants and landlords. The relationship was changed from essentially political to mainly economic.\textsuperscript{63}

Following the enactment of the Buganda Possession of Land Law 1908, which, \textit{inter alia}, defined the incidents of the mailo tenure; it was found necessary to simultaneously introduce a system of land registration to guarantee the indefeasibility of titles.\textsuperscript{64} This was achieved by the passing of a short provisional Registration of Land Titles Ordinance 1908,\textsuperscript{65} which prescribed the form of certificate of title for mailo land, and provided that the British Government recognised the person named in the title as ‘absolute owner’ of the mailo land in question.\textsuperscript{66} Land titles therefore, were to be registered initially, under the Registration of Land Titles Ordinance 1908 and had a guarantee of indefeasibility. Indeed the first batch of land titles issued by Sir Hesketh Bell, the then Governor of Uganda on 2\textsuperscript{nd} January, 1909 were registered under that Law.\textsuperscript{67} The ordinance established an important principle whereby all land, upon registration, had to be identifiable by a satisfactory deed plan as stipulated by the Torrens system.\textsuperscript{68} A comprehensive Registration of Titles Ordinance based on the Torrens system was later enacted in 1922 on the same principles as the Land Titles Ordinance 1908,\textsuperscript{69} and made it easy to bring the \textit{mailo} titles into the system of registration.\textsuperscript{70} Section 9(2) of the Ordinance provided that, ‘[a]ll land included in any final \textit{mailo} certificate shall after the commencement of this Ordinance be subject to the operation of this Ordinance and shall be deemed to have been registered thereunder.’ Under the Ordinance, all the transactions concerning mailo land were to be recorded in duplicate, the primary title to be retained by the Governor (now Uganda government) and the duplicate title issued to the owner of \textit{mailo} land.\textsuperscript{71} Thus, \textit{mailo}, a freehold tenure with definite limitations was established.\textsuperscript{72}

The Land Transfer Ordinance, 1906 and the Regulations published in 1912 carefully controlled the sales of mailo land to non-Africans. Initially, it was protectorate policy to encourage the transfer of mailo land to non-Africans. Firstly, it was believed that the mailo-owner, through selling part of his land, would raise capital to develop the remaining land.\textsuperscript{73}

\textsuperscript{63} Mukwaya, supra, n.46 p.16
\textsuperscript{64} Thomas, supra, n.8 p.242-43
\textsuperscript{65} Mukwaya, "Land Tenure in Buganda : Present Day Tendencies." p.18; Thomas, "An Experiment in African Native Land ". p.243
\textsuperscript{66} Thomas, supra, n.8 p.243
\textsuperscript{67} Thomas, supra, n.8 ; Mukwaya, "Land Tenure in Buganda : Present Day Tendencies," p.18.
\textsuperscript{68} Ibid.p.18
\textsuperscript{69} Thomas, supra, n.8 p.242
\textsuperscript{70} Mukwaya, supra, n.46 p.17
\textsuperscript{71} Batungi and Ruther, supra, n.1 p.121
\textsuperscript{72} Thomas, supra, n.8 p.242
Secondly, it was hoped that the development of some former mailo estates by Europeans or Asians would help to inculcate good farming techniques amongst the neighbouring African landowners. In 1916, a prohibition was set on the sale of land to non-Africans, by order of the Secretary of State although by then about 118 square miles of mailo had already been converted into freehold.\textsuperscript{74} The Land Transfer Act of 1944 prohibited a non-African from acquiring any interest in land owned by an African without the consent of the Minister in charge of the Land.\textsuperscript{75}

\textbf{6.3 The \textit{Busulu} and \textit{Envujo} law 1927.}\textsuperscript{76}

The relationship between the mailo owners and the peasants was not defined in either the 1900 Agreement or the Land Law, 1908.\textsuperscript{77} Neither was any mention made of the rights of the \textit{Bataka} (clan heads), protection of the peasants, nor of the needs of a shifting system of cultivation.\textsuperscript{78} There was neither security of tenure nor formal recognition of tenant rights.\textsuperscript{79} The peasants continued to assume exactly the same feudal relationships to the mailo owners as they did under the old system of clan heads and political chiefs.\textsuperscript{80} After all, the same individuals who either were or might have become chiefs were now the mailo owners.\textsuperscript{81} The mailo owners ruled and dispensed justice in the traditional manner and in return they expected, the same type of services and dues from their tenants as previously received from the peasant cultivators. Traditionally, a peasant was expected to give his chief periodical presents in kind (tribute), such as a bunch of bananas, a goat, a pot of beer each time beer was brewed,\textsuperscript{82} and to fulfil certain obligations towards his chief, including weeding of roads, building huts and fences of the Chief’s enclosure, and supplying him with food.\textsuperscript{83} These however, were political duties and had nothing to do with land ownership.

The situation changed especially following the introduction of cotton as a cash crop and particularly during and after the 1914-18 war when peasant cotton production became a considerable industry and the price of cotton rose to Sh. 33/- per 100 lbs.\textsuperscript{84} The peasants began to derive economic gain from their holdings while ownership of the land ensured the Landlord’s access to the tenant’s labour or products of his labour. The mailo owners began to exploit the peasants by either demanding the use of the customary labour due from the peasants on the

\begin{thebibliography}{9}
\bibitem{Richards1995} Richards et al. supra, n.7 p.16; Batungi and Ruther, supra, n.1 p.122
\bibitem{LandTransfer} Land Transfer Ordinance 1944, s.2.
\bibitem{RevisedLaws} Revised Laws, 1951, vol. vii, p.1238 (repealed).
\bibitem{Mukwaya1900} Mukwaya, supra, n.46 p.20 Meek, \textit{Land Law and Custom in the Colonies}. p.133
\bibitem{Meek1900} Meek, ibid., p.133.
\bibitem{Thomas1900} Thomas, supra, n.8 p.244
\bibitem{Mukwaya1900b} Mukwaya, supra, n.46 p.20
\bibitem{Mukwaya1900c} Mukwaya, supra, n.46
\bibitem{Thomas1900b} Thomas, supra, n.8 p.244
\bibitem{Meek1900b} Meek, \textit{Land Law and Custom in the Colonies}.p.132.
\bibitem{Thomas2000} “Mukwaya, supra, n.46 p.20; Thomas, “An Experiment in African Native Land “. p.244
\end{thebibliography}
cotton fields of the mailo owner or by demanding a portion of the cotton produced or its money equivalent. The tribute in kind, given by the tenants, known as “envujo,” was translated by landowners into a demand for a substantial proportion of the tenant’s crop. It is said that as much as one out of every three bags of seed cotton was levied in some cases. The landlords also imposed a rent on the peasant cultivators which was a commutation into money of the services traditionally offered by a peasant to his chief. By 1918 this rent (Busulu) was 10 Shillings a year for each peasant’s garden, occupying usually one or two acres, but there was every indication that this rate would soon be increased by the landlords. The peasant tenants’ economic conditions were very difficult. In addition to the excessive extraction of busulu and envujo by the Landlords, there was the customary labour required of them by the native government or a money payment in lieu as well as the poll tax imposed by the British Government. The tenants realized that they had become tenants at will of the new mailo owners and they were always faced with the prospect of being evicted.

Great discontent attributed to the extreme demands of the landlords prevailed among the peasants on their holdings and they compared the rapacity of their present landlords with the benevolent despotism of the chiefs of earlier days. Further, owing to the rising and oppressive rents demanded by the landlords, the peasants had started reducing production. According to Mamdani, the decline of acreage devoted to cotton in Buganda was the tenant’s reaction against the rising rents. Cotton acreage declined from 27,380 acres in 1911-12 to 20,100 in 1916-17.

Consequently, the British and Native governments in 1918 discussed the desirability of preserving ancient butaka tenure in its entirety. A law was drafted to provide for the acquisition of butaka lands and to vest them in clan trustees, while dispossessed landowners would be compensated by other land. The British Government offered Crown lands to facilitate this process. However, since the Native Council was dominated by the land owning class, this bill was
never passed into law. Good laws may never see the light of day because of a disinterest by the law makers or the state. In this case, this law which could have helped to resolve the land issue over butaka lands was sabotaged by the landed class whose membership was dominant in the Lukiiko.

However, a matter of such significance could not be arbitrarily deferred. The discontent that had long been endured reached a climax and found expression in the Bataka led tenant protests of 1921 under the Bataka Movement. The Bataka Movement was an association also usually referred to as the ‘Federation of Bataka’ under the leadership of the Bataka but having a membership of peasants, some minor chiefs and several other landowners, acting from various motives, chief among them being political opposition to Sir Apollo Kaggwa, the then Prime Minister and his government. The Bataka chiefs as we saw in Chapter five were clan heads who prior to the 1900 Agreement had been custodians of butaka land belonging to the clan and were aggrieved when after the 1900 Agreement, they were deprived of this influence and butaka land was allocated to other chiefs and private landholders as mailo estates.

The chief complaint of the Federation was that the allotment of mailo land was unfair in that it favoured the chiefs as against the other claimants to the control of land. A further grievance was the way in which the paper claims were converted into rights over actual land. The big chiefs, whose claims were naturally considered first, came into possession of the biggest and the best villages in complete disregard of the rights of occupation and cultivation of the minor chiefs and of traditional associations to certain villages by certain people. The Federation therefore demanded the restoration of lands to the clans—a return to butaka tenure, the ancient customary system of clan control of land and ‘the restoration of all the positions of authority that had characterized Buganda in the past, and described commodified social relations as a form of enslavement.”

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99 Ibid.
100 Thomas, supra, n.8 p.245
101 Thomas, supra, n.8; Meek, Land Law and Custom in the Colonies. p.134
102 Sometimes referred to as the ‘Bataka Association’ Mukwaya, supra, n.46 p.21
103 Meek, Land Law and Custom in the Colonies. p.135.
106 Mukwaya, supra, n.46 p.2
107 Hanson,”When the Miles Came: Land and Social Order in Buganda, 1850-1928.”abstract
The Federation was, essentially an association of the “have-nots”. Their arguments which questioned the good faith of the Native Council, were countered by the arguments of an association of the ‘haves’ the larger landowners. As a result, Buganda was divided into two political camps. Lengthy petitions from these two rival groups were presented to the King of Buganda, who had now assumed power after a long period of regency and from whom the petitioners expected redress. However, when the King recognised and eventually admitted his constitutional inability to effect change without legislation by the Lukiiko, the Federation then appealed to the British Government to address their grievances. As a result a special commission of enquiry was constituted in April 1924 to inquire into the distribution of land under the 1900 Agreement and to specifically investigate the grievances of the Federation. The commissioners found that there were definite injustices and that ‘in a number of instances, [the] Bataka were improperly dispossessed of the Butaka land which was vested in persons who were not rightly entitled to it.’ The commissioners also found that some kinship heads who were allotted mailo lands could not assert their claims to traditional lands because they were now owned by one or other of the big chiefs and that in other instances the rightful claimants to clan lands were passed over because either they were not Christians or lacked the necessary political influence.

The commission deemed a re-distribution justified in order to correct previous wrongs and injustices and hence recommended the establishment of a land arbitration court with the mandate to revise the original land allocations and restore lands to their pre-1900 Agreement owners. This recommendation although initially accepted by the British Government was on closer scrutiny found to be impracticable owing firstly, to the number and complexity of interests involved and secondly, to the firm entrenchment of the mailo system in Buganda.

The 3000 to 4000 original titled landowners in Buganda had through succession and purchase increased to an estimated 10,000 mailo title owners. Former butaka lands had been divided into small holdings and had passed to genuine purchasers for value. Others had been transferred to non-natives as plantations or encumbered with leasehold interests in respect, for

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108 Thomas, supra, n.8 p.246
110 Mukwaya, ibid Thomas, “An Experiment in African Native Land ” p.245.
instance, of cotton ginnery sites. It was clearly difficult to place any limitation on the scope of the proposed arbitration court, which it seemed would have to investigate the title of every landowner in Buganda. No workable plan for financing the enormous cost of expropriation and compensation was available and yet confiscation was not an option.

Secondly, the pseudo-freehold mailo tenure system had become firmly established. Attempts to formulate the incidents of the tenure upon which butaka estates would be held should butaka tenure be restored made it clear that modern conceptions of individual tenure had become ineradicably implanted in the minds even of the butaka claimants, and that the result of the inevitable confusion of the re-introduction of butaka tenure might be nothing more than the substitution of one group of landowners by another. According to Thomas:

...Buganda had, in less than a quarter of a century, progressed so far along the road towards Western conceptions of individual ownership of land that its social organisation could no longer adapt itself to a system of clan tenure. Any such system which might under legal sanctions have been introduced would be, not butaka tenure, but a hybrid adaptation to modern conditions which would inevitably be subjected to continuous modification under pressure of economic forces.

In 1926, the issue was referred to the Secretary of State for colonies L S Amery who 'rebuked the regents in very strong terms for the manner in which they used their powers at the time of allocation.' Nevertheless, the Secretary of State also decided that the whole matter could not be re-opened and that the present owners must remain in the possession of their estates. The British Government therefore, could not accede to the Federation demand of restoring Butaka tenure and redistributing the land as recommended by the Commission. This decision not to restore Butaka tenure was publicly announced on 7th October, 1926 and justified thus — 'whether the ownership of large freehold estates should vest in one individual or another is, looking to the interests of the country as a whole, of less importance than the safeguarding of the interests of native tenants.'

It was clear to the British Government that the Bataka isolated from the tenants were not a political threat. What they were looking for was not restoration of their pre-1900 responsibilities. They wanted to own land themselves. The real problem for the colonial government was the tenants’ grievances which had serious political and economic

119 Meek, supra, n.45 p.134
120 Thomas, supra, n.8 p.246-7
122 Low and Pratt, supra, n.4 p.235
123 Thomas, supra, n.8 p.247
implications.\textsuperscript{125} For instance, the Acting Governor had in 1926 expressed concern to the Secretary of State for Colonies that ‘the levying of excessive rents and of tribute on produce was endangering the production of economic crops and creating a sense of insecurity in the minds of their tenants.’\textsuperscript{126} Further, the rural unrest and discontent undermined the production of export crops thereby diminishing the colonial state’s revenue.\textsuperscript{127}

The British Government decided to insist on the enactment by the Buganda government of legislation which would guarantee security of tenure to native occupiers and regulate the payment of rents and tribute in kind. The Buganda Government cooperated and the narrower interests of its individual members succumbed to considerations of common welfare. Hence in July 1927, The \textit{Busulu and Envujo Law, 1927} was enacted.

The \textit{Busulu} and \textit{Envujo} Law, 1927 (hereinafter referred to as the ‘1927 Law’) was enacted to regulate the relations between the mailo owners and tenants and particularly to protect the interests of the customary tenants. The intention of the law was to create and preserve a class of smallholders, the official ideal at the time and grant them the security of tenure necessary to encourage the planting of coffee ‘which is a high-priced, slow-maturing and long-surviving crop.’\textsuperscript{128} The 1927 enactment was a law which, while safeguarding the peasant cultivator, gave reasonable regard to the claims of the landowner.

The 1927 Law legally recognised the usufructuary rights of the tenants and assured the tenants of security in the occupation of their plots and freed them from the fear of arbitrary eviction. They could not be forced off their holdings except upon a court order and save for public purpose or for other good and sufficient cause.\textsuperscript{129} Their rights of access to pasturage, salt-licks and the right to cut timber were also guaranteed.\textsuperscript{130} Their tenancy rights were inheritable but could not be divided among heirs, sublet or sold. In return, the tenant was obliged to pay an annual fee (Busulu) of Shs. 10/- for the use of the land. Failure to pay made the tenant liable to be sued for recovery in a Buganda Court. Payment of Busulu gave the tenant the right to cultivate all crops as he wished with the exception of cotton, more than one acre of maize and more than

\begin{thebibliography}{9}
\bibitem{126} Dispatch from Jarvis, Acting Governor to Secretary of State for Colonies, Aug 28 1926 Ref Co 536/143 Public Records Office London
\bibitem{128} West, \textit{Land Policy in Buganda}; p.72.
\bibitem{129} s.11, \textit{Busulu and Envujo Law, 1927}. Tenants could not be evicted unless they abandoned their land, or if a new owner could demonstrate that this was needed for his own agricultural use and that no alternative holdings were available. An owner could not evict tenants in order to engage in commercial agricultural activities – only his rights of subsistence production were guaranteed.
\bibitem{130} Ibid. s.9(a).
\end{thebibliography}
ten full-bearing coffee trees. In addition, the tenant had to pay tribute on produce (envujo) of one gourd (four gallons) of beer on every occasion of brewing or Shs. 4/- in lieu and one out of every five bark cloth trees on the plot. The tenant required the permission of his landlord to grow cotton, more than one acre of maize and more than ten coffee trees, and he had to pay envujo of Shs. 4/- an acre up to three acres. Where the kibanja exceeded three acres, determination of the envujo payable was by mutual agreement between the landlord and the tenant.\textsuperscript{131} Mailo owners could therefore levy commercial rents on bibanja\textsuperscript{132} plots where more than three acres were planted in cash crops and could also charge rent on leased land (non-inheritable) known as bupangisa. Furthermore, the law required that ‘the tenant shall on his part render to the mailo owner all respect and obedience as is prescribed by native law and custom.’\textsuperscript{133} The Busulu and Envujo fees established in 1928 were never revised until 1975 when they were abolished under the Land Reform Decree. By this time, the fee had become of more symbolic rather than of economic value.\textsuperscript{134} Mukwaya writing close to thirty years of passing the 1927 Law posited that:

[...] it is rare for courts to grant orders of eviction against tenants who fail to pay busulu or envujo. Any dues in arrears are legally considered civil debts, which are recoverable in the usual manner. But the main reason why there is so very little conflict about the busulu and envujo is that the present rates are within the means of every peasant. They bear no relation to the present value of the land, or the prices of the crops, or even to the rates of the monthly wages to which they were originally related.\textsuperscript{135}

Consequent to the 1927 Law was the rise of a class of small-scale capitalist farmers, who, with the security of their bibanja, started producing coffee for the world market using migrant labour from outside Buganda. The rise of this group was, however, the unintended consequence of the Busulu and Envujo Law because, until about 1955, official colonial policy remained the ideal of peasant producers with secure land-use rights.

Another unintended consequence of the 1927 Law was the expansion of a fledgling market in bibanja or usufruct rights. Prior to 1928, when a tenant shifted, the kibanja would revert to the landowner. However, in order to circumvent this reversion, some tenants would sell their kibanja without seeking the consent of the landowner under the guise that a relative was looking after it in their absence. When landowners discovered this deception, they started

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\textsuperscript{132} Plural of kibanja—a plot of land where the occupant has use rights (usufruct).

\textsuperscript{133} Section 10 Busulu and Envujo Law, 1928


\textsuperscript{135} Mukwaya, supra, n.46 p.63
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demanding *kanzu* (entry money) from every new *kibanja* occupant. The 1927 Law was intended, *inter alia*, to discourage tenants from sub-letting or selling their *bibanja* in line with the official policy of preserving traditional peasant producers with secure-use rights but without marketable title.\(^{136}\) However, although the sale of *bibanja* was forbidden by law, the practice of demanding *kanzu* was expanded and the fledgling market in *bibanja* grew. Once *kanzu* had been paid to enter *bibanja*, holders believed their rights to the land could be transferred or sold. Before long, a *de facto* practice was established that permitted the sale of *bibanja* subject to the landowner’s approval of the intended buyer.\(^{137}\) The landlords became willing accomplices to these illegal transactions because they preferred payment of *kanzu* to the alternative of outright loss of their control over the *bibanja* as they were now inheritable under the 1927 Law and yet the economic rents derived from them were fixed and meagre.

Similarly, large mailo owners were also keen to sell *bibanja* in order to shield themselves from the economic effects of the new Law. Opportunities for this arose out of the demand for residential and commercial land use in areas such as Mengo.\(^{138}\) Part of this demand came from Baganda workers (such as clerks) who desired titled land to become part of the landed gentry.\(^{139}\) This demand for *mailo*, the consequent land transactions, donations and inheritance increased the number of landowners in Buganda from approximately 4,000 in the initial allocation of 1900, to approximately 200,000 in 1974.\(^{140}\)

A negative consequence of The *Busulu* and *Envujo* Law was that it created an economic stalemate between the landlord and the tenant because ‘no constructive move [could] be made by either mailo owner or tenant. The mailo owner [had] ownership without inducement to invest and the tenant [was] in occupation without the power to progress.’\(^{141}\)

The 1927 Law was effective in providing security of tenure to the tenants, the primary producers of cotton and coffee and in fact led to an increase in the production of cash crops in demand by British industries in the 1930’s.\(^{142}\) In a study published in 1953, Mukwaya showed that


\(^{138}\) For several decades Kampala catered almost exclusively to European and Asian interests. Influential Africans lived outside the boundaries of the town in the *Kibuga* around the *Kabaka’s* Palace and the seat of the Ganda Native Government on Mengo Hill. Although this area was also increasingly urbanised, its administration was the responsibility of the Buganda Native Government.

\(^{139}\) AW Southall, "Determinants of the Social Structure of African Urban Populations, with Special Reference to Kampala (Uganda)," *Social Implications of Industrialization and Urbanization in Africa South of the Sahara* (1956).


\(^{141}\) West, *Land Policy in Buganda*: p.84.

in over 400 land cases he examined there was no case of illegal evictions. All the cases involved, 
inter alia, minor boundary disputes and succession related issues.\textsuperscript{143}

The success of the 1927 Law in protecting the tenants against the landlords was limited 
by the provisions that restricted the acreage allowed for the growing of some crops by the 
tenants. The law protected the tenants for a maximum of 3 acres; an insufficient area to provide 
the food needs of a family as well as grow cash crops.\textsuperscript{144} Any tenant therefore who needed a 
bigger acreage had to rent (\textit{okupangisa}) more land from the landowner, who was free to charge 
as much as he could get the tenant- renter to pay since the cap on rent under the 1927 Law only 
covered three acres.\textsuperscript{145} Furthermore, the tenants had no certificates authenticating their 
ownership of the areas occupied. A tenant could not mortgage his plot (\textit{kibanja}) to secure a 
loan.\textsuperscript{146}

\textbf{6.4 Why did property rights to land in Buganda change during the colonial period?}

The change from predominantly use rights to land in pre- colonial Buganda subject to the 
users' fulfilment of their socio- political obligations to their chiefs, and based on a unique 
concept of landlordism, where the chiefs ‘owned’ the people living on their land, distinct from 
the English concept of landlordism, where landlords owned the land itself,\textsuperscript{147} to individualized 
property rights ushered in by the 1900 Agreement during the colonial period, contradicts extant 
evolutionary theory that communities respond to increasing demands for property by moving 
endogenously toward greater individualization of property rights.

According to the evolutionary theory, if there is an abundance of land, we should not 
expect to observe private property rights. Yet, in Buganda, private property rights were 
introduced by the colonial government when land was not necessarily scarce as to make it more 
valuable and consequently its pursuit more competitive. On the contrary, land in Buganda was 
plentiful. In fact chiefs sought to control men and not the land. The scarcity of land – a vital 
precondition for the naïve theory of property rights was absent.

Instead, what existed was a need by the colonial government to make the protectorate 
self-sustaining, an objective which would be achieved by the land settlement under the 1900

\textsuperscript{143} Mukwaya, supra, n.46 ;Peter Mulira, "Towards an Equitable Land Regime in Uganda: The Land Ammendment Bill and Related Legislation," p.2.
\textsuperscript{145} Ibid. p.64
\textsuperscript{146}Nsibambi, A.R, Land Tenure Relations in Uganda 1900-1955
\textsuperscript{147} West, Land Policy in Buganda.
agreement. We have seen that when the commissioner Harry Johnston claimed waste and cultivated land in Buganda as crown land, it was with the intention of making Uganda a financially viable protectorate. He envisioned large scale plantation agriculture under European control being introduced in these areas, and anticipated that crown land would ‘place at the disposal of the Uganda Administration a very important source of future revenue.’ Private property rights in Buganda therefore, were established not as a result of native demand but rather by the action of the colonial government.

This may seem non-persuasive considering that the 1900 agreement under which the land rights system was altered was not solely imposed by the colonial government but rather negotiated between both the colonial government and leaders of Buganda kingdom. It is significant to note that although the Buganda leaders were part of the negotiation, they had no need for reform of land rights in Buganda. The 1900 Agreement was for all intents and purposes, a modality employed by the colonial government to streamline indirect rule in the protectorate. It is the agreement that established the basis of the relationship between the colonial and Buganda governments as well as that which defined the legislative, judicial and administrative functions of the Kabaka and his native council. Of course it is in that same agreement that the land settlement was provided for. The only reason that the commissioner Harry Johnston opted for negotiation was because Buganda already had a semi-feudal system with a well-established government with which discussions could be held. In this case therefore, we literally see the emergence of private property rights being the product of political negotiation with the intent to benefit the colonial government which was the interest group holding power.

It is also instructive to note that, with the exception of the Registration of Titles Ordinance 1908, all the laws affecting mailo tenure in Buganda were not enacted by the colonial government. Whenever the need arose, requiring the colonial administration to impose any policy decision with respect to mailo land, it exerted pressure on the Lukiiko to enact the relevant law. Certainly, there were strong political reasons for the colonial government not to get

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149 Ibid.
151 Batungi and Ruther, supra, n.1 p.117
154 See for example the Land Transfer Law, 1904; Land Law 1908; The Busulu and Envujo Law 1928.
directly involved in mailo matters. Land was a delicate issue and the government was careful not to antagonise the beneficiaries of the land settlement who also happened to be the political leaders of Buganda. Negotiation of the 1900 Agreement with the Buganda kingdom leaders was therefore no exception in the colonial government strategy of ensuring its will through subtle means namely making it appear as though it was the decision of the Buganda leadership being legislated.

Colonialism, a primarily political development, is the major factor that explains the initial emergence of private property rights in Buganda. In this case, institutional change was manifested as a change in the rules of the game implemented by the state (the colonial government) to alter an institutional structure so that it corresponds to its goal of having a self-sustaining protectorate.

The political agenda of the colonial administration required the expropriation of land for agricultural, settlement and administrative purposes. Thus, a legal framework was necessary to facilitate this agenda and provide for the administration of the resulting land allocation to both settlers and indigenous peoples.\(^{155}\) Whereas it may be said that, in the early 1900s, it suited both the colonial government and the Buganda chiefs to limit the number of large landowners so that those without land (title) would be available as followers, working under conditions set by the landowners, and on crops such as cotton governed by the economic objectives of the colonial government,\(^{156}\) it is unlikely that the natives—chiefs or peasants—had any clear understanding of the consequences of the land settlement under the 1900 Agreement. There were no European farmers in Buganda at the time and land had no intrinsic value. To the chiefs therefore, the land settlement seemed to have little more effect than to confirm the existing position under which a chief's wealth and influence were proportionate to the number of peasants whom he controlled. In fact, at the time of the distribution of mailo land, chiefs tried to ensure that they were allocated land which was already well populated. This lack of appreciation of the full extent of the effects of the land settlement was not only confined to the Baganda leaders. It appears from his despatches that the commissioner Sir Harry Johnston considered that he had given every man security of tenure.\(^{157}\) This as we now know was not the case. Following the conclusion of the 1900 Agreement, and the introduction of mailo land tenure, peasants had been rendered

\(^{155}\) Joireman, *Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development.* p.82.

\(^{156}\) Hanson, “When the Miles Came: Land and Social Order in Buganda, 1850–1928.”; Porter, “Questioning de Soto: The Case of Uganda.” p.213;Thomas, supra, n.8 p.239

\(^{157}\) Ibid; p.240
landless and left as mere tenants on mailo land with neither security of tenure nor formal recognition of tenant rights.

In fact, it may be said, that with respect to the land settlement clauses, the parties to the 1900 agreement, particularly the representatives of the British Government, worked on the assumption that, although they had secured crown land for the British Government, with respect to the natives, they were only formalising and granting in a permanent form the customary rights and privileges possessed by the beneficiaries of the square miles. However, as we have already seen, in reality, they found that the rights so granted to individuals constituted a fundamental change in the customary land holding system. Firstly, the political and usufructuary rights of the chiefs were changed into a kind of freehold tenure now known as the mailo system. Secondly, and subsequently, the rights of the peasant holders living on these mailo lands were defined by law.

6.4.1 The ‘Why’ of Property Rights Change under the Busulu and Envujo law, 1927.

The enactment of the Busulu and Envujo Law, 1927 ushered in further changes to the institution of property in Buganda during the colonial period and different dynamics of institutional change were observed. The evolutionary theory of property rights may partially explain the changes to the institution of property namely recognising the rights of the tenants on mailo as well as defining and regulating their relationship with the mailo owners under the 1927 Law. According to extant evolutionary theory, when relative prices change, there is a tendency for parties to believe that they could be better off under alternative institutional arrangements. This is because relative price changes alter the costs and benefits of an existing property regime such that it becomes less efficient than the one that replaces it. Scarcity compels individuals to experiment with different property rules in an effort to find a system that improves their welfare by enabling them to capture more of the value of the resource.

Following the 1900 Agreement, tenants continued living harmoniously on the land without any observable changes in their relationship with the land owners or grievances. This situation prevailed until the changes in relative prices in Buganda owing to the introduction of cotton as a cash crop. The demand for land was greatly heightened followed by increasing land scarcity and land values. There were increasing tensions between mailo owners and tenants.

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158 Mukwaya, supra, n.45 p.15
159 Ibid.
162 Ibid., p.350.
owing to the excessive rents being demanded by the former. The tenants responded to these relative price changes by the demand for more secure rights by seeking the restoration of the butaka tenure. Although butaka tenure was not restored, the government responded to their demand by the passing of the Busulu and Envujo Law, 1927. We therefore see that institutions may evolve in response to demand for new institutions as economic conditions change.

It should however be noted that the demand for a return to butaka tenure did not automatically generate institutional supply. The resultant changes in the property institution set out in the Busulu law of 1927 were clearly the result of a political process hence the limited explanatory power of the evolutionary theory. According to North, institutional change cannot simply be explained by the changing relative prices but also by evolving ideological perspectives that lead individuals and groups to have contrasting views of the fairness of their situation and to act upon those views.\(^{163}\) Hence the political process of formal institutional change.

North observed that formal rules are created to serve the interests of those with the bargaining power to devise new rules.\(^{164}\) The Busulu Law 1927 was no exception and it was passed to serve the interests of the British Government which had the bargaining power to devise new rules. The tenants in the protests of the 1920s led by the Bataka demanded a restoration of the butaka tenure as a consequence of the injustices they were facing under the new mailo owners. Since this rural unrest undermined the production of export crops thereby diminishing the colonial state’s revenue base, The Busulu and Envujo Law, 1927 was enacted to regulate the relations between the mailo owners and tenants and particularly to protect the interests of the customary tenants thereby serving the interests of the British Government.

It is noteworthy that although both the Bataka and the peasant tenants had expressed their grievances, it is only the grievances of the tenants that were addressed in the Busulu Law and the explanation for this is that the interests of the peasant tenants coincided with the interests of the British government. The grievances of the Bataka were of no consequence even if ignored. It was clear to the British Government that the Bataka isolated from the tenants were not a political threat. The major concern for the colonial government was the tenants’ grievances which had serious political and economic implications.\(^{165}\)

\(^{163}\) North, *Structure and Change in Economic History*: p.58.


6.5 The Emergence of informal (de facto) land rights in Buganda during the Colonial Period

We noted in chapter two that it is important to distinguish between *de jure* (formal) and *de facto* (informal) property rights when trying to understand and explain property rights change. This is because; *de jure* and *de facto* property rights emerge and change for different reasons. During the colonial period in Buganda, we observe the emergence of *de facto* property rights - the selling and buying of *bibanja*, mediated by the mailo owners, a practice contrary to the law. Why did this *de facto* practice emerge?

One intention of the *Busulu* and *Envujo* Law was to discourage tenants from sub-letting or selling their *bibanja*. West observed that:

> in framing the law [1928 Busulu and Envujo Law] it was advisable, for their protection, to discourage tenants from selling their *Bibanja*. There was no historical precedent for such sales and the intention of the law was to preserve the traditional landholding as closely as possible. Nothing in the law was to be construed as giving the tenant the right of transfer to sublet his *kibanja*... and subletting for the purposes of profit was specifically made an offence...\(^{166}\)

Thus until about 1955, the colonial government ideal was the peasant cultivator (*kibanja* holder) with secure use rights but no marketable title.\(^{167}\) Yet, commercialization of land emerged and with it, an informal market in *bibanja* going a long way to show that sometimes formal laws yield unintended consequences. They may intend one thing and yet inadvertently engender another. This budding market in *bibanja* was such an unintended consequence of formal law, the 1927 Act.

This *de facto* practice of selling and buying *bibanja* may be described as a reactive informal institution because it emerged in direct response to incentives created by the formal rules, the *Busulu* and *Envujo* Law. The *bibanja* holders and landowners alike were creatively responding to formal rules that they found too constraining. Selling and sub-letting of usufruct rights (*bibanja*) was forbidden by the 1927 Law. The landlords became willing accomplices to these illegal transactions because they preferred payment of *kanzu* to the alternative of outright loss of their control over the *bibanja* as they were now inheritable under the 1927 Law and yet the economic rents derived from them were fixed and meagre. As one writer observed, in view of the security of a tenant’s tenure and of the fact that this security passes to his heir, the

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\(^{166}\) West, supra, n.11 p.77

ownership of the mailo estates has ‘in all but law passed to the tenant, the proprietor’s rights being so restricted as to be almost valueless.’\textsuperscript{168} We therefore see a clear incentive for the landlords to try and evade the provisions of the 1927 Law.

This \textit{de facto} fledgling market in \textit{bibanja} therefore emerged as a coping strategy devised by \textit{bibanja} holders and \textit{mailo} owners to evade the restrictions, uncertainties, unfairness, ambiguities, and ineffectiveness of formal institutions. We saw in chapter 3 that where formal institutions are deemed unfair or illegitimate by some economic agents, reactive informal institutions may emerge to challenge or substitute for them with the view to transform or even eliminate them.

The \textit{de facto} market in \textit{bibanja} was a competing informal institution because its goals were incompatible with the goals of the formal institution. The 1927 Law was intended, \textit{inter alia}, to discourage tenants from sub-letting or selling their \textit{bibanja} in line with the official policy of preserving traditional peasant producers with secure-use rights but without marketable title.\textsuperscript{169} To the contrary, the practice of demanding kanzu was growing and the \textit{de facto} market in \textit{bibanja} was thriving and expanding. Once \textit{kanzu} had been paid to enter \textit{bibanja}, holders believed their rights to the land could be transferred or sold. Before long, a \textit{de facto} practice was established that permitted the sale of \textit{bibanja} subject to the landowner’s approval of the intended buyer.\textsuperscript{170}

As we saw in chapter three, competing informal institutions structure actors’ incentives in ways that are incompatible with the formal rules: to follow one rule, actors must violate another.\textsuperscript{171} The mailo owners and \textit{bibanja} holders were violating the provisions of the 1927 Law by engaging in this market in \textit{bibanja} using the practise of the demanding of \textit{kanzu}.

Such competing informal institutions may result from changes in either the content or the enforcement of formal institutions as we saw in chapter 3. That is why, with a change in law which provided that a tenant who relocates and leaves a kibanja unoccupied loses it to the mailo owner to the 1927 Law, which provided for the inheritability of \textit{bibanja} while fixing the rent payable, the \textit{de facto} practice was enhanced.

The rent and \textit{envujo} payable by the tenants to the landlords remained unchanged since 1927 despite the drastic drop in the value of money.\textsuperscript{172} Consequently, the mailo owners grasped

\textsuperscript{168} Morris and Read, supra, n.3 p.349
\textsuperscript{171} Helmke and Levitsky, “Informal Institutions and Comparative Politics : A Research Agenda.”p.729
\textsuperscript{172} Morris and Read, supra, n.3 p.349
every available opportunity to circumvent the 1927 Law. In addition to mediating the market in bibanja through the practice of demanding kanzu, the landlords also charged new tenants a premium. The practice of demanding kanzu was also used by the mailo owners to circumvent the provisions of the 1927 Law even beyond their engaging in the forbidden buying and selling of bibanja. In order to compensate for the reduction in the amount of rent they could extract from tenants, mailo owners resorted to demanding increasingly more entry money (kanzu), a condition not regulated by the 1927 Law. This ‘entry money’ practice became increasingly lucrative and widespread with the escalating arrival of immigrants from Rwanda and Burundi who were keen on taking up bibanja. Although these immigrants came to Buganda as wage labourers, they eventually acquired bibanja, thereby becoming peasant tenants. The mailo owners gained tremendously by allocating bibanja to the immigrants: Firstly, the immigrants paid entry money (kanzu) which was so high that they mistook the bibanja they obtained as being the same thing as purchase of the actual land (titled land). Secondly, the mailo owners gave the immigrants bibanja of less than three acres in order to increase the number of plots of land they could carve out of their land; Thirdly, on many occasions, the mailo owners did not issue receipts to the immigrants for the legal rent paid contrary to Section 7 of the 1927 Law because they knew that since they were non-natives, they did not have full knowledge of either the law or the local situation. This was beneficial to the mailo owners but worked against the immigrants because any tenant who could not produce a rent receipt could be liable to eviction without protection under the Law.

Change in competing informal institutions may also result from changes in either the content or the enforcement of formal institutions. On the one hand, competing informal institutions often persist because formal institutions are weakly enforced. Tenants on mailo had no documentary evidence of their usufructuary rights. All that the tenant received was a Busulu receipt from the mailo owner as required by the 1927 Law. This was already a loop hole that rendered enforcement weak and ineffective. This lack of documentation made it easy to stealthily carry out the practice of selling bibanja and giving of kanzu. It was not easy to detect the existence of the on-going sales in bibanja. This competing informal property institution was able to thrive and persist because the formal institutions, in this case the 1927 Law, which made sale and sub-letting of bibanja illegal was weakly enforced.

\[174\] Ibid.
\[175\] Helmke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda."
6.6 The Process of Property Rights Change in Colonial Buganda.

We explained in chapter two, that an overview of the literature reveals two broad categories of processes of institutional change that may be used to explain how property rights emerge and change.\textsuperscript{176} The first category comprises theories in which institutions are intentionally designed and implemented in a centralized way, either by an individual or by many individuals interacting through ‘collective-choice or political process in which they lobby, bargain, vote, or otherwise compete to try to implement institutional changes which they perceive as beneficial to themselves, or to block those they view as undesirable.\textsuperscript{177} This is direct institutional change. The second category consists of theories of ‘evolutionary’ institutional change which view property rights as an unintended consequence of uncoordinated actions of individual agents and thereby arising spontaneously.\textsuperscript{178} The evolutionary theory of property rights posits that private property emerges within society from the bottom up, in response to underlying economic and social forces.\textsuperscript{179} This is indirect institutional change.

That being said, in reality, both processes of institutional change namely evolutionary and deliberate design operate simultaneously,\textsuperscript{180} and it is often difficult to neatly separate the two. Nonetheless, in many cases, at a given moment, one of the two will probably be dominant.\textsuperscript{181} In this respect, the situation in Buganda was no exception. We therefore follow North and distinguish between the processes of direct and indirect institutional change in Buganda. North combines the intentional design and evolutionary approaches and offers one of the few existing analyses of institutional change explaining the possible mechanisms, their characteristics and their determinants.\textsuperscript{182} ‘Direct institutional change’ refers to the process of change of formal rules through a political process as a result of deliberate, although bounded rational actions by organizations, prominent among which is government influenced by interest groups and individual entrepreneurs. Indirect institutional change on the other hand relates to informal rules which change spontaneously through an evolutionary process, and play a key role in institutional change because they change slowly and cannot be changed deliberately.

\textsuperscript{177} Kingston and Caballero, supra, n.180 p.153
\textsuperscript{178} Kingston and Caballero, supra, n.180
\textsuperscript{179} Wyman, “From fur to Fish: Reconsidering the Evolution of private property,” p.120; Demsetz, “Toward a Theory of Property Rights.” p.350
\textsuperscript{180} Kingston and Caballero, supra, n.180 p.153
An empirical study of Colonial Buganda reveals a prevalence of formal property. We see several laws being enacted to give effect to various policies that define and guide the enforcement of land rights. We see that the de jure attributes of the institution of property are changed mostly by the intentional decisions of actors. Yet, this does not mean that de facto or informal property does not exist. We also observe de facto property attributes in Buganda. These however do not reflect the intentional decisions of actors. Instead they appear to be the consequence of the designer’s cognitive limits and unintended consequences.

In explaining the process of property rights change in colonial Buganda therefore, we employ a framework as explained in chapter two that incorporates both intentional and unintentional design because a theory that depends on one explanation would be incomplete. Thus, in the next section 6.6.1, we explain the process of formal property rights change while in the subsequent section 6.6.2, we attempt to explain the process of informal property rights change in Buganda during the colonial period.

6.6.1 The Process of Formal Property Rights Change in Colonial Buganda.

The Ugandan (Buganda) case suggests that the origins of private property rights under the 1900 Agreement were intentionally determined, and reflected the interests of the colonial government in an institutional design based on the idea of a self-sustaining colony. H. W. West a frequent commentator on the Buganda land system commented that it was an experiment in ‘individualisation by administrative decree.’ The allocation of large tracts of land to the Baganda royal family and chiefs and the acquisition of thousands of square miles of land for the British Crown were all deliberate endeavours of the colonial government. As it has been said, it was in the interest of the colonial government to have a select number of large landowners so that those without land (title) would be available as followers, who would work according to the landowners’ instructions, and on cash crops such as cotton determined by the economic objectives of the Colonial Government. We have seen that in Buganda, property rights were changed through law by the colonial administration to make room for British settlers and prepare for the advent of the market economy.

Scholars of the intentional design school suggest that private property is the outcome of a political process. However, as we explained in chapter 2, the dynamics of a political system greatly differ from those of the voluntary contracting of parties in a market hence our elucidation of the political process of formal institutional change in chapter 4.

183 West, supra, n.11 p.2
It is the intentional decisions by actors that may change *de jure* attributes of the institution of property rights. The perception of political actors is the most critical variable in effecting *de jure* property rights. The *de jure* conditions of property rights are changed through a political process of policy reform.\(^{185}\) Indeed we can see that the perception of the political actors was the most influential variable at this stage of institutional change in colonial Buganda. When there was no demand at all for private property by the Baganda natives, the colonial government and the Buganda leadership- the chiefs, all political actors established the institution of property rights through a foundational document, the 1900 Agreement.

Following the introduction of mailo, a quasi\(^{186}\) freehold tenure in Buganda, interest groups emerged which became a factor for change of subsequent property rights. The various veto players in Buganda emerged and were born. These include: the mailo owners a good number of whom were members of the Lukiiko (the native council), a collective institutional veto player which was mandated to legislate; the Buganda Government; the tenant peasants whom we may describe as partisan, indirect veto players because their approval was neither legally needed nor necessary in the law- making process. Nevertheless, they had the potential to influence legislation; and the colonial government which was also an institutional veto player.

Veto player theory aids our understanding of the process of formal institutional change in Buganda. The basic premise of the veto player approach is that in order to change the legislative status quo, certain actors referred to as veto players have to agree to the proposed change. We see individuals or groups interacting through some kind of collective choice or political process in which they lobby, bargain, vote or otherwise compete to try to implement institutional changes which they perceive as beneficial to themselves or to block those they view as undesirable. For instance, in 1918, prior to the enacting of the *Busulu* and *Envujo* Law, the colonial government, proposed a bill that would help to preserve ancient *butaka* tenure.\(^{187}\) The bill proposed that government would acquire *butaka* lands, vest them in clan trustees, and compensate dispossessed landowners by other land.\(^{188}\) However, the Native Council which was dominated by the land owning class blocked the bill and, never ever passed it into law because it was

\(^{185}\) Libecap, *Contracting for Property Rights*: p.4.
\(^{186}\) Referred to as such because of its limitations; notably, two major restrictions imposed statutory controls over the mailo owner. Firstly, the 1908 Buganda Law prevented a Mailo owner from disposing of his land to one who was not of the Protectorate, the Churches, or other societies, except with the approval of the Governor and the Lukiiko). The second restriction, through the Land Law, Succession Law & the 1928 Busulu & Envujo Law, evolved around the specification of the jural relations between the mailo owners and the peasants, on the former’s land.

\(^{188}\) Ibid.
In fact, much earlier in the early 1900s, Buganda Government exercised its veto and prevented certain aspects of Legislation from being translated into law. There was a provision in the first draft of the native Land Law 1908, to the effect that certain small areas occupied by clan ancestral burial grounds should be excluded from the surrounding estates and handed over to the trusteeship of the Native Council.\textsuperscript{190} The Buganda Government, influenced by its self-interested members, some of whom were beneficiaries of butaka lands as private estates, exercised its veto and sabotaged the proposal.\textsuperscript{191} The provision was omitted from the draft at the last minute.

Another instance is when the Federation of Bataka were making lengthy petitions to the King about their grievances which included their questioning of the good faith of the Lukiiko. It is noteworthy that these petitions were at the time countered by those of the association of larger mailo owners the majority of whom were also members of the Lukiiko. Not surprisingly, again we see the Lukiiko exercising its veto and blocking legislation that is undesirable to them hence the Kabaka admitting to the Federation of the Bataka his inability to resolve the matter without the legislation by the Lukiiko. These three scenarios portray Buganda government and the native council as institutional collective veto players exercising their veto and stopping property rights reform bills and or proposals from becoming law because they did not serve their interests.

The veto player theory helps to explain the process of the enactment of the Busulu and Envujo law, 1927. As we saw in chapter 2, organisations can directly lobby the state to obtain a change in formal property rights. The Bataka and peasants had lobbied the state by way of the 1920s Federation of Bataka protests following the extraction of excessive rents (Busulu-ground rent and envujo-commodity rent) from them by the new mailo owners. The peasants as indirect veto players were able to exert political influence on the direct veto players (British government, native council) through lobbying which in this case involved the protests and the subsequent petitions made to the Kabaka and eventually to the British government.

The peasants as we have mentioned earlier are indirect veto players meaning that they can only exercise their veto power indirectly, through another actor, a direct veto player. To this effect, the peasants succeeded in convincing the British government, a direct veto player and subsequently the Lukiiko, another veto player to act on their behalf. The peasants were able to persuade the British government, of an at least partial congruence with their policy preferences. Whereas both the Bataka and the peasant tenants expressed their grievances, the British

\begin{flushleft}
\textsuperscript{189} Ibid.
\textsuperscript{190} Thomas, supra, n.8 p.243
\textsuperscript{191} Thomas, supra, n.8
\end{flushleft}
Government was especially concerned about finding a solution in favour of the peasant tenants. This is because the interests of the peasant tenants coincided with the interests of the British government. The rural unrest caused by the protests greatly undermined the production of export crops and consequently negatively affected the revenue base of the colonial government. The grievances of the Bataka were of no consequence even if ignored. It was clear to the British Government that the Bataka isolated from the tenants were not a political threat. The British Government in turn impressed it upon the Lukiiko to act in the interest of the common good. The members of the Lukiiko subjected their individual selfish interests to this persuasion and the Busulu and Envuyo Law, 1927 which, inter alia, protected the tenants against the rapacity of the landlords was successfully passed.

We can also see that the process of formal property rights change in colonial Buganda was slow and greatly incremental as predicted by theory. Actors do not change de jure conditions of the institution of property rights easily because they rarely have the incentives or the bargaining power to change more than marginal aspects of institutional rules. So, from the foundational moment when property rights were established under the 1900 Agreement, it was a slow-moving process. We observe a series of small changes that add up to big changes over a period of time. It is eight years later that the Land Law, 1908 was enacted to define the incidents of the newly created ‘mailo’ tenure and lay down the conditions under which mailo land was to be held.

Following the passing of the 1908 Land Law, another legislative need arose, the need to design a law that would provide a land registration system guaranteeing indefeasibility of title. Initially, a provisional law based on the Torrens System was enacted: the Registration of Titles Ordinance, 1908 which prescribed the form of certificate of title for mailo land, and provided that the British Government recognised the person named in the title as ‘absolute owner’ of the mailo land in question. It was not until fourteen years later, in 1922, that a comprehensive land registration law also based on the Torrens System was enacted.

Although the process of institutional change is generally overwhelmingly incremental, an accumulation of many small changes rather than occasional large changes, with the passing of the Busulu and Envuyo Law, 1927, we witness a major change. This law was probably the first legislative enactment in Africa dealing with native rental conditions. Yet it also reflects the

192 North, Institutions, Institutional Change and Economic Performance: p.89.
194 Meek, supra, n.45 p.135
view that actors do not change *de jure* conditions of the institution of property rights easily.\(^\text{195}\) Since about 1918, there had been talks with a view to restoring *Butaka* tenure, the scrapping of which was the underlying cause for the subsequent *Bataka* and peasant grievances that led to the *Bataka* Protests of 1921. The peasants’ grievances of tenure insecurity and demands for exorbitant rents by the *mailo* owners had started much earlier in 1910 with the introduction of cotton growing. And yet, it was not until more than a decade later in 1927 that a Law providing a solution was enacted. A short fall in the acreage of cotton under production, a direct threat to the economic fortunes of the Colonial Government provided the incentive required to expedite the passing of the 1927 Law to regulate landlord – tenant relations, restore peace and calm in the countryside and ensure uninterrupted growth of cotton.

Thus, we see that throughout the colonial period, the colonial and native governments continued to engage in the deliberate design of property in Buganda in response to existing gaps and needs at the time. It was a slow, over-time, step–by–step process depending on the design needs at the time.

### 6.6.2 The Process of Change of Informal *de facto* Property Rights in Colonial Buganda.

Apart from formal property rights, we also witness *de facto* conditions (land rights, land holding practices, informal land tenure) which emerge as a result of the unintended consequences of the *de jure* changes and the law of limited cognitive ability that is impeded by a weak bureaucratic capacity. They are the conditions that reflect the actual distribution or allocation of those rights.

The evolutionary approaches seem to explain the development of informal ordering of property rights in colonial Buganda—where property changed endogenously within the society as a result of the unintended consequences of actors following changes in socio-economic conditions. The new *Busulu* and *Envujo* Law of 1927 rather than discourage, bolstered the budding practice of buying and selling *bibanja* with the mediation of landlords. These changes took place in the absence of collective action and outside the political process.

It is clear that informal property institutions are not amenable to deliberate change. *De facto* property rights seem to have been the consequence of the designer’s cognitive limits (the colonial government) and unintended consequences. We reiterate that the informal property rights that we observe in Buganda during the colonial period are reactive informal institutions, those that emerge in direct response to incentives created by the formal rules.

\(^{195}\) Giannoni, “The Evolution of Property Rights in Argentina 1853–1949.” p.73
Formal rules comprise several constraints and opportunities.\textsuperscript{196} In fact, the constraints intended to limit the range of officially permissible behaviour may motivate actors to develop non-official operating arrangements.\textsuperscript{197} Additionally, formal institutions characterised by ‘unrealistic mandates create opportunities for actors to adjust, ignore, or evade discrete portions of formal institutions.’\textsuperscript{198} The Busulu and Envujo Law, 1927 was riddled with unrealistic mandates. The law established a rent ceiling for portions of land held by tenants on mailo land and yet made those plots inheritable as well as gave the tenants security of tenure. These provisions put the mailo owners in a precarious situation. They had land titles but could not get maximum value out of them. On the other hand, are the tenants whose mobility was curtailed by forbidding the vacating of the plots for more than six months otherwise forfeiting them to the mailo owner and yet refusing them to sub-let or even sell their plots. It is these unrealistic demands of the 1927 Law that prompted the tenants to develop creative solutions to their predicament and obtained the acquiescence of the mailo owners because they too suffered great disadvantage.

Although these non-official arrangements initially appeared peculiar, unique and isolated, over time, with repetition and diffusion, they evolved into adaptive informal institutions which violated existing formal institutions.\textsuperscript{199} This practice of demanding kanzu while mediating the buying and selling of bibanja was contrary to the 1927 Law and to the colonial government policy of tenants with secure use rights but no marketable title. However, for this process of creating reactive (adaptive) informal property rights to progress successfully, at least the primary custodians of formal institutions need to be complicit in allowing the repeated evasion of the formal institutions.\textsuperscript{200} They may do this by deliberately misconstruing the requirements of the formal institutions that they are meant to promote. It is predicted that this kind of behaviour is more likely to be found in situations, \textit{inter alia}, where local officials have interests that coincide with those of the local citizens in a particular policy area.\textsuperscript{201} The primary custodian of formal institutions in Buganda during the colonial period was the Lukiiko which was constituted by mailo owning chiefs who at the same time were involved in the kanzu – demanding practice in the mediation of the bibanja market. They connived with the bibanja holders, the tenants to evade the provisions of the 1927 Law.

Thus, adaptive informal institutions are more likely to emerge and flourish in jurisdictions where the interests of the enforcers of formal institutions and the creators of informal

\begin{footnotesize}
\begin{enumerate}
\item[196] Tsai, "Changing China: Private Entrepreneurs and Adaptive Informal Institutions." p.118
\item[197] Ibid.
\item[198] Ibid.p.125
\item[199] Ibid.p.126
\item[200] Ibid.
\item[201] Ibid.p.123.
\end{enumerate}
\end{footnotesize}
institutions converge,\textsuperscript{202} and this is most likely to happen when there is a divergence between the original intentions of formal institutions and the perceived needs and interests of local actors as in the case of emergence of substitutive informal institutions.\textsuperscript{203} As we have seen, this was the exact situation in Buganda where the interests of the Buganda leadership, also mailo owners coincided with those of the tenants, the creators of informal institutions. Further, we also note that there was divergence between the original intentions of formal institutions and the perceived needs and interests of the local actors. Whereas it was the colonial government policy ideal translated into Law for the tenants to have secure use rights with no marketable title, it is clear that the tenants and even the mailo owners wanted to maximise economic gain of their holdings now that land had acquired economic value.

6.7 Conclusion.

Change in the institution of property rights to land in Buganda during the colonial period is an instance of the possible variations to the causal mode reflected in the extant theories of institutional change advanced by, inter alia, North and other neoclassical institutional economics scholars. It is a clear example of institutional change imposed from above where no relative price change necessarily occurs.\textsuperscript{204}

Institutional change from above is a change in the rules of the game implemented by the state to alter an institutional structure so that it corresponds with the state’s ideology or goals.\textsuperscript{205} It is the kind of change we witness in Buganda when the colonial government negotiates a land settlement with the native government and introduces private property rights in Buganda to correspond to its goal of an economically self-sustaining protectorate. The institutional change imposed on the Baganda by the colonial government, from above, was completely independent of any relative price change and was motivated entirely by the agenda of the state.\textsuperscript{206}

We have shown that property rights during the colonial period in Buganda changed, not as a result of a change in relative prices as predicted by extant theory, but rather was brought about by colonization. Colonialism, a primarily political development, is the major factor that explains the initial emergence of private property rights in Buganda. In this case, institutional change was manifested as a change in the rules of the game implemented by the state (the

\textsuperscript{202} Ibid. p.126
\textsuperscript{203} Ibid. p.123.
\textsuperscript{204} Joireman, \textit{Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development.}: p.88.
\textsuperscript{205} Ibid. p.70; also as noted by North, \textit{Structure and Change in Economic History}.
\textsuperscript{206} Joireman, \textit{Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development.}: p.304.
colonial government) to alter an institutional structure so that it corresponds to its goal of a self-sustaining protectorate.

We have distinguished between *de jure* (formal) and *de facto* (informal) property rights when trying to understand and explain property rights change in Buganda because each category of rights emerges and changes for different reasons.

In explaining the process of property rights change in colonial Buganda therefore, we have employed a framework as explained in chapter two, that incorporates both intentional and unintentional design because a theory that depends on one explanation would be incomplete. Indeed, we have shown that no single theory on its own can sufficiently explain the dynamics of institutional change. We see the evolutionary theory come into play in Buganda with the introduction of the cotton crop. The land values increased and the mailo owners in trying to maximize their profits from the land demanded exorbitant rents from the tenants. This caused agitation eventually leading to the Bataka protests and the passing of the Busulu Law. However, this Law was not the sole outcome of a change in relative prices but also of the emergence of interest groups in Buganda and the exercise of their veto power.

We have identified formal (*de jure*) property rights in Buganda and seen that it is the perception of political actors which is the most critical variable in effecting *de jure* property rights change. Consistent with North’s approach, we have found that change within formal institutions cannot simply be explained by the changing relative prices but also by evolving ideological perspectives that lead individuals and groups to have contrasting views of the fairness of their situation and to act upon those views.²⁰⁷ Hence the political process of formal institutional change. We have combined the intentional design approach with its inherent political process and the evolutionary approach to try and explain institutional change in Buganda.

We have shown that interest groups, which were also either, direct or indirect veto players, emerged in Buganda following the introduction of *mailo*, and became a factor for change of subsequent property rights. We have observed interest groups (the peasant tenants) directly lobbying the state (the colonial and native governments) to obtain a change in formal property rights, specifically the 1927 Law.

Contrary to the common belief among some scholars that informal institutions are culturally derived and change relatively slowly, we have shown in this Chapter that not all informal institutions are culturally derived. Whereas it is true that some informal rules have

strong cultural foundations, others like the reactive informal institutions prevalent in Buganda during the colonial period, have a non-existent relation with culture. The informal property institution we witness in Buganda is in direct response to the incentives created by the formal rules.

Institutions change slowly and incrementally and we have seen evidence of this proposition. First we saw a major change in the institution of property being ushered in by the 1900 Agreement when it introduced private property rights _vide mailo_—a previously unknown tenure. Then we observed the unfolding and passing in an incremental manner the subsequent laws that, _inter alia_, defined the incidents of mailo and laid out other conditions on which _mailo_ land could be held; facilitated the land registration system; regulated the transfer of land to persons not of the protectorate and regulated the relations between the landlords and tenants.

Finally, although we have shown that property rights were intentionally designed in Buganda during the Colonial period, owing to the bounded rationality of the designers and imperfect knowledge they may have possessed, unintentional consequences, non-deliberate property rights were also witnessed. The 1927 Law was intentionally designed to ensure that tenants enjoyed secure use rights with no marketable title and were protected from the oppressive demands of the landlords all of which would ultimately encourage increased production of cash crops to the benefit of the colonial government. However, we have seen that there was an unintended consequence— the fledgling market in _bibanja_. Contrary to the intention of the 1927 Law, the tenants had marketable title— albeit informally. Their bundle of property rights was thicker than that intended and granted by the colonial government.

‘Politics not markets then are and will remain the driving force behind land tenure reform in Africa; governments, African and donor, international agencies and consultants will forget this at their peril.’

7.1 Introduction

Uganda gained independence from Britain on the 9th day of October, 1962. The Kingdom of Buganda was part of the independent Uganda but it was granted full federal status while the other traditional kingdoms of Ankole, Bunyoro, Toro and the territory of Busoga were granted semi-federal status under the Independence Constitution. Buganda’s unique federal relationship with the central government was attained because the land-owning chiefs had made great endeavours to retain their chiefly control over land and labour in Buganda. During the pre-independence negotiations, they had carefully crafted institutions to reproduce that power and to insulate themselves from attacks within and outside Buganda. Not only did the land-owning Chiefs resist the democratic reforms of electing representatives to the Lukiiko but they also vehemently opposed direct election of Buganda’s representatives to the National Assembly. Although they later conceded direct elections of representatives to the Lukiiko they did not succumb for the national assembly. In this way they ensured that the notion that Buganda’s representatives would be selected by its Lukiiko was entrenched in the independence constitution. That way, they were assured that it is only those individuals who championed the land-owning interests who would represent Buganda in the National Assembly. This meant that the central government had no power in Buganda, not even to regulate the landlord – tenant relations. This devolution of power undermined the authority of the state, and left Uganda in a ‘quasi-federal milieu.’

The unrivalled superiority enjoyed by Buganda during the colonial period had earned it great resentment throughout Uganda. Consequently, many Baganda also ‘developed an attitude of complacent arrogance towards the other people of Uganda.’ Almost all other ethnic groups in Uganda were concerned by Buganda’s attempts to dominate the post-colonial state. Such

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1 McAuslan, Bringing the Law Back In: Essays in Land, Law and Development p.308
2 The Constitution of Uganda ,1962 (Repealed).Article 2(2)
4 Ibid.
5 Ibid.
‘suspicion and hostility engendered by this sort of attitude was hardly a sound basis for national unity.’

Thus, Uganda’s independence government was a coalition government of the Uganda Peoples’ Congress (UPC) founded and led by Apollo Milton Obote, a party of local notables - rich peasants, traders, bureaucrats and Kabaka Yekka (KY) - the Baganda only political party of landowners which was supported by rich and middle Buganda peasant tenants for fear that “foreigners” would take over Buganda land. This alliance was founded on the understanding that UPC, the dominant faction in the coalition would not meddle with land matters at all after winning the 1962 elections, and it culminated in the Kabaka of Buganda, Sir Edward Muteesa II being the first president at independence although it was a highly ceremonial position and Obote as the first prime minister.

In this chapter, we shall consider the evolution of property rights to land in Buganda during the post-colonial period, that is, from independence in October 1962 to 2010, a year we have identified for practical purposes as the cut-off date for the scope of this thesis. It is the year in which the Land (Amendment) Act, No.6 of 2010, the current last amendment to the statutory law relating to land was passed. We shall observe that generally during this period, politics and consequently interest groups and veto players played a key role in the way in which property rights changed and developed and that relative price changes as predicted by extant theory on institutional change had a very minimal role.

7.2 Property Rights to Land in Buganda under Obote and Amin (1962-1985).

The initial nine years of post-independent Uganda witnessed little change in the actual property rights structure of land in Buganda. The minimal government action regarding land matters during the early years following independence may be explained by the fact that it was deliberately avoided because ‘the impact of any new system would be felt more in Buganda, where private land ownership was most concentrated yet conditions were quite volatile in the political field as a result of Buganda’s entrenched rights under the Independence Constitution.’

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10 Nyangabyaki, supra, n.3 p.84
11 Meaning the King Alone
12 Banyarwanda, Barundi and other ethnic groups in Uganda
13 Nyangabyaki, supra, n.3 p.84
14 Nyangabyaki, supra, n.3
After independence, Crown land was renamed Public land and was under the control of the Uganda Land Commission (ULC) and Land Boards. In Buganda the approximately 9,000 square miles of Crown land taken under the 1900 Agreement was returned to the Baganda and vested in the newly created Buganda Land Board (BLB). Under the Public Lands Ordinance of 1962, indigenous Ugandans had a right to occupy any non-alienated public land without prior consent, provided that the relevant government body ‘shall not be prevented from making a grant in freehold or leasehold of public land... merely by reason of the fact that such land or any part thereof is occupied by persons holding under customary tenure.’ Customary tenants had a right to remain on the land until arrangements were made to compensate their improvements on the land and to resettle them. These provisions were similar in effect to those under the repealed Crown Lands Ordinance 1903.

Meanwhile, Buganda government was faced with challenges regarding mailo land tenure both from within and outside Buganda. First, agriculture in Buganda was on the decline. The landowners were not pulling their weight in developing their estates. The African ‘progressive farmers’, the new colonial government favourite in the post-World War II period had failed to enhance productivity on their lands and consequently development. They could not withstand the collapse of world market prices in the early sixties. Instead of adapting to the production of alternative crops such as sugar and tea, they ‘were reverting to the peasant –plus type of agriculture or to rentier farmers by simply abandoning all or part of their once prized coffee estates.’ Coupled with this were the Class relations in Buganda country side which hindered productivity and were often a source of rural political instability. There was also an emerging class of capitalist farmers in Buganda who were opposed to the landowners’ granting of bibanja to non-Baganda migrant labourers. Whereas the landowners preferred to resettle them as tenants paying rents, the emerging capitalists wanted them to remain a supply of cheap labour. It appears that the mailo land tenure system was riddled with several inadequacies and that consequently the Buganda government was under pressure to transform mailo land.

In fact, in 1964 the Buganda Economic Planning Commission attempted to effect a fundamental reform of Mailo tenure so that the landowners' basis for accumulation became

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18 The Public Lands Ordinance. (Repealed)
19 Ibid. s.22(1)
20 Ibid.
22 Ibid., p.144.
23 Ibid.
24 Nyangabyaki, supra, n.3 p.89
25 Mafeje, supra, n.21 p.145
wage rather than tenant labour. The commission was ‘convinced of the incompatibility between legally entrenched tenancies, scattered about in a random fashion on the various estates, and a progressive capitalist expansion.’ The Buganda Planning Commission therefore proposed that:

The existing Kibanja tenants would be given a legal title to their plots, which could be bought and sold and pledged as security for loans. The owners of these kibanja tenures would only lose their land if they failed to make the ‘annual payment’, but the kibanja would not revert automatically to the Mailo landowner, who would have to take the kibanja owner to court and the land would be sold by public auction.

It remains unclear whose interests the Buganda Planning Commission were championing or what their expectations were? Did the Commissioners really expect the landlords to dig their own grave? Clearly their proposal favoured neither the traditional mailo owners nor the emerging capitalist farmers. A likely explanation could be that they had assumed the existence of “progressive mailo owners” who were capable of ‘developing their land on an estate basis.’

As could have been expected, the commission’s proposal was vetoed by the Lukiiko which was dominated by the landowning class. Control over the tenants was valuable to the landowners both in terms of rents and also as a basis of class rule. Further, a large number of tenants were of non-Buganda origins. Mafeje explained that:

The recommendations were rejected by the Landlord-dominated Lukiiko for what was called "political reasons." The immediate reasons was that in some of the central counties of Buganda up to 50 per cent of the tenants are immigrants from Rwanda and Burundi, whom the Baganda accept only as a source of cheap labour, and not as land-sharing neighbours, no matter how modest the scale. However, one suspects that the fundamental reason was that the landlords did not wish to make concessions to the bourgeois elite inside and outside Buganda. They rightly saw the latter as their class enemies. Secondly, they did not want to lose control over their labouring tenants. In a nutshell, they were prepared to permit neither a revision of land relations nor a transformation of production relations in the form of free peasants and proletarians.

Here we see veto players, the landowners in the Lukiiko, vetoing a change in property rights to land which could have helped to resolve the landlord-tenant problem completely.

While the Buganda government was facing internal challenges regarding Mailo land tenure, it also had to deal with manoeuvres against Mailo land by the UPC. Although there was...
an existing alliance between UPC and KY, it was, right from the outset, a very fragile one. The UPC was wary of the political power of the landowning class and therefore sought means of weakening it. The UPC government recognised that the political strength of the mailo owning class derived from their control over the land and over the tenants; that what made the landlord faction in Buganda more powerful than similar factions in other kingdoms was not only its historical economic position, but also its ownership of private property rights to land in freehold. The objective of the UPC was to undermine the institutions through which the Buganda landlord class reproduced its power. As the party leader A.M. Obote remarked, ‘the land issue was coming nicely. The idea was to alter the mailo system to the leasehold system where land was leased to ...groups capable of making use of it for the national good.’ Of course, UPC would carry out its schemes under the guise of transforming agrarian relations so as to increase productivity and rural accumulation so as to eradicate poverty, ignorance and disease for the good of the common man. However, Obote’s true intention was to weaken the political strength of the landowning class. Leasehold ownership meant that the state owned the land. Therefore it would not be wise for a group leasing land from the state to challenge those in power. Thus, in reality, the aim was not to lease the land to good people, capable of enhancing its productivity, but to enable the UPC to gain control over the land. In this way, it could subdue the political opposition in Buganda and also control rural surpluses for ‘nation building or development.’ Although, he did not succeed during his presidency, the vision was accomplished by Amin who enacted the 1975 Land Reform Decree (LRD) as we shall see later on in the Chapter.

Thus in 1966, Obote through a coup, took over the position of President and forced Kabaka Muteesa into exile. Prior to the coup, Obote had overturned the 1962 Independence Constitution; and replaced it with the 1966 constitution which was presented by Obote to the members of the national assembly on 15th April 1966. Although the members had no time to read it, he insisted that it be adopted immediately hence it being commonly referred to as the ‘pigeon-hole’ Constitution. However it appears that this constitution was a temporary measure as in it was a provision which stated that, ‘this Constitution shall remain in force until such time

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33 Nyangabyaki, supra, n.3 p.85
35 Nyangabyaki, supra, n.3 p.85
36 Green, supra, n.16 p.375
39 It was called 'pigeon-hole' constitution because it was never discussed at all. Parliament did not participate in its drafting. Members of Parliament were simply told that they would find copies of the new constitution in their pigeon holes after the debate on its introduction had been conducted. Nyangabyaki, supra, n.3 p.87
as a Constituent Assembly established by Parliament enacts a Constitution in place of this Constitution.\textsuperscript{40}  

Shortly after, in September 1967, a new constitution, which increased the power of the central government, was enacted. Significantly, the constitution also officially abolished all kingdoms in Uganda, including the Buganda Kingdom, and turning Uganda into a republic.\textsuperscript{41} The 1967 Constitution abandoned the Land Boards. Public land ownership and powers of control were centralized and vested in the ULC. Obote’s government disbanded the Buganda Land Board, took all of its land and vested it in the ULC. It is noteworthy that the government did not forcibly acquire private land in Buganda, hence West’s observation that ‘the land tenure system in Buganda remains basically unaltered.’\textsuperscript{42} It appears that Obote was mindful of the absence of effective political organisation of UPC at the grassroots and he was extremely careful not to stir dissension in Buganda which could lead to popular rebellion if he seriously tackled the sensitive land question.\textsuperscript{43}  

Scholars have argued that the 1967 Constitution was aimed at sorting out Buganda. Mutibwa explains that:

The central issue addressed by the 1967 Constitution was to do away with quasi federal arrangement that had maintained the power of the kingdoms... Although not mentioned, the framers had Buganda in mind which had for long been a thorn in the flesh of the central government.\textsuperscript{44}

Kayeihamba also similarly opined that, ‘[t]here was one subject on which almost everybody was agreed. It was widely expected that the hereditary elements (kingdoms) in Uganda would be buried by the new Constitution.’\textsuperscript{45}  

In addition, from the late 1960s, government policy was clearly to advance the capitalist farmer and to attract European and Asian capital as well as managerial skill towards agriculture.\textsuperscript{46} The 1966 "revolution" which abolished the Independence Constitution was the first official step towards concretizing this policy in the post-independent era. Under Article 108(5) (b) of the 1967 constitution, ownership of public lands and powers of control over them were vested in the Uganda Land Commission. In 1969, the Public Lands Act (No. 13 of 1969) was passed and replaced as well as repealed the Public Lands Ordinance of 1962. Under the 1969 Act, all former
official estates in mailo tenure were made freehold. Under this law, people could acquire and register up to 500 acres of land or more with the consent of the minister. This limit of 500 acres was intended to slow down the privatization of public land in order to prevent a landlessness of peasants.

Further, under the Public Lands Act of 1969, the rights and legal protection of those holding lands under customary tenure were improved. The government was prohibited to grant in freehold or leasehold any public land that was lawfully occupied under customary tenure without the consent of the customary occupants. Applicants for land occupied by customary tenants had to furnish the government with evidence that the occupants consented to the application and the compensation payable to them. Failure to provide such evidence, or pay the customary occupants the compensation approved by the Minister, was a ground for revocation of the grants. The Act also gave customary occupants a right to apply for a lease over the land they occupied. All leases of public land were granted subject to standard development conditions, breach of which could result in forfeiture of the land. It has been suggested that this provision was for the benefit of ‘progressive farmers’ who wanted to use their land more productively or as security for a loan. The inference was that they could not do so under customary tenure, hence demonstrating that the independent government, like the colonial administration, believed that economic development was not achievable under customary land tenure. The only difference between the two governments was that the independent government was not proactive in promoting the conversion of customary tenure to leaseholds but rather left it to the individual landowners to decide whether or not to convert their titles.

UPC’s solution to the land question in Buganda was for reasons we have seen also half-hearted just like the colonial government’s 1927 Busulu and Envujjo Law solution. Remarkably, even after UPC removed the institutions that reproduced landlord rule from the rural areas, it was not willing to carry out a fundamental reform of property rights to land. It only abolished rents on official mailo land and not on private lands.

7.3 The 1975 Land Reform Decree.

Early in 1971, Idi Amin ousted Obote from power, and since the country was in political turmoil, everything in government was at a standstill for a time. Parliament was abolished and all

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47 Public Lands Act 1969 (Repealed) s.24(2)
48 ibid s.25
49 ibid s.22 and s.23
50 Mugambwa, “Comparative Analysis of Land Tenure Law Reform in Uganda and Papua New Guinea,” p.44.
51 Adoko and Levine, “A Land Market for Poverty Eradication?.”
52 Nyangabyaki, supra, n.3
the major legislative functions were assumed by Amin who was sometimes helped by a Defence Council comprising army men. In 1975, the Land Reform Decree (LRD) was unexpectedly enacted. It was a radical piece of legislation which, for the first time since independence, sought to overhaul the country’s land tenure system. Whereas, the landowners in Buganda were able to block the transformation of Mailo land within the Lukiiko and against the UPC government, they were unable to do so against Amin’s government. Amin’s LRD was a close attempt at fulfilling Obote’s unsuccessful quest of breaking the political strength of the Baganda land owners by transforming Mailo lands to leasehold. Under the Decree all land in Uganda was declared to be public land. Land owned in freehold including Mailo land was converted to leases held from the government subject to development conditions. Indeed, the Decree caused panic throughout the country, with landowners afraid of losing their land to rich and well-connected people.

Section 3(4) of the Decree repealed the Busulu and Envujo Law, the Ankole Landlord and Tenant Law as well as the Toro Landlord and Tenant Law. Although it appeared that the abolition of busulu and envujo freed the tenants from the obligation of making a permanent payment of part of their surplus to the landlord, it also had the effect of destroying the social bond between the landlord and the tenant. The lessee on conversion was deprived of any benefits whatsoever from the tenants on his Land and because of this, some lessees resorted to eviction of the tenants from their land. The LRD therefore, intensified the conflicts between the Mailo owners and the tenants. In effect the decree removed the security of tenure that had been guaranteed by the 1927 Busulu and Envujo law.

Further, repeal of the Busulu and Envujo Law under the 1975 land reform decree meant that rents were completely abolished. The Baganda landlords reacted to this abolition and to the attendant political and economic problems by selling off portions of their land. This response was not appreciated by the wider class of land owners in Buganda for political reasons. There was a fear that as a class, landowners were undermining themselves by selling land because then ‘foreigners’ might take over the land through such sales.

With respect to customary land tenure, the Decree removed the protection that customary tenants previously enjoyed under the Public Lands Act 1969 and made them tenants

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53 Ibid; p.133
54 Land Reform Decree 1975 (Repealed). s.1
55 It is not surprising that A. Nsibambi, the ideologue of landlords, could argue that the LRD introduced animosity between the landowners and tenants. Prior to that the relationship, according to Nsibambi was symbiotic. See Apolo Nsibambi, From Symbiosis to Antagonism: The Case of the Relationship Between the Landlord and the Tenant in the Rural Development of Uganda (Faculty of Social Sciences, Makerere University, 1981).
56 Nyangabyaki, supra, n.3 p.215
57 To the Baganda, foreigners meant any person even a Ugandan of non-Buganda origin. See Nyangabyaki, supra, n.3 p.216
58 Nyangabyaki, supra, n.3
at sufferance. The Decree empowered the government to lease any land occupied by customary tenants to any person without the consent of the occupants. Section 3(2) of the Decree expressly provided that: ‘For the avoidance of doubt, a customary occupation of public land shall be only at sufferance and a lease of any such land may be granted to any person, including the holder of such a tenure, in accordance with this Decree.’ The government’s only legal obligation was to pay compensation for the improvements which it has been argued was nominal. Professor Nabudere explains that:

[t]he peasant’s improvements on land as we know are minimal, comprising as they do of a wattle thatched hut, a plot of food crops, a hoe and a few wretched household implements. Any compensation for such improvements would in reality amount to nothing, and with the inflation obtaining in the neo-colony; such compensation could never buy even the poles to build a new hut.

Although Nabudere’s assessment may be slightly exaggerated, it is a vivid depiction of the plight of the evicted tenants.

The Decree also abolished the right formerly enjoyed by indigenous Ugandans of occupying, in accordance with their customary law, any non-alienated public land (outside urban areas) without prior permission. The Decree made occupation of any public land without consent a criminal offence. Customary landowners retained a right to sell or donate their land, provided the transfer did not vest title in the transferee except over improvements on the land. Any agreement purporting to transfer customary tenure as if it were an actual title was void and constituted a criminal offence punishable by up to two years imprisonment. Thus, the Decree was a comprehensive law with two main objectives. Firstly, to facilitate the state’s enforcement of good agricultural practices such as by making security of tenure dependent upon land use thereby promoting agricultural development. This objective left the customary occupants in a

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59 S.3(2) for the avoidance of doubt, a customary occupation of public land shall, notwithstanding anything contained in any other written law, be only at sufferance and a lease of any such land may be granted by the Commission to any person, including the holder of the tenure, in accordance with this Decree.

60 Land Reform Decree 1975 (Repealed).s.3(2)

61 The term “tenant at sufferance” refers to a person who initially entered in possession with the consent of the landowner, and remains in possession, after the period for which the consent was given expires, without the consent or dissent of the landowner. P E Nygh and Peter Butt, “Butterworths Australian Property Law Dictionary,” ed. Peter E Nygh and Butt Peter (Sydney: Butterworths, 1997).


63 Land Reform Decree 1975 (Repealed):s.3(1) This is the effect of repealing s.24(2) of the Public Lands Act 1969.

64 Ibid.s.4.


dilemma. On one hand, if they wanted security of tenure over their land they had to apply to the
government to convert their tenancy to leasehold with a risk of forfeiting the land if they failed to
comply with the statutory development conditions. On the other hand, if they did not apply for a
lease they risked the government alienating the land to others who could demonstrate to the
government the capacity to develop it. Nevertheless, some customary occupants took advantage
of the Decree to convert their titles to statutory leases. However, the majority of these were not
‘progressive farmers’ but relatively wealthy business people whose motive was ‘prestige, land
hoarding or for collateral for loans for their other business.’

Secondly, the Decree was introduced to resolve the longstanding landlord-tenant
stalemate on Mailo land under which the Mailo landlord had ownership without inducement to
invest and the tenant was in occupation without the power to develop the land. The Decree
therefore made it easier for the Mailo owner (lessee on conversion) to evict tenants and thus
consolidate land for large-scale farming. A lessee on Conversion could terminate any customary
tenure on his leasehold on giving notice of at least six months in writing, addressed to the
holder of the tenure or his representative, with a copy to the Commission. Furthermore, the
evicted tenant would only be compensated for his improvements on the land. It has however
been observed that some Mailo owners who evicted tenants, and acquired large chunks of land
under section 7 of the Decree, did not invest in the countryside. Instead, they acquired land,
mortgaged it and raised capital for commercial transactions, which were totally unrelated to
agricultural development.

The thinking that the passing of the Decree would stimulate capitalist use of land was
criticised by some economists as ‘simplistic and unlikely to stimulate agricultural development.’
They argued that it was difficult to identify appropriate development conditions that would suit
all circumstances and nature of land. For instance, it was difficult to ascertain the portion of land
that needed to be farmed in a given period or crops to be grown owing to the existing diverse
variables including ‘the ecology of the land, weather patterns, and value of the land.’

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67 Adoko and Levine, "A Land Market for Poverty Eradication?." p.14
70 A lessee on conversion according to s.16 of the Land Reform Decree (repealed) was defined as the holder of any
lease resulting from the conversion of a freehold / absolute ownership by virtue of s. 2 of the Decree
71 Land Reform Decree 1975 (Repealed). s.7
73 Mugambwa, supra, n.48 p.45; Green, supra, n.16 p.375
74 Mugambwa, supra, n.48 p.45
Additionally, it was thought that the cost of enforcing the development conditions would most likely exceed the benefit.\textsuperscript{75}

However, the grandeur of the Decree notwithstanding, many aspects of it remained unimplemented. For example, freehold and \textit{Mailo} titles were not converted into leases as was required under the Decree. The registry operated both leasehold and \textit{Mailo} registers.\textsuperscript{76} People who bought \textit{Mailo} land after 1975 and tenants who purchased the residual rights to their \textit{bibanja} still continued to register title as \textit{Mailo} land. Lessees on conversion were never given developmental and other conditions normally given to lessees. For instance, the former \textit{Mailo} owners now lessees on conversion did not pay ground rent to the government.

Several explanations may be proffered for the non-implementation of the Decree. Throughout the whole of Amin’s regime and until 1986, Uganda was politically unstable and, government activities were almost at a standstill.\textsuperscript{77} Government lacked adequate finance, specialised personnel and the political will to employ radical land decisions which were suddenly imposed on Ugandans by President Amin’s government. Some have argued that once the Decree enabled Amin to grab the land which he wanted at Bombo, he did not care about the subsequent land tangles and niceties.\textsuperscript{78} However, a more persuasive argument is that Amin’s interests were to a very great extent served even though the Decree was not implemented. Merely having the decree in place was enough to place Buganda landlords at the mercy of Amin’s government knowing that if the regime decided to, it could always invoke the provisions of the Decree. Another possible explanation for laxity in enforcement of the Decree could be the government’s intent to avoid legal challenge with respect to the constitutionality of the Decree.\textsuperscript{79} There was a conflict between the 1967 Constitution and the 1975 Decree. While the 1967 constitution entrenched the \textit{Mailo} tenure system, the decree abolished \textit{Mailo} tenure, without repealing Article 126 of the Constitution, thus rendering the abolition unconstitutional. Further, by reducing \textit{Mailo} and freehold interests to leases of 99 and 199 years respectively, the Decree in effect seems to have facilitated government to nationalise property in land without compensation contrary to Article 13 of the 1967 constitution.\textsuperscript{80}

\begin{footnotes}
\item[76]Nsibambi, “The Land Question and Conflict.”; Kisamba-Mugerwa, “Institutional dimensions of land tenure reform.”
\item[77] Mugambwa, supra, n.48 p.45
\item[78]Nsibambi, “The Land Question and Conflict.”p.224.
\item[79]This would have been as a result of government failure to expressly repeal Article 126 of the 1967 Constitution which provided that the Continuance in force of the System of mailo tenure in the District of Bunyoro, East Mengo, Masaka and West Mengo was not affected by Commencement of the 1967 Constitution.
\item[80]Mugambwa, supra, n.48 p.52
\end{footnotes}
The non-implementation of the Decree notwithstanding, there are those who hold the view that the Decree ‘was the best effort yet to grapple with the colonial legacy since it represented a root and branch attempt to get rid of the poisoned chalice of private landlord/tenant relations and sought to impose a uniform system of land administration throughout the country.’

7.4 Property Rights to Land in Buganda under Museveni (1986-2010)

Little activity took place in the seven years between the fall of Amin in 1979 and Museveni’s accession to power in 1986, largely due to the civil war in Buganda and continued economic collapse. However, once political stability was restored in most parts of the country in the mid-eighties, the government declared land tenure reform as one of its priorities.

7.4.1 Early Efforts at Reform (1986-1995)

Government deemed it important to develop a land tenure system that would promote agricultural development and overall economic development through the functioning of a land market which permits those who have rights in land to voluntarily sell their land and for producers and investors to gain access to land.

Additionally, there was need to address the issue of land rights which were of major concern for most Ugandans. There was widespread discontent in Buganda owing to the landlords’ behaviour. Landlords were evicting long standing tenants and bringing in new land borrowers who could pay. Land borrowers are those tenants who rented small portions of land from the landlord for a season or two and were allowed to use the land only for seasonal crops. This was a continuing reaction to the loss of rent-income by the landowners under the Decree.

At the end of the civil war in 1986, absentee landlords returned to the land they had not been to in two decades and demanded vacant possession. For example, Bikaako gives an example of a village in Mpigi District in Buganda where ‘the first time [that] the landlords introduced themselves and declared their interest in their land was when they issued 30 households with an eviction notice on 10 August 1988.’

Hence, with the assistance of the World Bank and other donors, the government

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81 McAuslan, supra, n. 1 p. 281
82 Mugambwa, supra, n. 48
84 Mugambwa, supra, n. 48 p. 52
85 Green, supra, n. 16 p. 376
commissioned various consultants to assist with the formulation of an appropriate land tenure policy. The land reform process during Museveni’s regime therefore began in 1989 when a study, funded by the World Bank and USAID, was carried out by the University of Wisconsin Land Tenure Centre together with the Makerere Institute of Social Research. The objective of the study was to analyse the existing land tenure systems in the country and come up with recommendations for appropriate changes in the national land tenure policy.

The study recommended, inter alia, the repeal of the Land Reform Decree 1975, which had vested all land in the State; that people without any other livelihood should not be forced off the land and the update and decentralisation of the Land Registry. Significantly, the Study also recommended that land tenure should be uniform hence that all existing forms of tenure (mailo, leasehold and customary tenure) be converted to freehold automatically or through a process of titling; and the emergence of a free land market as a mechanism for transferring land from inefficient to efficient farmers.

Government received conflicting advice and feedback from the consultants, civic leaders, and the public. The government’s stand on the content of the new land policy and proposed land reform was also unclear. Initially (1986–96), Museveni’s National Resistance Movement (NRM) government was quite broad based with Marxists such as Chango Machyo and Mahmood Mamdani holding key positions in government alongside Buganda monarchists and landlords such as J. Mayanja-Nkangi and Apolo Nsibambi. While as may be expected, the Buganda monarchists advocated for restoration of mailo land tenure, the Marxists argued against the continuation of mailo land tenure and advocated communal ownership of land claiming that those Baganda tenants who were against abolishing mailo land were misled by their landlords. President Museveni appeared to be on the side of the Marxists at least to the extent that he seemed to support the abolition of mailo land tenure as evidenced by his public statements.

According to President Museveni, “the Peasants in Buganda as elsewhere in Uganda, may not have discovered their own interests.” Museveni claimed that the struggle over land is a class struggle hidden by ethnic identity and that the ‘Baganda peasants have suffered as much injustice at the hands of their Baganda elite as at the hands of elements of the elite from other

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89 Ibid.
90 He was the Minister of Rehabilitation
91 Chair of the 1986/87 Commission of Inquiry into the Local Government System
92 Minister of Education; He was also a Buganda Kingdom Katikkiro (prime minister).
93 He was a member of the Commission on Local Government chaired by Mamdani. Green, supra, n.16 p.376
94 The New Vision, 12 July, 1994
Museveni affirmed commitment to the elimination of the mailo land system which ‘robbed the Baganda and non-Baganda of the lands of their birth and vowed not to rest until this injustice is resolved.’ Indeed, the ensuing land debate was protracted, lasting more than a decade and very controversial to the extent of government fearing that it could lead to civil war.

Meanwhile, as the decade long government consultations on a new and appropriate land policy were ongoing, there were developments in land rights based on the assumptions made and speculations held by landlords on the expected land policy. Following the president’s remarks, the landlords confirmed their suspicions that the NRM was ‘communist.’ They became extremely anxious and reacted by selling or trying to sell their land which led to some attempted evictions. Government promptly intervened to stop these evictions as the following statement by the minister of Lands released on 20 January 1987 attests:

The government would like to state that it has learnt with dismay that some former mailo land owners are engaged in an act of evicting customary tenants (bibanja owners) from their bibanja ‘plots’. Government would like to inform these landlords that under the 1975 decree any such eviction is illegal unless approved by the minister of lands and surveys. No bibanja owner should therefore agree to such a forceful eviction unless the landlord can prove through the office of the District Administrator that the Minister gave consent to such eviction.

Although this helped to slightly alleviate the suffering of the tenants, it did not solve the problem. Moreover, the Minister’s statement was legally flawed. Under Section 7 of the Decree which was still a binding law, consent was not required before the eviction of a tenant. Its illegality notwithstanding, the statement was politically expedient and went a long way to affirm NRM government support for the tenants and its disdain of the landowners and mailo land system in Buganda. The minister who made the statement admitted to its lack of legal effect but argued that ‘it was politically necessary to protect customary peasants who are a source of the Government’s power.’

This NRM favour and support of the tenants could not be and was not sustained. The NRM could not solve the landlord–tenant problem in Buganda. Why? First, there was war in northern Uganda which consumed much of government’s attention and political energy. NRM could not afford a war in both the North and Buganda. Nsibambi noted that ‘a government
grappling with a weak economy mismanaged since 1966 cannot afford to antagonize ‘landlords’, because they are economically and politically well organized. At the same time, it cannot ‘ignore’ peasants who are sometimes irresponsibly evicted by the ruthless lessees.’ There was no doubt that the land question was very sensitive.

People in Buganda made it clear that they did not take the government meddling and abolition of mailo land tenure lightly. For instance, they argued that ‘Baganda and land are interwoven and that the Government should not rush to tamper with the established land system.’ Further, the sub-county of Kira in Kyadondo passed a resolution requesting the Government to handle land matters most carefully.

Second, Government was also under a lot of unrelenting pressure from the IMF / World Bank and their capitalist projects. All this made the NRM less resolute in its attempts to safeguard the interests of the tenant cultivators. The same president Museveni who in 1994 had pledged commitment to the elimination of the mailo land was now in 1998 acknowledging that the ownership of the landlord needs to be recognised. He said that, ‘Our position has four points and is based on double reform- controlled rent and no power to evict. The points are : recognise ownership of the landlord, accept controlled or nominal rent, a landlord should not evict the tenant as he likes but go through a tribunal and set up a fund so that poor people can also get money to buy land. For me, I am ready to be hanged on these four points.’

At about the same time as the Wisconsin Study, the NRM established a Constitutional Commission chaired by Justice Odoki to collect views for a new constitution that would help establish a durable political and socio-economic climate. In fact the Report of that Commission, which was published in 1992, made recommendations similar to those of the Wisconsin Study.

In order to eliminate internal pressures for a multi-party dispensation, the NRM reintroduced the Kingdoms as cultural institutions. This was interpreted by the landowners as the return of their rule. Landlords started demanding rents, increased entry fees and also attempted to stop tenants from selling their bibanja.

On the other hand, the Baganda landed gentry were not satisfied with the restoration of Kingdoms merely as cultural institutions. They therefore demanded that the Kingdoms should be given political power and that Buganda as an administrative region should be re-instated hence

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103 Ibid. p.227.
104 Statement by Mr. E Mulirra, the Chairman of the Namirembe/ Bakuli Parish Resistance Council II, Rubaga Division, District of Kampala in an interview by Apolo Nsibambi quoted in Ibid.p.227.
105 Ibid.
106 Nyangabyaki, supra, n.3 p.198
107 Green, supra, n.16 p.376
109 Nyangabyaki, supra, n.3 p.199
110 Nyangabyaki, supra, n.3
the call for *federo*. The Baganda likened the NRM restoration of the *Kabaka* (King) to the Baganda being given ‘*byoya bya nswa*’ meaning just ‘wings of white ants without the ants’, a deceptive act, ‘an exercise in form, but not in substance.’ They argued that a restoration of kingdoms ought to be a meaningful affair and that to be worthy of office, the King must have chiefs and land. During the years of economic limbo, many Baganda had bought land in Buganda. The call for *federo* was therefore enough to threaten them and galvanise them into opposition. This fear was further aggravated by the Kabaka’s call to the Baganda to stop selling land. This heightened ethnic tensions as the Banyarwanda saw this as a move against them. Fortunately, all these tensions did not lead to civil war as feared by the government but instead culminated into a major land reform enshrined in the Constitution of the Republic of Uganda, 1995 and the Land Act Cap 227 enacted in 1998.

The Land Act was passed on July 2, 1998, the second anniversary of the first sitting of the Parliament which was elected under the Constitution. This was no coincidence. Owing to the sensitivity and complexity of the matter, the delegates to the Constituent Assembly who were assigned to discuss the constitution decided to evade the difficult task of totally resolving the landlord/tenant question and instead passed the buck to parliament under Article 237(9) of the 1995 Constitution of the Republic of Uganda which provided that, ‘[w]ithin two years after the first sitting of Parliament elected under this Constitution, Parliament shall enact a law: (a) regulating the relationship between the lawful or bona fide occupants of land referred to in clause (8) of this article and the registered owners of that land; (b) providing for the acquisition of registrable interest in the land by the occupant.

7.4.2 Constitutional and Land Act Provisions on land.

The Constitution of the Republic of Uganda, 1995 (hereinafter referred to as the Constitution) repealed the Land Reform Decree, 1975 and declared that all land belonged to the citizens of Uganda, to be vested in them under four land tenure systems namely customary, leasehold, freehold and *Mailo*. Chapter 15 of the Constitution, comprising Articles 237 to 245 deals with land. Article 237 is central to the Land Act Cap 227 which is the current legislation on land in Uganda. The primary objective of the Act was to ‘operationalise all constitutional

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112 Ibid.
113 Ibid.p.200.
114 Ibid.p.229.
116 Ibid.Article 237 (3).
117 The Act has since been amended by the Land (Amendment) Act of 2001, 2004 and 2010 respectively.
reforms relating to land and to provide a framework for the management of land under a decentralised system.\textsuperscript{118}

The Constitution was the first document ever to recognize customary land holding as a land tenure system in Uganda.\textsuperscript{119} It guaranteed the security of land ownership of the majority of Ugandans who hold land under customary tenure. With the exception of Buganda (central region) and urban areas, more than 80% of land in Uganda is held under customary tenure.\textsuperscript{120} The Constitution provided that customary tenants could acquire certificates of customary ownership which they could convert to freehold titles.\textsuperscript{121} The Land Act reiterated these provisions. Customary tenants can now gain title to the land they occupy.\textsuperscript{122} The certificate of ownership is primary evidence of customary occupation and it can be obtained at either the individual, family or community level.\textsuperscript{123} It confers upon the holder the right to undertake, subject to any limitations in it, and in accordance with customary law, any transaction in respect of that land which may include leasing, mortgaging and selling.\textsuperscript{124} No certificate of customary ownership has been issued as at the time of writing. According to Daudi Migereko, the Minister of Lands, Housing and Urban Development:

issuance of Certificates of Customary Ownership (CCOs) is demand-driven, based on requests from the benefiting districts..... For my ministry to actively get involved in issuing these certificates it requires all the land administration institutions at the local level to be in place and operational, i.e.,[sic] area land committees, recorders, district land boards and district land offices.\textsuperscript{125}

Although he intimated that there is demand for these certificates by the community who fear loss of their land without documentation, he did not give any reasons as to why the administration institutions may not be operational but as with all the many institutions set up under the Land Act, it is possibly due to lack of funds. As may be recalled, customary landowners were previously ‘tenants at will’ on public land. However, under the Land Act, customary tenure, like freehold tenure, now entails ownership of land in perpetuity.\textsuperscript{126}

\textsuperscript{118} Daudi Migereko and Minister for Lands Housing and Physical Planning, \textit{The New Vision} 17 May 1998.
\textsuperscript{119} “The Constitution of the Republic of Uganda.” Article 237(3) (a)
\textsuperscript{121} “The Constitution of the Republic of Uganda.” Art 237(4) (a). ibid.Article 237(4) (b), also see s.9(1) Land Act Cap 227.
\textsuperscript{122} The Land Act.s.4(1).
\textsuperscript{123} ibid.s.8(1).
\textsuperscript{124} ibid.s.8(2).
\textsuperscript{125} Daudi Migereko, “Government Sorting out Land Problems,” \textit{The Observer}, Tuesday, 27 November 2012 2012.
\textsuperscript{126} The Land Act.s.3(1) (h) and 3(2).
Another radical provision of the Constitution and the Land Act was the recognition of the rights of tenants namely, legal and *bona fide* occupants, on *Mailo* land with security of occupancy. A ‘legal occupant’ is one who occupied land by virtue of the repealed *Busulu* and *Enujo* law of 1927 or who had entered the land with the consent of the registered proprietor. A ‘*bona fide* occupant’ is 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.’ The effect of this provision was to give security of tenure to trespassers on land to the detriment of the land owners. The provision worsened the uncertainty regarding *Mailo* land as it left unresolved issues relating to the respective rights of landlords and tenants and the ambiguity with respect to ownership of the land. People who had obtained land from tenants by occupancy became tenants by occupancy themselves and were given the same rights under the Act as the occupants they had transacted with. Tenants by occupancy may apply for the issue of a certificate of occupancy which allows them to assign sublet, or sub-divide the tenancy with the consent of the land owner and with a right of appeal to the Land Tribunal. Under Section 34 (2) Land Act, a tenancy by occupancy may be inherited.

*Bona fide* and lawful occupants may only be evicted from registered land on grounds of non-payment of rent and only by order of Court. However, the rent payable is nominal, of a non-commercial nature and is to be determined by the Land Boards with the approval of the Minister. Where the responsible Board does not determine the annual nominal ground rent payable by the tenant within 6 months after the commencement of the Land (Amendment) Act 2010, the rent may be determined by the Minister responsible for lands. Only failure to pay this rent for more than one year may lead to the termination of the tenancy. Even then, the owner has to follow a cumbersome procedure before evicting tenants. This includes the need to send a notice to the tenant and the Land Committee and allow the tenant 6 months to provide good reason why the tenancy should not be ended for non-payment of rent. Only then may the owner apply to the Court for an order terminating the tenancy. As a consequence, land owners

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127 Bona fide and lawful occupants of land defined in Section 29 of the Land Act Cap 227.
129 Emphasis here is on Buganda but similar laws were passed and abolished in the kingdoms of Toro and Ankole.
130 *The Land Act* s.29.
132 *The Land Act*, s.1(dd). Tenants by occupancy are *bona fide* and lawful tenants.
133 Ibid.s.33(1).
134 Ibid.s.34(1) as amended by s.16(a) Land (Amendment)Act,2004.
135 Ibid.s.34(5).
136 Ibid.s.32A(1) as amended by the Land (Amendment) Act 2010.
137 Ibid.s.31 as amended by s.14 Land ( Amendment) Act 2004.
138 Ibid.s.31 (3)(d) as amended by s.1 Land (Amendment) Act 2010.
139 Ibid.s.31(6) as amended by s.1 (b) Land (Amendment) Act 2010.
140 s.2(4). *Land (Amendment) Act, 2010*, (6 January).Court shall mean a court presided over by a Magistrate Grade I or a Chief Magistrate.
have tried to circumvent the restrictions imposed by the law by selling of land to people who have either the money to compensate the occupants or the army muscle to evict them forcefully. These provisions of the Land Act appear to conform to the call for the integration of informal property rights into the formal property system.

Under Section 38A of the Land Act, spouses are granted a right to security of occupancy, defined as a right to have access to and live on family land as well as a right to give or withhold consent to any transaction such as a sale, transfer, gift inter vivos or mortgage which may affect their rights.

The Land Act decentralized land management and dispute settlement mechanisms. It provided for the creation of a large number of new institutions for land management and dispute resolution. This was intended to shift the focus of land management to the local level, and provide for effective community involvement in land management decisions.

Decentralised dispute resolution mechanisms are provided by the Act vide the establishment of land tribunals at district and sub-county level with their members being appointed by the Chief Justice and Judicial Service Commission respectively.


\[143\] The Land Act.s.39.

\[144\] Ibid.see sections 56, 64 establishing District Land Boards and Land Committees.

\[145\] Ibid.see Sections 74.80, and 81 creating District Land Tribunals, Sub-County and Urban Land Tribunals respectively.

\[146\] Ibid.s.46.

\[147\] Ibid.s.49. also see also see Articles 238 and 239"The Constitution of the Republic of Uganda." which provide for the establishment and functions of the Uganda Land Commission.


\[149\] The Land Act. s.64 (6).

\[150\] Ibid.s.74, 76; ibid. s.80-89. ibid. s.74(5). ibid. s.82.
Table 7.1 below is a rough estimation of the number of officers needed to make the Act operational.\textsuperscript{151}

\textbf{Table 7.1}

<table>
<thead>
<tr>
<th>Institution</th>
<th>No. of Offices</th>
<th>Officials</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Land Boards</td>
<td>112</td>
<td>5</td>
<td>560</td>
</tr>
<tr>
<td>Land Committees</td>
<td>7000</td>
<td>4</td>
<td>28000</td>
</tr>
<tr>
<td>Recorders</td>
<td>917</td>
<td>1</td>
<td>917</td>
</tr>
<tr>
<td>District Land Offices</td>
<td>112</td>
<td>5</td>
<td>560</td>
</tr>
<tr>
<td>District Land Tribunals</td>
<td>112</td>
<td>3</td>
<td>336</td>
</tr>
<tr>
<td>Sub-county Land Tribunals</td>
<td>917</td>
<td>3</td>
<td>2751</td>
</tr>
</tbody>
</table>

\textbf{Source:} Table adopted with modification from Margaret Rugadya and Uganda Land Alliance, "Land reform: the Ugandan experience" (paper presented at the Workshop on Land Use and Villagisation, Kigali, 1999).\textsuperscript{152}

McAuslan who participated in writing the Land Act also estimated that an additional 20,000 trained administrative personnel would be needed to staff the various new institutions and tribunals created by the Act.\textsuperscript{153} This number is now much bigger than earlier estimations because the number of Districts in Uganda with effect from 2\textsuperscript{nd} August, 2010 is 111 excluding the capital city Kampala.\textsuperscript{154}

The Land Act provides for the establishment of a Land Fund, the primary purpose of which is to support tenants by occupancy in obtaining registrable interests in accordance to the Constitution and pay compensation to landowners whose rights are thereby diminished.\textsuperscript{155} However, it is now fifteen years since the passing of the Act and the Land fund is not yet operational. It has been argued that it is because there was no evidence showing a correlation between tenure security and farm investment; and therefore land reform \textit{per se} seemed

\textsuperscript{151} The estimates were arrived at as a result of a simple rough count taken at one of the planning workshops for the ministry of lands Housing and Urban Development.Margaret Rugadya and Uganda Land Alliance, "Land reform: the Ugandan experience" (paper presented at the Workshop on Land Use and Villagisation, Kigali, 1999).

\textsuperscript{152} Ibid. p.7 The modification was to take into account the increased number of districts in Uganda from 45 at the time to the current 112.

\textsuperscript{153} McAuslan, supra, n.1 p.307

\textsuperscript{154} The personnel requirements may be further varied by the \textit{Land (Amendment) Act,2004}, which amended S.64 of the Land Act, 1998 thus changing from the compulsory establishment of Land Committees at Parish Levels( estimated personnel for those committees alone was 35,000) to appointment only upon request and after taking certain considerations into account.


\textsuperscript{156} \textit{The Land Act.}s.41(1) and (4) "The Constitution of the Republic of Uganda."Article 237 (9) (b)
insufficient to improve the lot of the rural poor.\textsuperscript{156} Government did not have the necessary resources and donors too were not keen to provide the estimated staggering amount of half a billion dollars (\$ 0.5 billion) to cover the costs of titling and the Land Fund given the political nature of the Fund, and its limited economic appeal.\textsuperscript{157}

The Land Act provides a complicated and laborious system through which people in a community can become a communal land Association and be able to register their land as communal land. Doubt is certainly cast as to whether the local communities most of which are illiterate will be able to handle all the requisite procedures to have their parcels documented and possibly converted to freehold. Incapacity of the poor to process their own documents and verify their own land rights has in the past led to abuse and fraud to the detriment of the would be beneficiaries.\textsuperscript{158}

Thus, Uganda’s Land Act provides the basis for formalizing customary land rights, enabling transition to freehold tenure, and guaranteeing tenure to tenants by occupancy previously un-provided for. To that extent, it can be interpreted as exemplifying the nature of reform advocated by De Soto. Nevertheless it is still far from ideal because despite the reform efforts, there are still several implementation challenges.

7.5 Challenges to implementation of Uganda’s Land Act and Resolution of Uganda’s Land Issues.

Uganda’s Constitution and Land Act embraced the contemporary economic thought that formalized, secure, and well–defined private property rights are crucial drivers of economic development. Salient features of the Land Act namely:(1) the recognition of customary land rights and provision for their eventual conversion to titled freehold, (2) legitimizing squatter’s interests by granting tenure security to bona fide and lawful occupants, are an attempt at integrating informal property rights to land into the formal property system. The current tenure regime in Uganda is aimed at supporting agricultural development through the functioning of a land market, establishing security of tenure, and ensuring sustainable utilization of land in order to bring about development. Indeed, the five Clause Land (Amendment) Act 2010 which was tabled in Parliament on February 5, 2008 as the Land (Amendment) Bill 2007\textsuperscript{159} and was met with unprecedented controversy, resistance and opposition from several quarters leading to government temporary closure of at least three radio stations and NRM, the ruling party

\textsuperscript{156} S Cross, “A Comparative Study of Land Tenure Reform in Four Countries: Uganda, Tanzania, Malawi and Kenya,” (Overseas Development Group (ODG), University of East Anglia, 2002), p.21.
\textsuperscript{157} Ibid.
\textsuperscript{159} The Land (Amendment) Bill 2007.
Members of Parliament being threatened by Museveni to be withdrawn support in the next election if they do not support the Land Bill, as well as the arrest of three Buganda Officials was an attempt by government to further enhance the security of tenure of bona fide and lawful occupants following the rise in evictions of non-titled occupants on land that were taking place since the enactment of the Land Act Cap 227 in 1998.

However, it appears that legal reform per se is necessary but insufficient for the realization of the full effects of secure, well-defined and formalized property rights. Several impediments to the implementation of Uganda’s Land Act and to the success of formalization in Uganda have been identified and they include, inter alia, conflicting land rights in the law, a malfunctioning land registration system, lack of a coherent land policy, lack of capacity, corruption and customary law. It has also been argued that even if all the necessary resources were available, the land Act was from its very onset doomed to fail because of its unpopularity in Buganda. Although customary tenure is the most prevalent in the whole of Uganda, the issues relating to it did not cause much public controversy. Instead it is land in Buganda which constitutes less than 20% of the land mass of Uganda which attracted the greatest and most heated contention.

One major challenge to implementation is the setting up of all the new institutions which are created by the Act and making them functional. First, is the issue of funding with respect to, inter alia, training costs and recurrent salaries. The Land Act made no provision for this funding. Bosworth rightly observed that ‘the Land Act was enacted essentially without forethought concerning the funding and human resource requirements for executing the wide-ranging tenure and institutional reforms that it proposed.’ To date both the District Land Tribunals and Land Boards cannot fulfil their functions for lack of funding. Although the Land Act was passed in 1998, by 2000, there were no functioning tribunals. In Mbarara District, the Land Tribunal whose members were appointed in 2001 only became functional in 2003 as a result of ‘logistical problems in getting desks, furniture, and files.’ Even where Land Tribunals were established their operations were intermittent due to resource constraints such as delays in remitting of expenses and salaries. Kampala District Land Tribunal in the capital city of Uganda, while it still

164 Green, supra, n.16 p.377
165 McAuslan, supra, n.1 p.295
existed, only met two days in a month irrespective of the volume of disputes pending to be heard.\textsuperscript{168} Currently, there are no functioning Land Tribunals in Uganda and jurisdiction of land disputes has reverted to Magistrates’ Courts as directed by the Chief Justice in Practice Direction No.1 of 2006\textsuperscript{169} until such time as a decision will be made by Government on the matter.\textsuperscript{170} The effect of this has been the growing backlog of land cases with civil magistrate courts.\textsuperscript{171} Further, according to the Land Act, District Land Boards are supposed to be supported by five technical officers namely the Registrar, Valuer, Surveyor, Physical Planner and Land Officer. However, to date, most Land Boards are only manned by one Land Officer or have not been set up at all.\textsuperscript{172} The Boards also lack the technical tools to carry out their work and a reasonable pay level to attract qualified staff.\textsuperscript{173}

Second, the existing institutions and agencies have inadequate capacity to successfully undertake implementation activities. Equally challenging is the manner of co-ordination of the large number of institutions, which are involved in land matters.\textsuperscript{174} The Directorate of Land and Environment has the overall responsibility to oversee the implementation of the Land Act. Although the Ministry of Lands, Housing and Urban Development has a number of experienced and well-trained professional staff, its overall capacity to handle the demands of the new land law is low. Overall there are major capacity constraints, both in terms of resources and expertise at the disposal of existing institutions, and the ability to resource and fund the new institutions.\textsuperscript{175}

It appears that the Land (Amendment) Act 2010, by giving the Minister the authority to determine the rent where Land Boards fail to do so and by empowering formal civil courts to issue eviction orders, was an attempt by government to circumvent the institutional and resource problems. Unfortunately, it appears that these provisions are both unconstitutional and impractical. Article 241 (1) and (2) of the Constitution provide, in effect, that the District Land Boards have the task of dealing with all land matters in the district and that in the performance of these functions, the Boards shall be independent of the Uganda Land Commission and shall not be subject to the direction or control of any person or authority but shall only take into

\textsuperscript{168}Ibid.
\textsuperscript{169} This Practice Direction is still effective.
\textsuperscript{172} The Uganda Land Alliance, The Land (Amendment) Bill: Transforming Power Relations on Land Equivocally (March 2008), p. 4.
\textsuperscript{173} “Objectives of the Land Act were not fulfilled”, The New Vision, March 25, 2008
\textsuperscript{174} Rugadya and Alliance, “Land reform: the Ugandan experience.”
\textsuperscript{175} Ibid.
account national and district council policy on land. The Constitution does not provide for any circumstances under which this independence may be interfered with by the Minister or anyone else. Therefore, it appears that the Land (Amendment) Act 2010 which allows such interference with the tasks of the Land Board is in breach of the Constitution.

Additionally, it is unlikely that the Minister will be able to properly handle all mandated cases of rent determination. 87.8% of the households in central Uganda are tenants by occupancy meaning that their rent will need to be determined.\textsuperscript{176} As long as most District Land Boards are unable to fulfil their tasks of determining rent for lack of funding, the Land (Amendment) Act effectively means that it is up to the Minister alone to handle all cases in the country. It is obvious that the minister alone cannot properly handle all cases, especially since determining rent is no routine work, but involves taking into account the circumstances of each case.\textsuperscript{177} Further, it is unlikely that any up-country landlord would travel all the way to the capital City; Kampala where the Minister’s office is located to have rent determined which in the end is so nominal that it might not even cover the travel costs.

The absence of a properly functioning land registration system is a challenge to implementation of the Land Act and to government efforts aimed at establishing secure and formalized property rights. As of 2005 the country had only two registrars at the central Land Registry in Kampala to handle all nationwide applications for land titles causing an enormous backlog of unprocessed land title applications. With effect from early 2013, the staffing has been slightly improved following the opening of zonal offices each with one registrar in six districts of Kampala, Wakiso, Jinja, Mukono, Masaka, Mbarara, four of which are in Buganda. Although the staffing has been slightly improved, the staffing in the land registries is still meagre. Consequently, certain crucial document verification steps are sometimes skipped and the title filing system which is meant to ensure orderly record keeping and easy retrieval has collapsed.\textsuperscript{178} This situation has been used by criminals to forge titles. Officials at the Ministry of Lands estimate that about 300 forged land titles are in circulation in Kampala.\textsuperscript{179} Even the titles registered by the Land Registry under due procedure are often inaccurate since the beacons were destroyed in the 1970s and 1980s.\textsuperscript{180} Consequently, the field data feeding into the national Land Registry has been

\textsuperscript{176} This is according to data collected during the 2005 National Household Survey “Land: 87.8% are potential evictees”, The New Vision, Special Report, February 23, 2008.

\textsuperscript{177} The Land Act.s.31 (3c) (i).


\textsuperscript{179} Ibid.

\textsuperscript{180} Beacons are points of known latitude, longitude and height values used as control references during land surveys.
inaccurate for years thus worsening the mess of the registration system.\textsuperscript{181} This lack of proper record keeping and persistent inaccuracies in the registry have also severely contributed to tenure insecurity, especially in urban areas and areas under mailo tenure, thus making evictions easier.\textsuperscript{182}

Fortunately, the challenge of a malfunctioning land registration system is being handled by the Ministry of Lands Housing and Urban Development (MLHUD) which in the last decade, has undertaken efforts and initiatives to modernize land administration and develop institutional transformation through the DeSILIsRoR project ("Design, Supply, Installation, Implementation of the Land Information System and Securing of Land Records") which started in February 2010, and is aimed at helping to secure the country’s land records, to facilitate the management of lands for the MLHUD and registration formalities for the public.\textsuperscript{183}

Corruption is another impediment to formalization and implementation of the Land Act in Uganda where bureaucratic and administrative forms of corruption are pervasive. According to the 2006 World Bank-IFC Enterprise Survey,\textsuperscript{184} more than half of firms expect to make informal payments to public officials to get things done while more than 80% of companies report paying bribes and make more than 30 unofficial payments each year. The situation is no different in land matters where it is normal practice for one to make unofficial payments in order to secure registration or transfer of land to avoid waiting for years for access to a title.\textsuperscript{185} There are many instances of complaints with respect to delays of up to five years in the titling of land or requests for bribes from bureaucrats responsible for filing the title.\textsuperscript{186} Also common are examples of land theft,\textsuperscript{187} and allocation of multiple titles to the same plot. In one incident, Kampala City Council (KCC) 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 KCC does so ‘at his or her own risk.’\textsuperscript{188} Corrupt officials may not carry out genuine field inspections prior to issuing of titles. Further, they may even destroy records leading to conflict and confusion arising out of defective titles.\textsuperscript{189}

\begin{flushright}
\textsuperscript{181} Butagira, "Mess at Land Registry."

\textsuperscript{182} For this assessment see also Ministry of Lands, Housing and Urban Development, Drafting the National and Policy, Working Draft 3 (January 2007), 7.1., 132.

\textsuperscript{183} \url{http://lis-uganda.go.ug/about-project.html} (Last accessed on 10/11/2013)

\textsuperscript{184} \url{http://www.enterprisesurveys.org/ExploreEconomies/?economyid=193&year=2006} (last visited on 10/11/2013).


\textsuperscript{187} The New Vision, 22\textsuperscript{nd} January, 2010.

\textsuperscript{188} Daily Monitor, 17\textsuperscript{th} September, 2005 ‘Has Government stopped recognizing KCC?’

\textsuperscript{189} Nsibambi, "The Land Question and Conflict," p.239-42.
\end{flushright}
Customary Law is another impediment to the implementation of the Land Act and the process of Uganda’s land reform to the extent that it is contrary to the provisions of the Constitution and the Land Act particularly with respect to women and their rights to property. The Land Act provides that:

..any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally, shall be in accordance with the customs, traditions and practices of the community concerned, except that a decision which denies women or children or persons with a disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void.190

Under customary law, it is the men who own the land. Women may only be allowed use rights to it through their relationships with men as Asiimwe noted:

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.191

Additionally, issuance of a certificate of ownership under the Land Act is done in the name of the head of the household who is male. This is still contrary to the equality of women provided for in the Constitution and Land Act. Women’s access to land is crucial for economic development in as much as they are actively engaged in production and reproduction.192

Customary law impedes women’s access to capital to the extent that it excludes them from ownership of land and thus is a hindrance to formalization and to economic development.

However, the issue of customary law as an implementation challenge may be short lived. This is because, although the Constitution and the Land Act gave customary land tenure formal legal recognition, it appears that the underlying policy of the legislation is to facilitate the demise of customary land tenure. Evidence of this may be found in the legislative provisions that allow customary land holders to convert their customary interest into freehold by following the prescribed procedure.193 Upon conversion to freehold, the land is registered under the Registration of Titles Act and it ceases to be subject to customary land law.194

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190 The Land Act s.27.
193 The Land Act s.9(1).
194 Ibid s.14.
provision in the *Land Act* to reconvert freehold to customary land tenure is significant. This policy was informed by the recommendations of the Constitutional commission on which the legislative reforms were based.\(^\text{195}\) According to the Commission’s findings, customary land tenure was on the decline: ‘in practice, many individuals and families holding land under customary tenure have something akin to freehold tenure.’\(^\text{196}\) The Constitutional Commission was persuaded that the conversion of customary tenure to freehold tenure was the way forward for the country’s greater economic development. It asserted:

The great disadvantage of the customary tenure is that it tends to emphasize cultural values more than the economic and financial gains from the land. This retards development. Land users are not encouraged to make long-term investments in the land; nor can they take good care of the land as they would have done if they had clear titles to it. Land held under customary land tenure especially for communal use tends to suffer from neglect and consequent degradation.\(^\text{197}\)

While Uganda’s Land Act is an attempt at formalization, it has the effect of curtailing the land market particularly with respect to *mailo* land. Yet, enhancing of the land market is one of the expected benefits of formalization. This is because the Land Act recognizes the rights of tenants by occupancy. This development has intensified parallel claims over such land.\(^\text{198}\) Prospective buyers are unlikely to be interested in buying land encumbered by interests of tenants by occupancy. As Okoth-Ogendo rightly remarked, ‘[t]he provisions relating to the tenant by occupancy may have rendered registered land subject to them totally unmarketable in perpetuity.’\(^\text{199}\)

Currently, the Land Act makes it mandatory for a registered owner who wishes to sell his interest in land to give the first option to purchase to the tenant by occupancy.\(^\text{200}\) However, tenants will in most cases lack the financial resources to purchase the land. Therefore, an owner who wishes to sell without option must undergo a lengthy process which may take up to 9 months. This process might be further lengthened since he might have several tenants living on his land. He would have to identify the people on his land and establish whether they qualify as lawful or *bona fide* occupants. Even where he successfully completes the process, it is highly likely that the person originally interested in buying the land has already bought elsewhere.

\(^{195}\) Justice Benjamin Odoki (Chairperson), *The Report of the Uganda Constitutional Commission: Analysis and Recommendations*, (1992). The commission was set up to review the constitution and make proposals for a new constitution (which was the 1995 Constitution).

\(^{196}\) Ibid; para 25.61.

\(^{197}\) Ibid; para 25.62 -63.


\(^{200}\) *The Land Act*.s.35 and s.35(2)
Section 3 (a) Land (Amendment) Act 2010 amended section 35 of the Land Act by criminalising the practice of tenants by occupancy assigning their interests without giving first option to the registered owner. This provision would ensure that owners get the opportunity of regaining full authority over their land and thus help to abolish conflicting rights thereby doing away with a major constraint to the land market. However, in view of the general low knowledge about the law among tenants, it is likely that, they may disregard the law, not advertently but because of ignorance of the law. It would therefore be desirable to sensitise tenants by occupancy about the provisions of the law in order to achieve the desired effect. Merely imprisoning them when in breach of this provision would not be helpful.

Uganda’s commercial banks have traditionally considered land an important source of collateral. However, banks are now likely either to be more reluctant to accept land as collateral or to increase the interest rates to take into account the increased transaction costs and associated risks. The banks cannot be certain of the absence of parallel claims because the Land Act is very clear that the rights of customary, lawful and bona fide occupants of land are not prejudiced merely by the absence of a certificate. This means that banks would not be able to foreclose in the event of default. This is because the law does not permit the eviction of tenants by occupancy whereas failing to evict them would render the land economically unviable owing to the non-commercial rent payable by them. Further, banks also fear that owners might deliberatively impose tenants on the land as a means of preventing foreclosure in case of default. Therefore; registered owners would have difficulty in using their land as collateral to raise funds for new investments hence retarding economic development. Most tenants on mailo land lack the resources needed to develop their land or to acquire more land to allow commercial agriculture and invest in modern farming methods. This constraint could be easily overcome by borrowing. However, the Land (Amendment) Act 2004 withdrew the tenants’ right to pledge the certificate of occupancy only allowing tenants to sublet assign or subdivide the right of occupancy thereby leaving them without possibilities to use their land as collateral.

Under the Land Act, customary occupants of urban land who are compelled to vacate it in order to either comply with zoning regulations or allow infrastructure development can now claim compensation for the value of their land and developments thereon. Whereas this new

201 Yamano, Deininger, and Ayalew, “Legal Knowledge and Economic Development: The Case of Land Rights in Uganda.” p.14 and Table 5
203 Ibid., p.128.
204 “Banks oppose Land Bill”, Daily Monitor, March 6, 2008. According to this article banks only express these fears vis-à-vis the proposed law. However, the position is the same under current law.
206 The Land Act.s.34.
207 Ibid.s.73(3).
protection of occupants’ rights is a step in the right direction as payment of adequate compensation is one of the requirements for acceptable eminent domain that respects the property rights of other parties, the framers of the Land Act did not give any thought to or make provision for these resources hence the unforeseen adverse implications for urban authority budgets. In rural areas too, land must be acquired for infrastructure development meaning that all local authorities must negotiate, and pay compensation for land acquisitions for public use. Further, urban authorities also encounter difficulty in enforcing access to the land of customary occupants for infrastructure maintenance usually resolved by the obtaining of court orders which is an additional cost to the authorities both in terms of direct cost and delay in execution of works.

The current provisions which restrict the registered owners’ rights to charging only a non-commercial rent and to evicting tenants only for non-payment of rent leave them with practically no authority over “their” land. This might be reasonable for land which is occupied by tenants whose predecessors held bibanja under the Busulu and Envujo Law, 1927 or the Toro or Ankole Landlord and Tenant Laws. It is however problematic for bona fide occupants who are given security of occupancy by the mere fact that they have been occupying land unchallenged by the owner for 12 years before the coming into force of the 1995 Constitution. It may appear that by providing security of tenure for such occupants, the Land Act merely replicates the position under the Limitation Act that no action for recovery of land shall be brought before a court after the expiration of 12 years from the time such rights arose. It is actually argued that whereas the Limitation Act grants squatters full rights of ownership after 12 years, the Land Act only grants them the lesser rights of bona fide occupants. However, under the Limitation Act, the period of 12 years does not apply where the person having right of action was under legal disability. This means it would not apply to landlords who, due to exile, displacement or minority age, were unable to enforce their rights. However, the Land Act provides no such exceptions. Since many owners cannot be blamed for not claiming their rights during the years of unrest in the seventies and beginning of the eighties, it appears unjust to deprive them of all their authority over their land. This is especially so because most landlords today are not related and or connected in any way to the mailo owners to whom land was assigned by the 1900 Agreement. Rather, they bought their land in good faith for value and thus expected full ownership over their land so as get a return on their investment.

209 The Limitation Act 1959 Cap 80 Laws of Uganda. s.5
210 Mugambwa, supra, n.48
211 The Limitation Act 1959 Cap 80 Laws of Uganda. s.21
7.6 Why did property rights to land change in post – colonial Buganda?

The extant theory and dominant causal model for change in the institution of property rights seems to suggest that institutions change over time in response to relative price changes and change in preferences which lead one or both parties in a transaction to believe that they could be better off under alternative institutional arrangements. However, in Buganda, the evolution of property rights to land during the post-colonial period appears to deviate from and contradict extant theory. However, it seems to resonate with North’s modified approach of the NIE naïve theory of property rights change to wit, that ‘[i]nstitutions are not necessarily or even usually created to be socially efficient; rather they or at least the formal rules are created to serve the interests of those with the bargaining power to devise new rules’. 212

As we saw in Chapter Two, North further elaborates that, a theory of institutional change confined to the strictly neoclassical constraint of individualistic, rational, purposeful activity would not allow us to explain most change. He argues that ‘change has occurred not only because of the changing relative prices stressed in neoclassical models but also because of evolving ideological perspectives that have led individuals and groups to have contrasting views of the fairness of their situation and to act upon those views.’213 Furthermore, that an adequate theory of institutional change would contain “a theory of property rights that describes the individual and group incentives in the system”; "a theory of the state, since it is the state that specifies and enforces property rights"; and "a theory of ideology that explains how different perceptions of reality affect the reaction of individuals to the changing 'objective' situation."214

Accordingly, as we explained in chapter two, it is the intentional decisions by actors that may change de jure attributes of the institution of property rights.215 The perception of political actors is the most critical variable in effecting de jure property rights. In this thesis, we have conceptualized political actors and those with the bargaining power to devise new rules as veto players widely defined as any player who can block the adoption of a policy or legislation either directly or indirectly. As their perceptions change in the face of socio-economic conditions, the actors make policy choices to serve their interests at the time and that in turn may affect the

212 North, Institutions, Institutional Change and Economic Performance. p.16
213 North, Structure and Change in Economic History: p.58.
214 Ibid., p.7-8.
215 Ibid., p.73.
institution of property in one of three ways: strengthening the institution, weakening the institution, or having no effect.\textsuperscript{216}

Admittedly, land was becoming scarce in the mid-60s and according to theory, that is a factor for institutional change. However it is noteworthy that property rights to land did not evolve in response to the scarcity of land and its relative price increase. The politics of actors did not allow it. Instead, property rights were continually changed or the status quo maintained to serve political interests.

7.6.1 The Period 1962 to 1974.

We have seen that, in Buganda, from independence in 1962, to 1975 prior to the enactment of the 1975 Land Reform Decree, there were no fundamental changes in property rights to land. At independence, there were three land tenure systems in Buganda:

First, there was private \textit{Mailo} which is the unique freehold land system peculiar to Buganda. In fact most of the discontent regarding tenure in Buganda at the time was to be found on private \textit{Mailo} lands where there were endless squabbles between landlord and tenant. All factors necessary to warrant a spontaneous change in \textit{Mailo} land tenure were present but no change in \textit{Mailo} land tenure was witnessed. Government too did not forcibly take or transform private \textit{Mailo} land in Buganda. The position of both the landlord and tenant on private \textit{Mailo} also remained unchanged. Why did private \textit{Mailo} land tenure remain unchanged during this period?

There was increasing pressure on land in Buganda in the 1960s owing to, inter alia, greater population. The influx of settlers into \textit{Bugerere} County in eastern Buganda, an area initially deemed unattractive and inhabitable due to infestation by dogs and tsetse flies is evidence of the growing shortage of good mailo land in Buganda.\textsuperscript{217} Population increases could be partly attributed to the influx of migrant labourers from Rwanda and Burundi which started in the 1950s. The 1969 census showed that there was an increase of about 45% in the African population between 1959 and 1969 in spite of the loss of the 2 counties of Buyaga and Bugangaizi to Bunyoro in 1965.\textsuperscript{218} Owing to this increasing scarcity of fertile land and the declining value of rents payable by tenants due to inflation, landlord – tenant tensions had reached their peak. Tenant evictions were rampant; there was increased demand by landlords of

\textsuperscript{216}Ibid., p.82.
\textsuperscript{217}Fortt, supra, n.29 p.78
\textsuperscript{218}Republic of Uganda, "Statistical Abstract," (1970).Table UB 12 Fortt, supra, n.29

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high entry fees to new bibanjas and widespread granting of new bibanja to immigrants, an act detested by the Baganda. According to extant theory, such land scarcity and the subsequent increase in relative prices would demand a prediction that property rights would spontaneously evolve towards individualisation. There was every reason for property rights to change spontaneously towards a more efficient arrangement. However, curiously this did not happen. The perceptions of the political actors did not allow it. Political actors vetoed change that they deemed contrary to their interests.

The perceptions of two different categories of political actors influenced property rights change at the time in Buganda. The first category constituted internal actors namely the Buganda Lukiiko dominated by land owners. We have seen that in the 1960s, the Buganda Planning Commission came so close to carrying out a fundamental reform in mailo tenure by proposing to give tenants semi freehold titles and completely resolving the issue of the land question in Buganda namely the landlord-tenant problem and the attendant overlapping land rights. However this otherwise excellent proposal was vetoed by the landowners who dominated the Lukiiko. For them, preservation of the status quo and maintaining their privileged position over land and the tenants and superiority in society was paramount.

The second category comprised actors external to Buganda namely the UPC government which had a desire to transform mailo tenure and destroy the political base of the powerful Buganda landlords, once and for all, but the political actors opted for a no change policy with respect to mailo. It did not serve the interests of the UPC government to allow or effect change in private mailo land rights at the time in Buganda. The UPC government was afraid of rebellion as a result of antagonizing the politically powerful mailo land owners in Buganda. In this situation therefore, we observe political actors, making policy choices that have no effect on the institution of private mailo tenure. We observe institutional inertia instead of institutional change as predicted by theory in the case of private mailo as a result of politics. The political actors made a policy choice which had no effect on the institution of property hence the institutional inertia we observe in mailo land tenure at the time. Thus whereas it is true that all circumstances that would warrant a theory prediction of change were present, change could not spontaneously take place because of the interruption by and veto of political actors.

Secondly, there was the official Mailo tenure. In this instance, we observed some changes which reflected the interests of the veto players, those with the bargaining power to make new laws. All Official mailo with the exception of the Kabaka’s official estates was
appropriated, turned into public land, and vested in the Buganda Land Board. Later in 1967, when the UPC government was more confident having severed the special relationship that Buganda enjoyed with the central government, and consequently weakened the political influence of the landlord class and the monarchy, then even the only remaining official mailo, the Kabaka’s 350 square miles official estates was expropriated to public land and this time vested not in Buganda’s Land Board but in the Central Uganda Land Commission.

Here we can see that this change was another attempt by the political actors, the UPC government, to erode the power of the landed class in Buganda. It was a bolder attempt since the UPC had already gained confidence after the abrogation of the 1962 constitution and its eventual replacement with the 1967 constitution which did away with kingdoms altogether. Although that move was purportedly intended to improve the welfare of the ‘common man’, UPC’s and Obote’s true intention was to break the political spine of the Buganda landlords. The control of the Buganda landlords over the tenants on these previously official mailo estates was broken hence weakening their political clout.

Not only were the official mailo estates abolished, but also, all rents previously payable on official mailo estates were abolished placing the tenants on those lands in a more advantaged position compared to their counterparts on private mailo lands who were burdened with rents and other social obligations. This was UPC’s initial attempt at eroding the political power of the Kabaka. So although the change was minor in practical terms in that the expropriated official mailo land was vested in the Buganda land board, politically, this dispossession of the Kabaka, the Ssabataka, of his official estates was a major drawback to his political clout. We can see the politics of interest groups at play.

Thirdly, there was Public land tenure. No major structural changes were observed under this tenure during the period 1962-74. The modifications that took place were administrative and dwelt on nomenclature to reflect the change from the colonial government to self-government on attaining independence. For instance, crown land was renamed public land at independence and in Buganda it was administered by the Buganda land board. In fact the provisions of the 1962 Public Lands Ordinance which contained these changes were very similar to the provisions of the replaced Crown Lands Ordinance, 1903.

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219 Ibid: 73
221 Title of the Kabaka meaning that the Kabaka has control over all the land in Buganda
7.6.2 Why did property rights to land change under the 1975 Land Reform Decree?

For the first time since independence, a law was passed, the 1975 Land Reform Decree that altered property rights in land. By the stroke of a pen, individualized ‘freehold’ mailo land in Buganda was transformed into public land. Freehold mailo owners were overnight dispossessed of their exclusive rights to land in perpetuity and turned into lessees on conversion. According to the Decree, land was now to be leased to individuals for a specified period and with specific development conditions. Why did property rights to land change in 1975?

Many reasons have been advanced to rationalize the enactment of the Decree. Amin himself justified the transformation of mailo land to leasehold as a means of ensuring that ‘conservative’ forces did not prevent fertile land from being put to productive use. He said that ‘there was plenty of undeveloped fertile land claimed to be owned by certain individuals and the so called owners did not allow other people to use it to grow crops which when sold or used as food can help Ugandans.’ However it seems clear that the passing of the Decree was an attempt by Amin to diminish the social and political power of the landlords and to place their opportunities for prosperity squarely in the hands of the regime. Clearly, Amin did not appreciate and could not tolerate political opposition. That is why, although he seemed like a pacifist when he allowed the Baganda to return the dead body of their King, Kabaka Edward Muteesa who had died in exile in Britain, he never conceded to Buganda’s demands to restore the Kingdoms. He knew that doing so would mean creating a rival power that would weaken his control over the population. Just like Obote’s government, Amin fully understood that ownership of land was the source of power for the Buganda landlords. Therefore, it seems the Decree was intended to create landed gentry whose fortunes were tied to the regime in power.

Thus, the passing of the Land Reform Decree 1975 as we have seen is another instance of deviation from the dominant causal model. The Decree was unexpectedly enacted. It is true there were changes in relative prices of land and changes in preferences which according to theory could have led actors to seek alternative institutional arrangements, but the change ushered in by the Decree was very different from the alternative arrangements that could have been pursued. It appears that, again, this was institutional change imposed from above, a change in the rules implemented by the State to alter an institutional structure so that it corresponds

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224 Ibid.p.129.
225 Ibid.p.130
226 Ibid.p.135
with the regime’s ideology, the weakening of the Buganda landlord class by transforming it into a politically docile group dependent on the state for economic survival. Of course the state’s true intentions were camouflaged by noble objectives or goals namely to facilitate the state’s enforcement of good agricultural practices such as by making security of tenure dependent upon land use thereby promoting agricultural development and to resolve the longstanding landlord-tenant stalemate on mailo land under which the mailo landlord had ownership without inducement to invest and the tenant was in occupation without the power to develop the land.227

7.6.3 Why did property Rights to land change during the Museveni regime (1986-2010)?

Formal land rights in post-1986 Buganda were fundamentally changed by the Constitution of the Republic of Uganda, 1995 and the Land Act Cap 227 with its subsequent amendments in 2004 and 2010 respectively. In fact, the Land Act may be said to be, ‘a revolutionary law, overturning almost a century of land relations’228 and the basis for the possible evolution of a market in land based on individual ownership.229 Prior to these monumental changes, the Land Reform Decree 1975, although largely unimplemented, remained the law applicable to land. Why did property rights to land in Buganda change the way that they did?

In this section therefore, we explain why property rights to land in Buganda changed in the post-1986 period. Noticeably, the Land Reform Decree which was the main applicable law, although largely unimplemented had remained on the statute books for almost two decades since 1975. Thus, we explain why the NRM government deemed it necessary to change the status quo, finally repeal the 1975 Decree and overhaul the formal property laws at this time. We demonstrate that, more than anything, it is ‘path dependent’ political factors, the political interests of the veto players widely defined, the actors with the bargaining power to devise new laws, namely the Buganda landlords, the NRM government, the tenants on mailo land, and foreign donors who determined property rights change in Buganda in the post 1986 period.

Contemporary theory of institutional change and scholarship posits that institutions change over time in response to relative price changes and change in preferences. When a resource such as land becomes scarcer, and therefore more valuable, as reflected in relative prices, competition for it makes it worthwhile to spend more resources to create and protect the property rights to that asset. Technologies, both for production and enforcement, and changes in the costs of information are also considered major sources of change. Sometimes however, there are variations to this causal mode. The first variation occurs when relative prices change,
but institutional changes are delayed or do not manifest at all, or manifest in an unpredicted manner, that is, in a manner contrary to the changes expected as a result of the price changes, because of vested interests that prevent proper institutional adjustment. The second alteration to the theory comes about when no relative price change occurs but institutional change is imposed from above. Institutional change from above is a change in the rules of the game implemented by the state to alter an institutional structure so that it corresponds with the state’s ideology or goals. Where this second variation occurs, we find that then formal rules are created to serve the interests of those with the bargaining power to devise new rules and that it is the perception of political actors that is the most critical variable in effecting formal property rights.

Formal land rights in Buganda cannot be said to have evolved in response to relative price changes although these had occurred, as we have seen earlier in the Chapter, or to the development needs of the residents. If that were the case, then the changes would have addressed and resolved a major concern for people in Buganda namely the multiple and conflicting tenure rights and interests often overlapping on the same piece of Mailo land. We have seen that the land rights changes did not resolve this issue. But as North observed, property rights do not usually change towards efficiency. Rather, formal rules are created to serve the interests of those with the bargaining power to devise new rules.

The initiative for Land Rights change in the period 1986-2010 seems to have been taken by donors and government all of whose perceptions and actions were influenced by their political interests and ideology. Initially, we shall consider the ideological interests of the World Bank. From the early 1980s, the World Bank became interested in agricultural policy reforms in Uganda. According to Tumusiime-Mutebile the former Permanent Secretary, Ministry of Planning and Economic Development, the history of the Land Act dates back to 1983. He explains that:

[recognizing the importance of agricultural policy in the rehabilitation and development of agricultural sector, and in agreement with the World Bank under IDA – Agricultural Rehabilitation Project, government established, in 1983, an Agricultural Policy Committee supported by the Agricultural Secretariat to formulate, co-ordinate, direct and review key policies and programmes in the agricultural sector.]

Certainly land reforms were integral to the proposed review of policies and programmes in the agricultural sector as appropriate land use and policy are critical for agricultural development. Remarkably though, Uganda had no systematic land policy in place at the time. The government had neither a white paper nor a green paper on a national land policy and any understanding of

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230 McAuslan, supra, n.1 p.281
the content of such policy could only be deduced by piecing together statements made by political leaders such as the president and ministers while discussing Land – related laws such as the Decree and other related matters such as agricultural development, environmental protection and poverty alleviation. The government of the day could not follow through with either the agricultural policy review or formulate a land policy due to the civil war of 1981-86.

Years later, when the NRM government was in power, this foreign donor led initiative was revived. There were renewed calls for market-based land reforms as a result of a fresh resolve by donors and government alike to develop enabling policies for agricultural development. This meant that land had to be transformed into a tradable commodity to allow those with the capability of putting it to more productive use to gain access to it. Thus, the NRM abandoned its Ten Point Programme; a policy aimed at building an ‘independent, integrated and self-sustaining economy’, and embraced neo-liberal policies in 1987. The same year, a working group on land tenure recommended that the effect of the Land Reform Decree be studied and a sound national land tenure policy be formulated, conducive to agricultural development and consistent with positive steps to rehabilitate and update the Land Registry. The World Bank together with USAID funded this major study of land tenure in Uganda carried out by the University of Wisconsin Land Tenure Centre and Makerere Institute of Social Research. The adoption by the NRM government of market-based land reform was influenced by the World Bank and other international aid and lending agencies and theoretically reinforced by the MISR-Wisconsin Study. That the interests of international financial institutions and donors, of upholding the sanctity of private property, influenced the initiative for land reform in Uganda, may be evidenced by USAID and World Bank’s sponsorship of the Wisconsin/ MISR land tenure study. Bazaara posits that the timing of the Wisconsin/ MISR study arose partly from rural unrest in Uganda as well as an external donor driven agenda of privatisation.

This study essentially recommended that the Land Reform Decree be repealed and that the new policy should facilitate the development of a market for land based on freehold titles. Mailo owners, mailo tenants, lessees on public land and customary tenants (those holding public land under customary tenure) should be able to obtain freehold title to the land they occupy.

232 McAuslan, supra, n.1 p.311  
234 Makerere Institute of Social Research (MISR) and Wisconsin Land Tenure Centre Study, "Land Tenure and Agricultural Development in Uganda."  
236 Nyangabyaki, supra, n.241  
237 Patrick McAuslan, Land Reform in East Africa, (Taylor and Francis, 2013).chapter Seven.
Mailo owners would be compensated for land occupied by tenants and converted to freehold land through a process of leasehold enfranchisement.\textsuperscript{238}

The findings of the study also provided a basis for a draft law which provided, inter alia, for the restoration of freehold tenure with the exclusion of mailo land tenure and later for the drafting of the Tenure and Control of Land Bill of 1990 whose main proposals largely exposed an economic agenda by seeking to remove all impediments to the land market through increased individualisation of tenure.\textsuperscript{239} The bill, however, never became law and was overtaken by events, particularly the process for a new national constitution.

Next, we shall demonstrate that the political interests of the NRM government also explain why property rights changed in Buganda in the post – 1986 period. When the National Resistance Movement (NRM) government led by Museveni assumed state power in 1986; it promised a fundamental change in all aspects of people’s lives including agriculture. Therefore, the nature of ownership and access to land being critical to an agricultural country like Uganda, it is not surprising that the NRM embarked on land reform as one of its policy priorities purportedly to ultimately encourage agricultural development.\textsuperscript{240} Being a predominantly agrarian economy, it was argued that to stimulate economic development, land reforms aimed at making the existing land tenure regime more efficient were crucial.

The NRM also embarked on reform because of increasing social unrest in the rural areas particularly in Buganda. Landlords in Buganda feared that a communist NRM was soon going to expropriate their lands. They therefore decided to sell off their lands before the speculated expropriation could take place. Since selling of these lands involved evictions of tenants, there was a lot of social unrest and tension. The NRM government therefore embarked on a land reform which culminated in the change of land rights in Buganda from a situation in 1986 where all land in Uganda was public land to the current situation where all land belongs to the people of Uganda and may be held under any of the four tenure systems recognised under the law: Mailo, leasehold, public land and customary tenure.

In fact, it appears that the immediate catalyst for property rights change was the political interest of the NRM government to ensure its survival. It may be argued for instance that

\textsuperscript{238} Ibid.
\textsuperscript{240} Agriculture still dominates Uganda’s economy, accounting for more than 40% of GDP, 85% of export earnings and 80% of employment. However, productivity in the sector is low, and while coffee, tea, cotton and tobacco are major exports, commercial agriculture remains highly underdeveloped. The UN’s Food and Agriculture Organization (FAO) estimates that 80% of the country’s land is arable, but only 35% is exploited. Investment in agriculture accounts for less than 10% of the country’s FDI.
land reform was not initially a priority of the NRM government as it was not even listed in its Ten Point Programme, a manifesto made in the ‘bush’ before assuming power.

Various scholars have argued that the government interest in the 1990s land reforms was politically motivated so as to win the loyalty and support of the influential Buganda landlords.\textsuperscript{241} This argument is supported by Cross who attributes the NRM’s driving force for formal land reform to appeasing the Baganda political elite for whom grievances over land were central.\textsuperscript{242} This may explain the restoration of mailo land tenure which had been abolished by the 1975 Land Reform Decree and which was neither recommended by the MISR/Wisconsin Land Tenure Centre Study nor the subsequent committees and workshops. Yet, whereas the NRM government wanted to appease the Buganda landlords, it also recognized that the majority of Ugandans being tenants and not landlords, it could not afford to ignore the numerical strength of the tenants which could give them significant political strength. Moreover it has been said that commitments were informally made to the peasants in Buganda on this matter by the NRM during the civil war that preceded the collapse of the Obote II regime and the coming to power of the NRM in early 1986.\textsuperscript{243} The NRM government therefore was faced with a dilemma which also underscores both the complexity of the problem of landlord/ tenant relations on mailo land, and the difficulty of resolving it without necessarily opening a Pandora’s Box of necessarily related issues.\textsuperscript{244}

A compromise between the two interest groups was therefore reached by not only restoring mailo land but also to an extent tackling the landlord – tenants relations problem by securing favourable usufruct rights of mailo tenants in the constitution through Article 237 (8) and (9) of the 1995 Uganda Constitution.

Property rights change in Buganda in the post- 1986 period was deeply interwoven with the power politics of the NRM government.\textsuperscript{245} The process of enacting a law that would facilitate the carrying out of a thorough land reform was interfered with and hindered by the NRM government. The political cost of following through with a definitive resolution to the Buganda landlord - tenant relations issue was way too high. It appears that the political interests of the NRM government were best served by avoiding any major tenure reforms in Buganda and by resorting to ad hoc incomplete irresolute changes to property.

The Land Act was an outcome of compromise between foreign actors such as the World Bank, landlords, the NRM and civil society.\textsuperscript{246} The resulting Land Act of 1998, therefore, is theoretically informed by the modernisation paradigm with an IMF/World Bank inspiration, and

\begin{itemize}
\item McAuslan, Bringing the Law Back In:Essays in Land, Law and Development.p.285.
\item Cross, "A Comparative Study of Land Tenure Reform in Four Countries: Uganda, Tanzania,Malawi and Kenya."
\item Okuku, "The Land Act (1998) and Land Tenure Reform in Uganda." p.11
\item Ibid.P.11.
\end{itemize}
politically by the power plays of the NRM regime. It encourages and supports investment through making land, in both rural and urban areas, more readily available to the market.

7.7 Informal land rights in post-colonial Buganda.

In Chapter 3, we observed and explained that informal institutions are not easy to define. To a large extent, they are insusceptible to precise specification. Nevertheless, we defined informal institutions as ‘socially shared rules [and norms], [that shape human behaviour], usually unwritten [and therefore inaccessible through written documents] that are created, communicated, and enforced outside of officially sanctioned channels.’ Informal institutions are all the implicit rules, customs, norms, practices and habits that are more or less followed by a certain group of people. They are a way of doing things for that particular society.

Informal institutions are widely accepted as legitimate even though they are usually uncodified. They are often unconsciously developed yet remain ‘in everyone’s interest to keep.’

They are rules in use rather than just rules on the books. While formal institutions are the model for expected behaviour, informal institutions define the actual behaviour of players.

In Chapter 3, we also identified that there is a relatively new strand of scholarly thought regarding the interaction of formal and informal institutions which unlike the predominant theoretical views that consider informal institutions as either problem-solving or problem-creating, recognises that informal institutions sometimes co-exist, overlap, complement or conflict with formal institutions depending on the effectiveness of formal institutions in a given economy and on whether the goals of formal and informal institutions coincide. Where formal institutions are ineffective, theory predicts the emergence of competing and substitutive informal institutions corresponding to the incompatibility or commonality of goals with the formal institutions respectively.

Further, we showed that informal institutions emerge and change differently from formal institutions and for a variety of reasons depending on whether they are reactive or spontaneous. Whereas spontaneous informal institutions originate independently of formal institutions and in fact often precede them, reactive informal institutions are endogenous to formal structures

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and emerge in direct response to incentives created by formal rules. Reactive informal institutions are creative responses to formal rules that actors find too constraining.

In Buganda, informal property rights seem to have emerged and evolved because of the growing scarcity of land and in response to the unfavorable land laws and policies. The kind of informal property rights that we observe are mostly competing with formal institutions in line with the theory that where there are weak poorly enforced formal rights, competing and substitutive informal institutions prevail.

The increasing pressure on land in Buganda at the time attributed to a rapidly growing population led to the emergence of spontaneous informal institutions such as informally held land holdings, which were the result of quick undocumented sales of land that were never recorded in the land registry. After independence, mailo land was to a very great extent unsaleable. People were not keen on buying land occupied by bibanja tenants whom they could not evict and whose rent was fixed at uneconomical rates which they could not increase. It is mostly tenants themselves who could buy the mailo land on which their bibanja were situated. However the prices of the export crops were not doing very well at the time after independence and so bibanja holders were not financially thriving. Therefore, anyone who succeeded in raising money to buy the mailo interest in his kibanja would not take the further step of securing a title because of the additional colossal expenses that would accrue. These informal property institutions were spontaneous because they emerged following rapidly increasing land values and a growing population. The increasing scarcity of land also led to sub-divisions of mailo land especially on inheritance to almost uneconomical sizes. These practices were indeed informal institutions to the extent that they were carried out outside the formal official channels, laws and procedures. Owing to the likely uneconomic return expected on the land, the beneficiaries of the sub-divided lands would be reluctant to formalise their holdings under the Registration of Titles Ordinance by following through with all its procedures, as well as paying survey and registration fees in order to get formal title to the land hence the furtherance of informal property. This kind of behaviour and response to the 1927 Law frustrated the working of the Registration of Titles Act, Cap. 205 in its application to mailo land and can properly be defined as a competing informal institution whose goals conflict with the goals of the formal laws. In another sense though, these changes in informal property rights may also be described as reactive to the extent

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\(^{250}\) Ibid.

\(^{251}\) West, Land Policy in Buganda, p. 84.

\(^{252}\) Ibid.
that they were a creative evasion of the formal law, the Registration of Titles Act, Cap. 205; which since its inception as the Registration of Titles Ordinance, 1922 has been criticised as ineffective by those conversant with its application. West observes that:

[a]s a piece of legislation it has a sophistication still generally uncalled for in either rural or urban areas of Buganda. It has 211 sections and 22 schedules; much of it is couched in abstruse phraseology; many of its sections have no application in practice. Its very complexity has weighed against its successful operation in a number of ways.253

As we explained in Chapter three, institutional change in spontaneous informal institutions occurs, through the uncoordinated choices of many agents, rather than in a centralized and coordinated manner.254 The process starts when an individual recognises his circumstances as a new problem and then creates a solution to it. Although both the problem and its solution are of a strictly personal nature, this novel response to a specific problem becomes an innovation as soon as other individuals decide to emulate it. The reaction of other individuals and their emulation of the solution give rise to a cumulative process through which the new behaviour or pattern of action becomes ever more widely adopted by those who expect to better their condition by doing so.255 The diffusion of this innovative behaviour among several or all society members engenders the solution to a problem, which, from an external point of view, is social in nature. In other words, an institution arises and the problem-solving individuals ‘do not have the overall pattern that is ultimately produced in mind, neither on the level of intentions nor even on the level of foresight or awareness.’256 However, the most prevalent informal property rights that we witness in post independent Buganda seem to be reactive, those that emerge in direct response to the formal laws. Reactive informal institutions emerged in response to all the major laws that prevailed in post- colonial Buganda namely the Busulu and Enuvo Law of 1927, the Land Reform Decree, 1975 and the Land Act of 1998.

Sometimes, informal property rights border on the illegal. Competing informal institutions are usually observed where formal institutions are weak and ineffective and where the goals of the formal and informal institutions diverge. Competing informal institutions structure actors’ incentives in ways that are incompatible with the formal rules: to follow one rule, actors must violate another. These institutions are allowed to prevail either because states do not feel the need to enforce the formal laws hence ignoring them or they lack the capacity for

253 Ibid.p.168.
effective enforcement the costs of which are too high. The 1927 Law was not always well implemented. There were instances, for example in Luwunga, Mawogola County, where illegal rental payments ranging between Shs. 350-450 were being levied for pieces of land less than three acres when the official rent payable should not have exceeded Shs 20.257 According to West, this commercial orientation to land although illegal was a result of the continued local demand for bibanja in this area because of its suitability for coffee growing coupled with the remoteness of the area which led to laxity of control by those responsible for enforcing the Law.258 This practice of demanding and paying of excessively high and illegal rents was a competing informal institution which was in response to the 1927 Law which was out of touch with the economic realities of the time. West observed that the bibanja owners were paying the illegal high rents ‘without any obvious resentment.’259

As we saw in Chapter Six, the 1927 Law was intended to, inter alia, protect the tenants against the escalating demands of rents by the landlords. We note that the 1927 law was still valid even after independence until it was repealed by the 1975 Decree. In response to the perceived unfairness of the 1927 Busulu and Envujol law, landlords started giving away bibanja to new holders and demanding entry money (locally referred to as kanzu), a fee that was not provided for by law and therefore unregulated. The practice of giving out bibanja and demanding an entry fee a condition not regulated under the 1927 Law was a reactive informal institution. The landlords compensated for the decrease in the amount of money that they could exact as a result of the rent ceilings in the 1927 Law, by demanding increasingly higher amounts of entry money from young Baganda wanting to settle on their own plots of land away from family holdings and from immigrants who were mainly from Rwanda and Burundi.

The landlords also tried to circumvent the rigidities of the 1927 Law by informally letting out land for short term tenancies locally referred to as ‘okupangisa’ particularly to the Alur from West Nile who would come to Buganda to grow cotton but also to any other person who was interested in accessing land for cultivation. They would agree with the renters on a formula of sharing the harvest. This practice of ‘okupangisa’ was an informal institution because it was beyond the provisions of the 1927 Law or any law. It was neither regulated nor recognised in any formal channels. Indeed, it was also a competing informal institution since it conflicted with the expected outcomes of formal institutions. The 1927 Law was meant to ensure that tenants on mailo land had security of tenure and could comfortably continue to grow export crops. To the contrary, this informal leasing of land afforded the users of land very little security of tenure as

257 West, Land Policy in Buganda. p.83; Fortt, “Land Tenure and the Emergence of Large Scale Farming.” p.82
259 Ibid. p.83.
the mailo owner could ask them to vacate at any time and they were not allowed to grow perennial crops. We can therefore see that the landlords sought all sorts of ways and means of circumventing the restrictions of the 1927 Law. They engaged in practices on the lands and related to the tenants in ways that were unregulated by the 1927 Law or any Law, hence giving rise to the emergence of reactive informal institutions; which arise in direct reaction to the existing laws.

Although the landlords were not entirely satisfied with the provisions of the 1927 Law because the value of rents they were receiving from their rents were dwindling due to inflation, and it was very difficult to evict the tenants, they were at least earning some income from their estates as well as enjoying the obedience and loyalty of their tenants. However, following the passing of the Land Reform Decree in 1975, which repealed the 1927 Busulu and Envujo Law and abolished the payment of rents (busulu and envujo) the Landlords in Buganda sought means of ensuring a continued income from their lands. They therefore devised mechanisms of dealing with the land and with the tenants in ways unregulated by the Land Reform Decree hence again giving rise to the emergence of reactive informal institutions which as we saw in chapter three may emerge as coping strategies devised by local actors to evade the restrictions, uncertainties, unfairness, ambiguities and ineffectiveness of formal institutions.

Landlords in Buganda started to informally lease land to tenants for short periods of time. According to Ssenkumba, this system of leasing (okupangisa) or ‘borrowing’ (okwaziika) of land comprised ‘the main source of income for the landlord since the abolition of rent in the Land Reform Decree.’ Thus, to earn an income from their land, many landlords would evict long-standing tenants in favour of those who informally lease land at market price. In addition, this kind of occupant was also easy for the landlord to evict. This informal practice of leasing land may be described as a reactive informal institution to the extent that it developed in direct response to formal law, the 1975 Decree in this instance which the people found unsuitable and unfavourable.

The 1975 Decree eradicated the security of tenants on mailo land making them tenants at sufferance. To a large extent though, the owners did not evict their tenants and the majority of tenants continued to occupy the land with neither legal recognition nor protection. The numbers of these tenants increased over the years because they also continued to further sub-divide and even sell their usufruct interests on mailo land. The 1975 Decree although largely

262 Green, supra, n.16 p.376
unimplemented remained in place until the passing of the 1998 Land Act which eventually repealed it. Over the years, the extent of informal property greatly increased in Buganda. There were increased numbers of tenants on mailo land who were tenants at sufferance and could be evicted any time by the mailo landlords and who had neither formal title nor documentation for their bibanja. Then, there was another category of informal property holders- people who simply settled themselves on mailo lands without the consent of the mailo land owners especially in rural areas where there were absentee landlords or where the holdings of the landlord were vast and they could not quickly ascertain if someone had encroached and settled on a remote part of the estate.

Whereas the 1995 Constitution of Uganda formalised most of the existing informal property rights by giving legal recognition to both bona fide and legal tenants on mailo land and whereas the Land Act clarified their interests and relationship with the mailo landlords, this still left a significant category of occupants of mailo land unrecognised and unprotected by the Law. This group, known as "squatters", includes all those who occupied land after 1983, even if they had lived on and used the land undisturbed by the owners. Based on the law of limitation, which permits title to be claimed only after 12 years of undisturbed occupation, all those who occupied after 1983 are required to take steps to identify the owner and negotiate their occupation. “Squatting” therefore is an incidence of reactive informal property rights still prevalent in Buganda up to date and it is a competing informal institution as well in as much as it contradicts the objectives of the Land Act Cap 227.

It would appear that there is a lacuna in the provisions of the 1995 Constitution and the 1998 Land Act that seem to give both the mailo owners and tenants rights to land in perpetuity. This is a source of tension and conflict. The definition and rights accorded to tenants is unpopular and restrictive, it lacks legitimacy on the part of mailo owners. In addition, particularly given the rising economic value of land as a result of, inter alia, a quickly growing population, and particularly an upsurge in the demand for land as a result of the emergence of large land dealers, real estate developers and agents, the mailo landowners are dissatisfied with the unrealistic rent ceiling provided for in the Land Act Cap 227, which by setting a nominal ground rent only devalues their property. Further, the improved tenant security attempted by the Land (Amendment) Act 2010 simply exacerbates the dual claims to land in Buganda where the mailo owners are unable to sell their land which is occupied by tenants and the tenants occupying it are also constrained in developing it because they lack title to it. Consequently, the land lords have

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had to devise creative means of evading the unfavourable provisions of the Law and continuing
to derive value from their property. Thus we observe prevalent massive forced evictions, the
emergence of yet another kind of reactive informal property rights where desperate landlords
sell land to those individuals with either the military muscle to evict, the judicial capacity to
manipulate the legal system or the resources to evict on a large scale and get away with the
giving of ‘quasi-compensation’, which is often not commensurate to the interest forgone by the
evictees. The mutual agreement between the registered land owner and the occupant as
provided for in the Law has so far failed to work, hence the rampant evictions.

7.8 The Process of Change of Property Rights to Land in Post-Colonial Buganda.

The changes in formal property rights to land that took place in this period (1962-2010)
were provided for in, inter alia, the 1962 Public Lands Ordinance, the 1967 Constitution, the 1969
Public Lands Act, the 1975 Land Reform Decree, the 1995 Constitution of the Republic of Uganda,
the Land Act Cap 227 and its subsequent amendments in 2004 and 2010 respectively. Thus we
see that most of the changes in property rights to land that occurred during the post-colonial
period were generally intentionally designed.

In chapter two, we saw that the de jure conditions of property rights are deliberately
changed through a political process of policy reform. In other words, formal institutions change
as a result of political processes resulting from the interactions between interest groups and
organizations and the interactions between these two kinds of groups and the rule-makers. The
outcome of these interactions will depend upon the transaction costs associated with
institutional change and the bargaining power of the different interest groups and organizations.

Since actors’ interests often diverge, direct change is undergirded by political conflicts. It
embodies the outcome of conflicts between interest groups, according to each group’s
bargaining power. North’s approach as we saw in chapter two, highlights the role of the state
among other actors, which rules in these conflicts, while at the same time being itself a self-
interested agent of institutional change. The state can act to define property rights in its own
interests and does so when ideology takes primacy in its agenda, for instance, in the wake of a
revolution or a regime change.

In this thesis, we have employed the veto player theory to help us understand and analyse
the politics of the various interest groups at play in post-independent Buganda. The veto is

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264 Libecap, Contracting for Property Rights: p.4.
265 Joireman, Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development: p.278.
important in policy-making because it allows certain political actors to refuse a change in policy. Some scholars have noted that the ability or inability to veto is important for understanding what policies get elected, what laws get enacted. The veto is a negative power, the power to say no to change such as the power to stop a property rights reform bill from becoming law. When actors hold a veto they can decide whether policy is changed or not and as such, may have some influence in what way the policy is changed by restricting the set of acceptable alternative policies. We argue that veto players are the key explanatory variable for stability or flexibility of legislation.

Throughout Uganda’s post-colonial history we observe that land matters were directly intertwined with the politics of the day and that attempts were continuously being made to deliberately design land rights. At the same time, interest groups were also continually strategically re-aligning themselves to ensure that they are well placed to exercise their veto power. At independence, the land-owning chiefs in Buganda successfully opposed the direct elections of Buganda’s representatives to the National Assembly. In this way, they ensured that is only those individuals who championed the land owning interests who would represent Buganda in the National Assembly. In this way; they ensured that they were strategically placing themselves in a position where they could effectively veto policy and legislative change to land rights.

Although there was need for reform, the land tenure system in Buganda remained largely unaltered because Obote, the president at the time feared to evoke rebellion in Buganda by seriously tackling the sensitive land question. Part of the agreement reached by Uganda’s independence government, the coalition government of UPC and KY, was that the UPC would not meddle with land matters at all in Buganda after winning the 1962 elections. This may explain why the first nine years after independence were a period of institutional inertia. There were minimal changes in property rights because the UPC government had committed itself not to meddle in the affairs of Buganda’s land rights and feared the volatile political atmosphere surrounding land in Buganda where private land ownership was most prevalent. Thus we witness deliberate institutional inertia with respect to private land in Buganda because of a veto exercised by the Buganda Land owners through the Kabaka Yekka (KY) party. In this instance, the Buganda Land Owners through the Kabaka Yekka party acted as partisan veto players, who without any legally derived veto can effectively veto policy change. They are actors who by virtue

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267 Ibid.
268 Nyangabyaki, supra, n.3 p.84
of their political importance or because of a position they hold may be able to prevent change, even if this ability is not based on any legal right.

It is only a few minor changes that took place and even these were deliberate – intentionally designed. Crown land became public land vested and managed by a centralised body, the Uganda Land Commission. However in Buganda, Crown land was vested in and managed by the Buganda Land Board.  This was because of Buganda’s privileged position and autonomous status under the 1962 Constitution. For the Baganda, this was the return of ‘their’ 9000 square miles taken by the colonial authorities by the 1900 Uganda Agreement.

In 1964, the Buganda Economic Planning Commission described the kibanja system as ‘a serious obstacle to economic and social development’ and attempted to effect a fundamental reform of mailo land tenure where existing kibanja tenants would be given legal title to their plots which could be bought and sold and pledged as security for loans. This proposal was vetoed by the Buganda Lukiiko which was dominated by the land owning class because it did not serve its interests. First, they could not stand ‘foreigners’—immigrants from Rwanda and Burundi becoming Land owners in Buganda. Secondly they did not want to lose control over their labouring tenants. The landowners in the Buganda Lukiiko, an institutional veto player, because its consent to legislation is required by the Constitution, vetoed and prevented a change in property rights to land which could have helped to resolve the landlord-tenant problem completely.

However, a few years later, the government of the day deliberately by intentional design under the 1967 constitution disbanded land boards and the 9000 square miles of public land that Buganda had regained under the 1962 Public Lands Ordinance was now taken by the Central government, Obote’s government and vested in the Uganda Land Commission while the Buganda Land Board was disbanded. The 1967 Constitution by doing away with the federal arrangement that had sustained the power of the Kingdoms had diminished the bargaining strength of the landowning interest group in Buganda, and weakened the veto power of the Buganda landlords. Hence, Obote’s government could now easily initiate change in property rights without much opposition. Under the 1969 Public Lands Act, all official estates in mailo tenure were made public land. People could acquire and register up to 500 acres of land or more with the consent of the

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269 The Public Lands Ordinance.
270 McAuslan, supra, n.1 p.279
271 The Buganda Planning Commission, “The Economic Development of the Kingdom of Buganda ... A Report to the Kabaka’s Council of Ministers “.p.1
minister. The 500 acre limit was intended to slow down the privatisation of public land in order to prevent the landlessness of peasants.

The 1975 Land Reform Decree was also deliberately enacted and was intended to completely break the political backbone of the land-owning class in Buganda and make them dependent on Amin’s regime. It was also purportedly intended to resolve the longstanding stalemate on mailo land where the mailo landowner had ownership without the inducement to invest and the tenant was in occupation but without incentive to develop the land. The Decree was also intended to promote agricultural development by making security of tenure dependent upon land use. These objectives were accomplished by the decree by abolishing all mailo and freehold tenure and making all land in Uganda Public land, held under leasehold from the state.

When Museveni’s NRM government came to power, it wanted to develop a land tenure system that would promote agriculture through the functioning of a land market which allows those who have rights in land to voluntarily sell their land and for investors and producers to gain access to land. Government also wanted to try and resolve the land issue in Buganda where landlords were evicting tenants and causing a lot of social tension.

Consequently, the government commissioned various studies and technical committees in order to establish the nature of land reform required to meet its objectives. Prominent among these was the Wisconsin/ MISR study whose recommendations, although appropriate to meet the economic objectives of the intended land reform did not take the political interests of government into account. In general, the recommendations for property rights change given by the several commissions, workshops, committees and studies although diverse seemed unified in pointing towards a uniform system of land tenure based on freehold tenure, the gradual phasing out of customary tenure as freehold titles replace customary holdings, government facilitating leasehold enfranchisement and leaving the resolution of landlord/tenant relations on mailo land in Buganda to market forces. All these efforts were however soon overshadowed by the making of Uganda’s new constitution. The Late Francis Ayume, the then Minister, Office of the President, in his address to Parliament while moving that the Land Bill, 1998 be read a second time, said that:

however, as the Constituent Assembly was preoccupied with discussing sensitive land issues, Government thought it prudent to delay the legislation on the land matters to avoid biasing the Constituent Assembly debate on land. Suffice to say...that the Odoki Commission shared information on land issues with the Technical Committee and that the Committee’s Report and Draft Bill provided useful information for many Constituent Assembly Members.\(^{272}\)

\(^{272}\) Ayume, Francis, Minister, Office of the President Parliament of Uganda, “Parliamentary Debates (Hansard),” (1998).pp.4041-4043

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Prior to the promulgation of the 1995 Constitution, a constitutional commission was established under the Constitutional Commission Act 1988. It was a body with the mandate to hear public testimony and draft a new constitution. Thereafter, in 1993, an election for delegates to the Constituent Assembly, an organ with the mandate to debate and pass the Constitution was conducted. The constituent assembly was a veto player in the sense that it could veto proposed provisions for inclusion in the new Constitution. In Buganda, the majority of delegates elected were from the landowning class because it is this class that had educated individuals with the credentials to run and be elected to this important organ. Again, this ensured that the landowning class in Buganda was well positioned to exercise their veto power. In the Constituent Assembly, the representatives claimed that all people in Buganda supported the restoration of the mailo-land form of tenure. This was not very far from the truth because as Richards recognised four decades ago, ‘both the mailo and kibanja systems have come to have emotional overtones in the minds of landowner and tenant, as something uniquely Ganda and not available to other citizens of Uganda, a part of Buganda’s treasured past.’ Although the Constitution laid out very important property rights changes, the constituent assembly delegates avoided the difficult task of resolving the landlord-tenant problem on mailo land and instead passed it on to parliament to pass a law regulating the relationship between landlord and tenant within two years of enacting the constitution.

Article 237 Clause 9 of the Constitution of 1995 provides that:

(9) Within two years after the first sitting of Parliament elected under this Constitution, Parliament shall enact a law—
(a) regulating the relationship between the lawful or bonafide occupants of land referred to in clause (8) of this article and the registered owners of that land;
(b) providing for the acquisition of registrable interest in the land by the occupant.

Consequently, in accordance with that constitutional provision, parliament started its responsibility of passing a law that would, inter alia, regulate the relationship between the landlord and tenant on mailo land by way of considering the Land Bill and ensuring its passage into Law by the 2 July 1998. It is worth mentioning that the decision by the Constituent Assembly delegates, to put off for two years, legislation regulating the landlord/tenant relationship on mailo land did not make things any easier. It has been said that ‘the debate over the Land Act

273 Statute 5 of 1988
274 Nyangabyaki, supra, n.3 p.228
276 Green, n.16 p.376-77
turned out to be one of the most difficult political struggles of the NRM’s first 15 years in government.277

The Land Bill was resisted both within the NRM and Parliament.278 The absence of a clear majority in parliament made it more difficult for the NRM government. The Movement system was prevailing in Uganda at the time and consequently a no party parliament. Members of Parliament had been elected to Parliament not on party tickets but on an individual merit basis. There were no whips in Parliament. This meant that there was neither party cohesion nor discipline and that the Members of Parliament (MPs) were not easily aligned into support for the government position so that a coalition of interests had to be developed for the passage of each new bill. Within parliament, the sessional committee on Lands, Water and Environment was also a key veto player. A sessional committee has an important role in the legislative process in the parliament of Uganda. It has the mandate to critically examine bills brought before the House before they are debated; and The Constitution in Article 90 (4) provides that, ‘[i]n the exercise of their functions under the Constitution, committees of Parliament-(a) may call any Minister or any person holding public office and private individuals to submit memoranda or appear before them to give evidence;’ In effect therefore, the sessional committee may invite submissions from the public and even receive unsolicited suggestions for change.279

Buganda Kingdom, which was then newly restored in 1993 as a cultural institution, also vehemently opposed the Bill and mobilized large numbers of people to resist the Act as unofficial veto players. This category refers to actors who employ extra institutional veto power to block change of the legislative status quo in a political system. Although this category of veto players does not have an official capacity to veto change, they can nevertheless use their unofficial veto power to block change.

The Sessional Committee collectively successfully exercised its veto on several provisions in the Land Bill, 1998 so that they did not become law at all or became law but in a greatly modified form. We shall however, owing to space constraints, only consider the two most contentious ones. Firstly, we shall look at the provision relating to leasehold enfranchisement. This provision is also an instance where we observe incongruence between politics and market-driven perspectives. Article 237(5) of the Constitution provides that leases granted to Ugandan citizens on former public land may be converted to freehold tenure in accordance with a law made by Parliament. Accordingly, Clause 9 of the Land Bill, 1998 provided for the automatic

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278 Ibid.
279 McAuslan, supra, n.1 p.304
conversion of leases into freehold. This was one of the most contentious clauses of the bill.\textsuperscript{280} Members of the public took exception to this provision and so did the committee. In referring to the land settlement under the 1900 Uganda Agreement where the Colonial Government gave half of the land in Buganda Kingdom to 4,300 people out of a population of nearly half a million, Benedict Mutyaba, the chairperson of the Sessional Committee on Lands, water and environment said, ‘if we believe that this act was wrong, we would be committing a bigger crime, if this enlightened Parliament were to do the same, by allowing a few people who have leases over stretches of land to convert them into freehold automatically.’\textsuperscript{281} The Committee was also concerned that automatic leasehold enfranchisement leading to individual freehold ownership could encourage the growth of a class of rural proletarians contrary to the notion that, ‘in Africa, land belongs to a great family for which many members are dead, some are living, but the larger number is yet to be born.’\textsuperscript{282} In fact, the Sessional Committee Report to Parliament at the second reading of the bill seemed to suggest that the issue of leasehold enfranchisement, automatic or otherwise be postponed to say, 50 years in the future when Parliament may make a law providing for it. However, it was pointed out that the Constitution had already provided for it and so finally, the Bill was amended so that leaseholders on former public land can apply to District Land Boards for freehold reversion of their leases and that they would have to pay for them.

Secondly, we shall consider the Sessional Committee’s veto on provisions relating to the regulation of the landlord and tenant relations on land and particularly the definition of \textit{bona fide} occupants as a category of tenants. The Land Bill defined a \textit{bona fide} occupant as a person who, before coming into force of the Constitution:

(a) had occupied land which lawfully belonged to another person, but which the occupant occupied and utilised or developed genuinely, believing that no registered owner or agent of the registered owner was available, from whom the occupant could obtain consent to occupy or utilise or develop the land.

(b) had occupied and utilised or developed any land unchallenged by the registered owner, or agent of the registered owner, for 12 years or more.

(c) had been settled on land by Government or agent of Government which may include a local authority.

\textsuperscript{281} Ibid.
\textsuperscript{282} Ibid.
Members of Parliament MPs and members of the public particularly in Buganda were not persuaded by the definition of bona fide tenants given in the Land Bill and their inclusion into the category of tenants granted security of occupancy in perpetuity. The greatest contention was with respect to the first definition as it was argued that it is unlikely that anyone, especially in Buganda, could settle on land without knowing who the owner was and that granting such a person a right to remain on the land is to reward illegality which is most undesirable.\(^{283}\) Besides, proving the genuineness of the occupant when he claims that he did not know who the owner was or that there was no registered owner is difficult as it is an issue of the mind. The Sessional Committee exercised its veto and had this group of persons removed from the category of bona fide occupants.

At this point, it was no longer the objective of developing a land market in land that was important but rather, the answer to the political question of who was to control land in Buganda. Would the status quo be maintained so that the traditional landlord class individually as *mailo* land owners remained in control of *mailo* land and collectively, through the *Lukiiko* controlled public land or would control be lost to the tenant peasants whom it appeared the Land Bill sought to give ownership. Whereas as we have seen earlier on in this chapter that President Museveni seemed to be clearly in support of fundamental reform and vesting of ownership in the peasant tenants, many politicians and opinion leaders in Buganda claimed that the Land Bill was aimed at taking away land from the Baganda and so managed to rally the support of the peasant tenants behind the landlords and to support the maintenance of the status quo on *mailo* land. The people in Buganda were suspicious about the 12 year period as the cut off point for legitimacy on land as they believed that the 12 years coincided with the time since the NRM government came to power and that therefore it was a scheme to secure people, ‘foreigners’ it had settled on other people’s land.\(^{284}\) Partisan veto players have a veto over the legislative process not because it is legally required but because their support is politically required to change the legislative status quo. The peasant tenants on mailo land in Buganda are an example of partisan veto players. Owing to their numbers and therefore consequent contribution to maintaining the NRM government in power, they can exercise a veto over the legislative process. McAuslan narrates that he was told by very prominent people in Buganda that ‘there was no need for changes to the law on mailo land as relations between landlords and tenants were very

\(^{283}\) McAuslan, supra, n.1 p.295
\(^{284}\) To the Baganda, a ‘foreigner’ with regards to land is anyone who is not ethnically from Buganda
good and only outsiders wanted to disturb things; the solution was to revert to the independence settlement on land.\textsuperscript{285}

We also observe the role of the indirect veto players particularly during the process of enacting the Land Act, 1998. Indirect veto players may have special ties to veto players enabling them to influence these players. The means of political influence for indirect veto players is direct lobbying which involves bargaining with political elites. In fact, actors can be described as indirect veto players if they succeed in convincing at least one of the veto players to act on their behalf. Indirect veto players such as interest groups can therefore indirectly veto legislative change if they succeed in effectively winning over at least one veto player, persuading that player to become an agent for their specific interest, to put it on the legislative agenda, support it and build a minimum winning coalition.

Thus in Buganda we recognise the role played by all the national daily newspapers, the various radio stations in creating public awareness of the Land Bill and in this way also lobbying veto players by rousing public opinion. Non-Government Organisations (NGOs) notably the Uganda Land Alliance, a consortium of many small NGOs and the Uganda Women’s Network also actively participated as indirect veto players by ‘sensitising people to the Bill, researching on their needs and publishing well thought-out specific suggestions for amendments to the Bill.’\textsuperscript{286} In this way, they were able to win over government; MPs all veto players in their own right and secure their positions in the final Law. Government was constantly open to suggestions for change and there were considerable changes to the published March 1998 Bill and hence to the final Land Act.

Finally, the government was able to pass the Land Act in June 1998. Nevertheless owing to its unpopularity; there have been repeated calls for its amendment and increased support for the demand for revival of the Federal State of Buganda that existed between 1962 and 1966.\textsuperscript{287} To the Baganda, the only way that land in Buganda could be safeguarded was if the 9000 square miles of public land wrongfully taken away from Buganda by Obote in 1966 was ‘restored’ to Buganda by being re-vested in the Buganda Land Board which was re-established to manage the 350 square miles of land returned to the Kabaka as his land when the Kingdoms within Uganda were restored as cultural institutions under Chapter 16 of the Constitution.\textsuperscript{288} However, the expectation by the people of Buganda to have the 9000 square miles restored seems a far cry

\textsuperscript{285} McAuslan, supra, n.1 p.297
\textsuperscript{286} McAuslan, supra, n.1 p.304
\textsuperscript{287} Ibid; p.377
\textsuperscript{288} Ibid; p.297
from reality for two reasons: First and foremost, there is no public land to be returned to Buganda following the elimination of the category of public land by the 1995 Constitution which vested all land in the citizens of Uganda and also conferred ownership on customary tenants on former public land.

The most recent amendment to the Land Act of 1998 was the heavily contested Land (Amendment) Act, 2010 with only five sections which did not fundamentally alter the property rights structure in Buganda but was purportedly aimed at increasing the security of occupancy of lawful and bona fide occupants (tenants) on registered land in accordance with Article 237 of the Constitution following the increasing illegal evictions of non-titled occupants. However, this Act does not seem to address the real causes of illegal evictions and we can safely predict that its impact will be modest. The cause of illegal evictions in Uganda is not the lack of laws protecting occupants but rather the laws themselves, which create conflicting rights over the land as well as the lack of a functioning registration system and a coherent land policy that could guide land administration. To actually enhance tenure security, it is suggested that the relationship between registered owners and occupants would need to be redesigned more fundamentally.

Although as we have seen direct institutional change of formal property is the result of ‘purposive activity of human beings to achieve objectives’ it implies neither an effective control of institutional evolution nor efficient results for several reasons. Firstly, deliberate strategies of various actors interact and can yield unexpected results which do not coincide with any of their initial intentions. ‘The maximising efforts of entrepreneurs frequently have unanticipated consequences.’ Secondly, owing to bounded rationality, imperfect information, imperfect political markets, and because institutional change is inclined to encounter systemic or political lock-ins, ‘institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to devise new rules.’ In a world of zero transaction costs, ‘bargaining strength does not affect the efficiency of outcomes; but in a world of positive transaction costs it does.’

Admittedly, even in Buganda, in several instances, these carefully crafted designs gave way to unintended consequences. For instance, the Land Reform Decree was generally intended

\[\text{289 North, supra, n.130 at p.7.}\]
\[\text{290 North, Institutions, Institutional Change and Economic Performance: p.4.}\]
\[\text{291 Vincensini, "The Evolution of Post - Socialist Ownership Structures in Central Europe: From Deliberate to Spontaneous Institutional Change". ( last accessed 10/11/2013) p.4.}\]
\[\text{292 North, Institutions, Institutional Change and Economic Performance: p.78.}\]
\[\text{293 Vincensini, "The Evolution of Post - Socialist Ownership Structures in Central Europe: From Deliberate to Spontaneous Institutional Change". p.4.}\]
\[\text{294 North, "Economic Performance through Time."}\]
to spur capitalist agriculture, by making land available to those most able to put it to the greatest productive use. Hence, the Decree removed the protection given to customary tenants under the Public Lands Act 1969 with the intention of making security of tenure dependent upon land use so as to promote agricultural development. However, studies have shown that the unexpected consequence was that the majority of those who converted their tenancies to leaseholds were not interested in agriculture but did so for prestige, or to get collateral for loans for their other businesses but not for agriculture.

Further, eviction of tenants was also made easy under the Decree so as to free land for large scale farming. Again, the unexpected outcome was that whereas people actually acquired large chunks of land after easily evicting tenants, many of them, instead of devoting it to agriculture, hoarded it, or even mortgaged it to raise capital for other non-agricultural business transactions.

One of the objectives of the Land Act was to facilitate a land market. However, an unintended consequence that resulted was the curtailing of the mailo land market. The Land Act recognises the rights of tenants by occupancy which overlap with rights of the titled mailo land owners. It is therefore unlikely that any prospective buyers will be attracted to land encumbered by tenants who are almost impossible to evict and who pay only a nominal rent. Further, the Land Act makes it mandatory for the mailo owner to give the first option of purchase to the tenant who may not even have the financial capability and provides a lengthy procedure for selling out of option thus making any prospective sale even more cumbersome.

And finally, another unintended consequence of the carefully designed property rights changes of the post–colonial period is the huge financial commitment required to ensure the successful implementation of the Land Act.

7.9 The direction of property rights change in post- colonial Buganda.

In this chapter we have seen, that even during the post-independence era, the direction of property rights to land in Buganda was not linear, an observation consistent with our theoretical framework in Chapter 2, where we argued that the more accurate position seems to be, that there are multiple directions to property rights change.

We argue that whereas most scholars of property rights change assume a linear development of property rights from communal towards greater specification and ending in private property in response to a changing environment, what we observe contradicts this assumption. In Buganda, we witness a culmination of rights to a mix of private, state and

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295 Joireman, Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development, p. 269.
communal property. Moreover even where we see private property, rights are not clearly defined and enforced and there is a prevalence of overlapping and conflicting rights on the same piece of land.

We agree with Joireman who theorises that the path of property rights change is not always towards greater specification or privatization but rather that responses to changes in relative prices can follow multiple trajectories depending on, *inter alia*, the type of resource base that exists, state agendas, the influence of non-state actors as well as the types of pre-existing institutions that are in place.\(^\text{296}\) Any of these factors can distract property rights away from the linear path towards privatization to multiple paths towards common property, state property, other restrictive property arrangement or even a mix of individualised and communal tenure.\(^\text{297}\)

Thus at independence, we see the nature of resource base dictating the direction of property rights change. The waste and uncultivated lands previously held as Crown land under colonial rule were maintained as public land and did not move towards more specified tenure. Since these lands were mainly swamps, forests, tsetse fly and dog infested, there was no encouragement to invest in greater specification of rights to them. Further, they were uncultivated and remote and land was still plentiful at the time. There was therefore no justification for more precise property rights.

The political agenda of the state is another important factor in determining the direction of institutional change because privatisation of property must be regulated through the state and land titling effected through state organs.\(^\text{298}\) Consequently, the state can and does influence the allocation of property rights and the direction of institutional innovation through its own ideological agenda, and through the intervention of interest group politics.\(^\text{299}\)

True to this preposition, we witness, under The Land Reform Decree, the agenda of the state influencing the direction of property rights to land away from mailo a more privatised tenure to leasehold a more restricted tenure where lessees on conversion were required to hold land subject to development conditions imposed by the state. All land in Uganda was also declared to be public land under the Decree.

A state comprises politicians and bureaucrats with specific goals and political debts which gives the state an agenda of its own which may or may not coincide with economic efficiency.\(^\text{300}\) It may, therefore, be politically incorrect to assume, as the evolutionists do, ‘that a state will automatically intervene to specify property rights, award title and adjudicate disputes.’\(^\text{301}\)

\(^{296}\) Ibid.p.290-292.  
\(^{297}\) Ibid.p.304.  
\(^{298}\) Ibid.p.276.  
\(^{299}\) Ibid.  
\(^{300}\) Ibid.p.277.  
\(^{301}\) Ibid.
are several reasons that may explain a state’s stymieing of endogenous property rights change towards privatization and as a corollary why a state may opt not to title land.

After independence, we recognise that although individual titles could be secured under mailo land tenure, there was still a prevalence of public land. Official mailo estates which were freehold lands held in perpetuity were transformed into public land. Following the loss of Buganda’s federal status enjoyed under the 1962 Independence Constitution and the abolition of kingdoms in Uganda, the former Kingdom of Buganda became a province in the Republic of Uganda with Obote’s government with Socialist tendencies at the helm of administration and authority. The official estates of the Buganda chiefs and later of the Kabaka were brought to an end and converted into public land. Some of the land comprising these estates measuring about 4,067 square miles was very fertile. Therefore according to extant theory, we would expect to see a move towards more individualised tenure. But that was not the case. This was definitely a political decision. First, Obote’s government had socialist leanings and second, he wanted to further weaken the political base of Buganda’s aristocracy as we saw earlier in this Chapter. We can see the interests of the politicians informing the agenda of the state and influencing the direction of property rights away from the expected linear path towards greater specification and steering it towards public tenure. We also notice the prevalence of a large number of tenants on both mailo and public land who hold ill-defined and insecure rights to land. We therefore observe more or less a reversal of direction of change contrary to that predicted in theory that property rights evolve towards greater individualization.

The evolutionary theory of property rights envisages a transition from relatively imprecise community-based arrangements to well-defined, often individualized rights that may be inherited and traded. However in Buganda, we do not witness such a neat trajectory. Under the Land Reform Decree in 1975, government legislated to move tenure away from specified land rights to only leasehold. By the stroke of a pen, individualized ‘freehold’ mailo land in Buganda was transformed into public land. Freehold mailo owners were overnight dispossessed of their exclusive rights to land in perpetuity and turned into lessees on conversion. Subsequently, the 1995 Constitution of Uganda and the Land Act of 1998 widened the tenure system to four legally recognised categories. Therefore, property rights to land in Buganda changed from a position where only one tenure system- leasehold, was recognised in the Law and all land in Uganda belonged to the government and vested in the Uganda Land Commission for management and administration to the current position where all land in Uganda belongs to the citizens of Uganda and is held under four tenure systems: Mailo; leasehold; freehold and customary tenure.

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Even at the present time, we still observe a prevalence of imprecise informal land rights arrangements such as ‘squatters’, conflicting and overlapping land rights held between titled mailo land owners and non-documented *bona fide* and lawful tenants, customary land holdings which may still be very difficult to clarify and specify.

Whereas the evolutionary theory of land rights change posits that land scarcity, investment options and the underlying resource value of land are key determinants of the evolution and direction of property along a linear path towards more individualized tenure, empirical evidence from Buganda has shown that the evolution of property rights to land does not necessarily follow a linear path. In some circumstances, the expected linear process of change may be obstructed or affected by, inter alia, ‘path-dependent’ political factors, and the more specified rights expected may not emerge at all or that the end result appears more like retrogression rather than a development of property rights.

**7.10 Conclusion.**

Empirical evidence in this chapter has shown that formal rules are indeed created to serve the interests of those with the bargaining power to devise new rules. We have recognised that this bargaining power may be exercised either directly by veto players widely defined as actors who can block the adoption of a policy or legislation or indirectly as indirect veto players who would have to persuade at least one veto player to act on their behalf.

The passing of the revolutionary Land Reform Decree by Amin in 1975 clearly shows that where it serves the interests of those with the bargaining power to devise new rules, then property rights can be transformed at the stroke of a pen. Amin, a veto player by any standard, as all the major legislative functions were undertaken by him, having abolished the parliament, wanted to completely destroy the political might of the *Baganda* landed gentry by making them dependent on his regime for economic survival.

We have also observed that even where relative prices of land increase and property rights may be expected to change in response, institutional inertia may be deliberately caused by veto players. In the period 1962-74 there were no substantive property rights changes in Buganda because of commitments undertaken by UPC, a veto player not to meddle in land rights in Buganda. Subsequently, the Buganda Lukiiko, another institutional veto player, also vetoed proposed changes to mailo land tenure by the Buganda Economic Planning Commission in 1964.

Throughout the post-colonial period, we have seen that the law makers changed property rights only when it served their interests and only protected or took into account the interests of other stake holders when they coincided with their agenda.
Generally property rights in Buganda throughout the post-colonial period were not always very well implemented and this sometimes led to the emergence of reactive informal institutions as the people’s response to the poorly implemented laws and creative evasion of unfavourable legal provisions.

Regarding the property rights change initiatives of the 1980s, we concur that ‘[t]he emergence of land reform on to national political agendas in the late 1980s can be understood only in the context of wider pressures for the liberalization for the liberalization of African economies.’ For instance, whereas it is true that Museveni’s NRM government was under intense pressure particularly in Buganda to deal with grievances over land matters, that does not fully explain the donor-funded land reform studies, workshops, and committees as well as the subsequent thorough overhaul of property rights that resulted.

Yet the market-driven land reform initiatives notwithstanding, we note the significance of path dependence- history matters. We see that the history of land tenure in Uganda since 1900 clearly had a much greater impact on shaping the final outcome of the Land Act ‘than the decade of the market –orientated donor- sponsored committee reports on land tenure.’ Benedict Mutyaba, the Chairman of the sessional committee on Lands Water and Environment recognised this and commented that ‘[i]t is, however, disappointing that most of the heated debates about the Land Bill dwelt on historical events whose relevance and applicability is no longer current.’ Although he called upon members of the House not to be dissuaded by historical events and emphasized that the Land Bill was not about politics, the reality was that path dependent political factors mattered. McAuslan who assisted in drafting the Land Act had this to say:

The political compromises negotiated within the Sessional Committee, between the Committee and the minister and between the Government and its critics, especially within Buganda, diluted the pure milk of the market solution and although the resultant law may look messy, a law of compromises which recognises the continuing strengths of the indigenous land tenure system will have a better chance of successful implementation than a law which seeks to set them aside and replace them with a law based on “legalistic plagiarism”.

We have noted that it is important to acknowledge that some ethnic groups may have a special attachment to their land and that this must be taken into account when considering transformation of property rights to ensure that it is well embraced by such groups. The Baganda as an ethnic group have a special cultural and emotional attachment to their land, their

304 McAuslan, supra, n.1 p.304
306 McAuslan, supra, n.1 p.304
307 Green, supra, n.16 p.372
traditional territory, their homeland. That may explain why Buganda’s leaders treat with suspicion any government intervention relating to land. They associate such interventions and reforms as ploys by ‘foreigners’ whether non-Ugandans or non-Baganda Ugandans colluding with government to take away their land. President Museveni himself, a non-Muganda is treated with suspicion by the Buganda leaders and they have on several occasions accused him of conniving with foreign investors to ‘steal’ their land. The Baganda are the largest ethnic group in Uganda constituting 18% of the population and Buganda has always been regarded as the largest and wealthiest of the Country’s kingdoms. Buganda sees itself as a separate political entity which means that its leaders may continue to oppose a uniform national policy on land. It is not surprising that the President in recognition of Buganda as an essential pillar of his political support base has had to tone down his tough stance on land reform and even had to renegade on undertakings he had made to do away with mailo tenure.

Chapter 8: Conclusion

8.1 Introduction

To a large extent, extant scholarship posits that institutions play a central role in the economic development of nations. It therefore follows that nations that aspire to improve their economies must establish institutions such as well-defined and enforced property rights. However, although the importance of institutions is widely recognised, there seems to be an absence of consensus on what institutions actually matter for economic growth and how to acquire them. This thesis contributes to the literature on institutional change by identifying objectives of political actors and interest groups within a society as additional variables for institutional change and also furthers knowledge of the actual process by which property rights institutions change using Buganda, a region in the central part of Uganda as a case study.

The findings in this study are discussed in Chapters 6 and 7 where the history of property rights in Buganda is analysed in light of the analytical-cum-conceptual framework set out in chapters 2, 3 and 4. This chapter synthesises the findings of this research.

8.2 Review of the research objective and questions.

This study aimed to investigate the evolution of property rights to land in Uganda during the period 1900 to 2010 in order to understand why, when, in what direction, and how property rights emerged and changed. To achieve that objective, we asked the following questions: (1) why do property rights institutions emerge and change? (2) When do property rights change? (3) In what direction do property rights institutions change? (4) What is the process of property rights change?

We employed an institutional analytical framework based on the field of New Institutional Economics because it is particularly suited to the kind of research questions asked in this study. The success of NIE as a field has been attributed to its ability to answer new questions such as why economic institutions emerged the way they did and not otherwise thereby allowing more robust micro analytic reasoning than usual.1

We conceptualise property rights as institutions because they are rules, ‘humanly devised constraints that shape human interaction.’2 We are then able to use an institutional analytical framework to understand why and how property rights change over time and take the form that they do. It is argued that the richest literature examining property rights as institutional structures lies within the New Institutional Economics.3

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2 North, Institutions, Institutional Change and Economic Performance: p.3.
In this thesis, we have considered two different ways of explaining the emergence and change in property rights. One attributes property to intentional design, the other to unintended consequences. However, we recognise that each approach cannot independently explain institutional change plausibly. What one approach can accomplish, the other cannot and vice versa. For example, while the intentional design approach can persuasively explain the creation and enforcement of most property rights, it fails to explain changes in informal institutions which evolve in a spontaneous decentralised manner. Likewise, whereas the unintended consequences approach avoids the short comings of the intentional design school, it overlooks the role of collective action and the political process and cannot explain institutional change in instances of resource abundance.

The analytical framework we have employed to examine change in the institution of property rights to land in Uganda therefore, is a combination and modification of the two approaches. It is a two - part framework. Part one explains the process of *de jure* (formal) property rights change (‘direct institutional change’) while part two explains *de facto* (informal) property rights change (‘indirect institutional change’). We also incorporate Tsebelis’ veto players’ theory from Political Science in our framework to help us understand the political processes through which formal property rights are created and changed.

We acknowledge that although the unintended consequences approach is suited to explaining informal institutional change, it neither distinguishes between the various kinds of informal institutions nor recognises and explains the different ways in which they emerge and change. Further, none of the two approaches takes into account the interaction of formal and informal institutions. To this end therefore, we in Chapter 3 also adopt Helmke and Levitsky’s typology for the interaction of formal and informal institutions from the Politics literature and argue that informal and formal institutions may interact in four ways: complementary, accommodating, competing and substitutive.

We selected Buganda as the empirical case study in this thesis for reasons explained in Chapter One (1.5) and to demonstrate how politics and the weight of history are key in explaining the emergence and change in property institutions.

Any scholar who wants to appreciate the property rights to land in any country needs some understanding of its history because ‘[e]ven where revolutionary change occurs, its rationale lies in the past and the extent to which path dependent patterns of development can be overcome.’ Buganda is no exception to this general trend and so we started the case-study

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part of this thesis by sketching the history of property rights to land in Buganda in the period before colonialism in Chapter 5.

8.3 Findings and conclusions.

In this section, we summarise and synthesise the major findings of the thesis.

8.3.1 Why do property rights institutions emerge and change?

Land rights in Uganda have clearly evolved from the predominant customary tenure of the pre-colonial times where inheritable usufructuary rights to land derived from kinship were guaranteed based on a unique concept of landlordism, where the chiefs ‘owned’ the people living on their land, to the current position where there are four recognized land tenure systems namely mailo, leasehold, freehold and customary and where insecurity of tenure prevails. Admittedly, this historical evolution of land rights has not been in response to purely economic forces, namely ‘increased payoffs from investment in more intensive use of land due to population growth or opportunities arising from greater market integration and technical advances.’

Instead, as shown in this thesis, the genesis of the evolution of land rights in Uganda can be attributed to the colonial era land settlement vide the 1900 Uganda Agreement, the effects of which are still evident today.

In answer to the first question why do property rights change, we show that whereas extant theory proffered by, inter alia, North and other neoclassical institutional economists suggests that institutions change in response to changes in relative prices or preferences which lead parties in a transaction to believe that they could be better off under alternative contractual and institutional arrangements, we have demonstrated using property rights to land in Buganda that there are possible variations to this ideal causal model. Property rights do not always respond to relative price changes. Sometimes, property rights changes are delayed or do not take place at all (institutional inertia) because of vested interests of veto players. This implies that even where relative prices change and cause institutional demand, institutional supply is not guaranteed. Other times, institutional change is imposed from above, usually by the state even in the absence of any changes in relative prices.

NIE has been critiqued for conflating formal and informal institutions and collectively considering them all as rules of the game that structure actor incentives thereby hindering proper examination of institutional change and of how formal and informal institutions interact.

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We have shown that distinguishing between *de jure* (formal) and *de facto* (informal) institutions is critical when trying to understand and explain institutional change because each category emerges and changes for different reasons. While it is the deliberate decisions of political actors that may change *de jure* attributes of property rights, *de facto* property rights are more likely to be the consequence of the designer’s cognitive limits and unintended consequences.

Empirical evidence from Buganda reveals that formal rules are created to serve the interests of those with the bargaining power to devise new rules, and that this power may be exercised either directly by veto players widely defined as actors who can block the adoption of a policy or legislation or indirectly as indirect veto players who would have to persuade at least one veto player to act on their behalf. The actors with the bargaining power to devise new rules have been conceptualized as veto players in this study and they include the colonial government, the Buganda Lukiiko, UPC, foreign donors, NRM government, Sessional Committee of Lands, Water and the Environment, Parliament, Buganda landlords, the tenants on *mailo* land, NGOs and the media. Thus, for instance, we have seen the colonial government, a veto player, negotiating a land settlement with the native government and introducing private property rights in Buganda for the very first time to correspond to its goal of an economically self-sustaining protectorate even though land in Buganda was plentiful.

We have also observed that even where relative prices of land increase and property rights would be expected to change according to theory, institutional inertia may instead be witnessed owning to intervention of veto players. There were no substantive property rights changes in Buganda during the period 1962-74 because of commitments undertaken by UPC, a veto player not to meddle in land rights in Buganda. Subsequently, the Buganda Lukiiko, another institutional veto player, also vetoed proposed changes to mailo land tenure by the Buganda Economic Planning Commission in 1964.

Contrary to the common belief among some scholars that informal institutions are culturally derived and change relatively slowly, we have shown in this thesis that not all informal institutions are culturally derived. Whereas it is true that some informal rules have strong cultural foundations, others like the reactive informal institutions prevalent in Buganda have no relation to culture. The informal property institutions we witness in Buganda are in direct response to the incentives created by the formal rules.

In Chapter 2, we saw that institutions that are deeply embedded in the socio-economic and cultural fabric of societies may explain inertia. However we have seen many instances of institutional inertia particularly in chapter 7 which are a result of the intervention of veto players seeking to fulfil their specific objectives.
8.3.2 When do property rights change?

The timing of institutional change is not easy to ascertain. Ideally, formal rules may change in relatively short spaces of time while informal rules, being part of habitual behaviour, tend to be more resistant to change and usually take longer to develop.

However, there may be a time lag between demand for institutional change, and the witnessing of the actual change. Vested interests in the status quo may distort the timing of institutional change.

We have argued in this thesis that institutional change may not necessarily follow after a change in relative prices. That means that we cannot always predict an immediate change or any change at all in property rights following a change in prices. Sometimes, institutional change may happen when we least expect it to, for instance when it occurs in the absence of any relative price changes.

Where the interests of the veto players coincide with a new property rights arrangement that may be ushered in due to a relative price change or where the interests of veto players demand a change in the existing property rights arrangement, change in formal rules may happen very quickly. The passing of the revolutionary Land Reform Decree by Amin in 1975, for example, clearly shows that where it serves the interests of those with the bargaining power to devise new rules, then formal property rights can be transformed at the stroke of a pen.

Some scholars treat informal institutions as culturally derived and as relatively permanent, changing only slowly if at all. However, we have shown elsewhere in this thesis that this is not always the case. Informal institutions take various forms; emerge for a variety of reasons, and in several different ways. Slow moving informal institutions are usually those with strong cultural foundations. Yet, there are many informal institutions with no link to culture but instead emerge and change in response to formal rules which actors may find too constraining. These kinds of informal institutions can change quickly.

8.3.3 In what direction do property rights institutions change?

Most scholars of property rights change assume a linear development of property rights from communal towards greater specification and ending in private property in response to a changing environment. Our observations in Buganda contradict this assumption but coincide with our argument in chapter two that the more accurate position seems to be that evolution of

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7 Joireman, Institutional Change in the Horn of Africa: The Allocation of Property rights and Implications for development.; p.269.
property rights to land does not necessarily follow a linear path, rather that there are multiple
directions to property rights change.

A wide range of factors such as the type of resource base, state agendas, the influence of
non-state actors and the nature of pre-existing institutions may distract property rights away
from the expected linear path towards privatization, expected economic efficiency and increased
tenure security and instead direct it along multiple paths towards common property, state
property, other restrictive property arrangement or even a mix of individualised and communal
tenure.

Empirical evidence from Buganda reveals an evolution of property rights along multiple
trajectories and ending in a mix of private, state and communal property. Moreover, even where
private property is witnessed, in many instances, rights are not clearly defined and enforced and
there is a prevalence of overlapping and conflicting rights on the same piece of land. Path
dependent political factors are particularly significant in determining the trajectory of property
rights to land in Buganda. The history of land tenure in Uganda since 1900 clearly had a much
greater impact on shaping the final outcome of the revolutionary Land Act, 1998 than the decade
of the market—orientated donor-sponsored committee reports on land tenure.

8.3.4 What is the process of property rights change?

Despite the importance of the institution of property rights the actual process by which
the institution is changed has received relatively little consideration.\(^8\) In this thesis, we have
attempted to explain the process of property rights change using historical evidence from
Buganda.

In chapter two, we showed that there are two categories of processes of institutional
change that may explain how property rights emerge and change.\(^9\) The first category ‘direct
institutional change’ comprises theories in which institutions are intentionally designed and
implemented in a centralized way, either by an individual or by many individuals ‘interacting
through collective-choice or a political process in which they lobby, bargain, vote, or otherwise
compete to try to implement institutional changes which they perceive as beneficial to
themselves, or to block those they view as undesirable.’\(^10\) The second category ‘indirect
institutional change’ consists of theories of ‘evolutionary’ institutional change which view

\(^10\) Kingston, ibid, p.153
property rights as an unintended consequence of uncoordinated actions of individual agents and thereby arising spontaneously.\footnote{Ibid.}

We have explained the process of property rights change in Buganda by employing a framework which, as explained in chapter two, incorporates both intentional and unintentional design because a theory that depends on one explanation would be incomplete and unsatisfactory.

Scholars of the intentional design school suggest that private property is the outcome of a political process. However, as we mentioned in chapter 2, some authors tend to conflate political decision making and market ordering of property rights and treat them as similar whereas they are not. Comparing the dynamics of a political system to those of the market overlooks the fundamentally different decision making rules in both and the dissimilar conditions for institutional change. In recognition of this we elucidate the political process of formal institutional change in chapter 4 using veto player theory which eases the understanding of political decision making. It is the intentional decisions by actors (veto players) that may change the attributes of formal property institutions. The perception of political actors is the most critical variable in effecting \textit{de jure} property rights.

We have shown that throughout Buganda’s history in the period under study, the perception of the political actors was the most influential variable of formal institutional change whether or not there was either demand for private property or change in relative prices or preferences. These political actors whom we have conceptualized as veto players include the mailo owners a good number of whom were members of the \textit{Lukiiko} (the native council), a collective institutional veto player which was mandated to legislate; the Buganda Government; the tenant peasants whom we may describe as partisan, indirect veto players because their approval was neither legally needed nor necessary in the law-making process but nevertheless had the potential to influence legislation; the colonial government which was also an institutional veto player, the NRM government, the Sessional Committee on Lands, Water and Environment in Parliament, foreign donors, NGOs and the media.

Veto player theory aids our understanding of the process of formal institutional change in Buganda. The basic premise of the veto player approach is that in order to change the legislative status quo, certain actors referred to as veto players have to agree to the proposed change. We see individuals or groups interacting through some form of political process to enable institutional changes which they deem useful or to block those they consider detrimental to their
interests. We argue that veto players are the key explanatory variable for stability or flexibility of legislation.

Finally, although we have shown that property rights were intentionally designed in Buganda during the period of study, owing to the bounded rationality of the designers and imperfect knowledge they may have possessed, unintentional consequences, non-deliberate property rights were also witnessed. A good example is the 1927 Law which was intentionally designed to ensure that tenants enjoyed secure use rights but with no marketable title and to protect them from the oppressive demands of the landlords all of which would ultimately encourage increased production of cash crops to the benefit of the colonial government. However, we have seen that there was an unintended consequence – the fledgling market in bibanja. Contrary to the intention of the 1927 Law, the tenants had marketable title- albeit informally. Their bundle of property rights was thicker than that intended and granted by the colonial government.

8.3.4.1 Why and how informal institutions emerge and change.

A good number of studies acknowledge the existence and effects of informal institutions and concede that formal institutions alone do not shape human behaviour, but that much of what goes on can also be explained by informal institutions.\(^\text{12}\) In fact formal and informal institutions are not the independent variable but rather two components of the same dependent variable.\(^\text{13}\) Yet there remains considerable uncertainty as to how informal institutions emerge and change.\(^\text{14}\) This uncertainty may explain why informal institutions are often taken for granted in many studies and the common belief among scholars that informal institutions change relatively slowly.

We argued in chapter 3 that all informal institutions are not culturally derived. We distinguished between spontaneous informal institutions which have connections to culture and reactive informal institutions which may emerge as coping strategies devised by local actors to evade the restrictions, uncertainties, unfairness, ambiguities and ineffectiveness of formal institutions and have no relationship to culture. The latter kind may change relatively quickly.

Accordingly, we saw in chapter 3, that spontaneous informal institutions emerge and change differently from reactive informal institutions. Although it is important to understand

\(^{12}\) North, supra, n.2; Ostrom, "Institutional Rational Choice." Lowndes, "Varieties of New Institutionalism : A Critical Appraisal."
\(^{13}\) de Soysa and Jütting, "Informal Institutions and Development: Think Local, Act Global?", p.2.
\(^{14}\) Giannoni, supra, n.8 p.70

High, Pelling, and Nemes, "Understanding Informal Institutions: Networks and Communities in Rural Development.." p.61 ; Helmke and Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda." p.16
how spontaneous informal institutions change, in this thesis, we limited our analysis only to the emergence and change of reactive informal institutions which seem to be the most prevalent in our case study- Buganda.

Reactive informal institutions normally emerge as peculiar, unique and isolated non-official arrangements intended to adjust, ignore, or evade discrete portions of overly constraining and undesirable formal institutions. However, over time, with repetition and diffusion, they may evolve into adaptive informal institutions which violate existing formal institutions.

8.4 Contributions of the thesis.

Whereas NIE accentuates the pre-eminent role of institutions in economic development; considerably little attention is given to the dynamics of institutional change, and there are relatively few empirical studies of the process of property rights change. This study attempts to narrow this empirical gap by explaining the process of property rights change using empirical data from Buganda.

This thesis is a theoretical and empirical contribution to the discourse on institutional change and specifically on changes in property rights to land. We have contributed to closing the gap in the literature by shedding some light on how to transform bad institutions into good ones by improving our understanding of the process of institutional change.

Thus, the study contributes to the theoretical discussions and existing knowledge on institutional change. We have incorporated objectives of political actors and interest groups within society as additional variables in the causal model for institutional change and have conceptualised these groups as veto players. We have applied veto player theory to analyse the dynamics of political decision making thereby contributing to the debate on the political decision making processes of institutional change.

Our findings in Buganda provide evidence that we cannot always expect changes in property rights following changes in prices and preferences. Intervention by veto players can lead to institutional inertia even where there are relative price changes or dictate change in the absence of any changes in the environment. Our incorporation of political factors into the model of changing property rights leads to a less parsimonious, but more accurate description of the progression of land rights in developing countries in particular. It more closely resembles the process of property rights change in the developing world.

15 Giannoni, supra, n.8 p.72 ; Libecap, Contracting for Property Rights: p.2.
16 Sorensen, supra, n.3
This thesis brings to the fore the role of politics in institutional change and highlights the social dimensions of property rights in understanding property rights change. Although Property rights are necessary for economic growth, they sometimes serve a social function in society. As Nathan Rosenberg remarked, institutional changes are sometimes ‘driven by nationalist, religious or imperialist motives so intense as to sacrifice economic gain.’\textsuperscript{17} We have shown that the Baganda as an ethnic group have a special cultural and emotional attachment to their land, and that it goes a long way to explain why Buganda’s leaders treat with suspicion any government intervention relating to land. Confining analysis to only the economic dimension of property rights may hinder proper understanding of change in the institution of property rights.

This study also contributes to the literature by incorporating country specific data into empirical generalisations. For instance, path dependence is known to be relevant in institutional change generally. However, drawing on Buganda’s property rights history we have highlighted that it is crucial to take path dependent factors into account. This is because they seem to have played a more pivotal role than donor- proposed market- driven initiatives in the process of change of property rights to land in Buganda.

We have examined both theoretically and empirically, the interaction between formal and informal institutions in Buganda and drawn attention to reactive informal institutions which are prevalent in economies, yet have no relation to culture and which may change quickly in response to undesirable and overly constraining formal laws. This has added substantially to our understanding of informal institutions, their nature and to why and how they change over time.

8.5 Policy implications.

Implications of this research are that firstly, politics should be taken into account by governments, donors, international agencies and consultants when designing policies for institutional change. Policy makers who overlook the role of political actors may get less than satisfactory results given that “[a] particular locale’s institutions emerge from a long political history and set of compromises that cannot be overturned in short order.”\textsuperscript{18}

Secondly, that attention should be paid to informal institutions, particularly reactive informal institutions which emerge in response to existing laws as they reflect the actual practices of actors in an economy and provide insights into which aspects of the formal laws are not functioning effectively. Generalisations and ‘wholesale’ transplants of formal laws from successful economies should be avoided as institutional change ‘is highly specific to local

\textsuperscript{17} Rosenberg, “Review of the Unbound Prometheus,” 498.

\textsuperscript{18} Hongxing Yang, “Diversities in Unity: Engine of China’s Economic Development” (University of Chicago, 2009), p.15.
conditions and that it contains a high degree of tacitness.\textsuperscript{19} In addition, care must be taken to study the interactions between formal and informal institutions with a view to identify complementary informal institutions which may then be translated into formal laws by intentional design.

8.6 Future research

Much as the bulk of land in Uganda is held under customary land tenure, it remained outside formal law until fairly recently, in 1995, when the new Constitution was promulgated and it was recognised in formal law. This legal and policy gap may also be explained by the fact, as shown in this thesis, that since colonialism, the predominant view has been that customary land tenure is one of the basic constraints to economic development in Uganda.

Nevertheless, despite a century of purposeful penetration by non-customary tenure ideology and neglect by the legal system, customary land tenure has not only persisted but is still by far the pre-dominant form of tenure in Uganda.\textsuperscript{20} None of the strategies adopted to ignore or diminish it have been successful. The issue that remains unresolved is whether it is true that customary land tenure is indeed a major constraint to economic development in Uganda. Consequently, a pertinent question that remains unanswered and that could be addressed by future research would be an investigation into why customary land tenure persists in spite of the perception that it is a sub-optimal tenure system and all efforts to phase it out.

\textsuperscript{19} Rodrik, “Institutions for high-quality growth: what they are and how to acquire them,” p.15.
\textsuperscript{20} The majority of Ugandans hold land under customary tenure with the exception of Buganda (central region) and urban areas. More than 80% of land in Uganda is held under customary tenure. Ministry of Lands Housing and Urban Development, “Drafting the National Land Policy, Working Draft 3.” 5.2.11, 102; Batungi and Rüther, “Land Tenure reform in Uganda. Some reflections on the formalisation of customary tenure,” 119.
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