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SECURING FAMILY AND COMMUNITY LAND RIGHTS FOR EQUITY AND SUSTAINABILITY THROUGH RESILIENT, TRADITIONAL LAND MANAGEMENT INSTITUTIONS

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Abstract

The majority of Ugandans with property hold land under the customary land tenure system. Whilst customary tenure is recognized in law, the traditional governance system under which it is managed, has not until recently been recognized by the State. This paper sets out that for those communities seeking to use a customary approach, their rights are best-managed and protected through traditional management institutions.

Traditional governance systems are progressive and can respect family traditions, as well as promoting sustainable agricultural methods, but only if supported by the State. To achieve security and certainty over rights, some of the major tribes in Uganda have written down their own land rights and responsibility for land management, evidencing an evolution in customary governance.

Many customary approaches to land management cannot be accommodated in a freehold system. The pursuit of freehold and the introduction of Local Council governance have weakened the traditional system (despite the latter being recognized in law) by promoting individualization as preferable to customary approaches. However, the customary system does not require replacement. In failing to accommodate traditional processes in favor of freehold, there is a serious risk of undermining customary methods for managing and protecting the vulnerable and providing them with livelihoods safety nets. This is evidenced in the Uganda example, and applicable in other similar situations.

Key Words: Community, Customary, Governance, Traditional, Uganda

1. Introduction

As is the case with all systems of land rights, Uganda's land tenure system has evolved over time. In Uganda's case, this history - in particular its colonial legacy - has shaped the system that exists today, as well as influencing attitudes to customary land tenure. In order to consider the relationship between the customary system of land ownership (the dominant system in Uganda by land area) and other tenure systems, this paper will first chart a brief history of Ugandan land law. It will go on to consider the impact of legislative and policy changes in the approach to customary land, and the impact on traditional systems of favoring freehold tenure. It will conclude by reviewing the extent to which Uganda has succeeded in operating a dual-tenure system.

1.1 Customary Land Tenure During Colonialism

Before the advent of British colonial rule, two very different types of land tenure systems had evolved within what is now Uganda, broadly split on geographical terms. Taking these in turn:

In the north and east of the country, a clan-based system prevailed. Under this approach, central authority was not held in the name of any one individual, but governance was by the consensus of clan elders as a whole. Land, too, could not be vested in one individual, but was held by the clan and for the clan. This method of land governance is sometimes mistaken for "communal ownership". Although the approach is one of shared principles and community obligation, families and individuals hold their own land, whilst the clan leadership held oversight and management of the clan's land in its entirety.

In the south and west of the country, where 'kingdoms' existed, ethnic groups tended to develop centralized centers of power and authority, with the King and his Cabinet as decision-makers. As British colonial powers began to exert their influence in Uganda at the turn of the twentieth century, it was amongst these kingdoms that they undertook most of their dealings. It is widely considered that this is due to a combination of the strategic location of the land, and the British preference to deal with a more centralized governing authority, which more closely resembled western governance. The decentralized clan system of rule was seen as primitive, and its methods of land governance not recognizable (or understood). With a focus on the natural resources available in the south and west, land in the north and east of the country was defined as "crown land" by the Crown Lands Ordinance 1902. Crown Land could be alienated to owners as freehold (and at a later date after independence, as leasehold). Customary

tenants were permitted to continue their occupation of Crown Land unless and until the land was considered to be required for public purpose or was issued to an individual or legal body as a Freehold. Whilst this permitted existing practices to continue, in effect it gave customary owners little protection from arbitrary expropriation of their property. Unsurprisingly, it was within the kingdoms of the south and west that forms of tenure similar to the European style of freehold were more readily applied. Rather than the clan-based systems of the north - based on familial relationships and obligations - instead interests in a delimited area of land were vested in an individual. In the case of Mailo land, this individual owner came to be known as "Landlord", with the original owners becoming "tenants". Despite the law not recognizing customary land tenure, this forms of tenure existed side by side with other indigenous forms of customary tenure, and often even overlapped on the same piece of land.

The colonial government established a Royal Commission in 1952 to examine land issues across East Africa. The Commission reported in 1955 and covered the area that today forms Uganda, Kenya and Tanzania. The report notes that in the course of the Commission's deliberations on the matter, Sir Phillip Mitchell[1] wrote to the Commissioners to say:

> *"It is inevitable that tribal systems of tenure should be profoundly modified under the combined impact of cash farming and pressure of population, with both of which it is ill-designed to cope"*

Predictably, the Commission determined that those land tenure systems that most closely mirrored those of the UK were superior to those that were unfamiliar to them. The Commission concluded:

> *"The trend towards individualization…has the virtue of developing a political as well as an economic sense of responsibility. Individual tenure has great advantages in giving to the individual a sense of security in possession, and in enabling, by purchase and sale of land, an adjustment to be made by the community from the present unsatisfactory fragmented usage to units of an economic agricultural size."* (East Africa Royal Commission, 1955)

The recommendations made in the report extended to 86 separate points under the header "Alternatives to Customary Land Use". The Commission clearly sought to fundamentally change the approach that Ugandans had themselves developed to managing their land. The Report of the Commission does little to

[1] Sir Phillip Mitchell was Governor of Uganda 1 May 1935 – 11 October 1940 and Governor of Kenya 1944-1952

demonstrate that the authors had sought to understand the realities of land law in Uganda, nor the complex system of rights and obligations within customary tenure, and why they might suit the Ugandan societies in which they had developed. It is therefore tempting to conclude that the Commission was not willing (or perhaps not able) to consider any alternatives to the system with which they were already familiar.

1.2 Customary Tenure Following Independence

Following independence, the Public Lands Act 1962 vested Crown Land (now termed "Public Land") into Local Land Boards (later replaced by the National Land Commission in 1969). This approach of greater state control was supposed to allow for the more 'rational' allocation of land, to give opportunities to those who would use land best. In practice, this made little difference to most citizens. Most land continued to be held informally under customary tenure, though this had no legal status.

The subsequent Land Reform Decree in 1975 brought about a fundamental change in the consideration of what 'ownership' meant. The Decree declared that *all* land was public land, vested in the Uganda Land Commission, thereby abolishing Mailo and freehold as tenures. Land that had been held as freehold prior to the Decree was converted to leasehold for a term of either 99 or 199, years subject to the use. The Decree also stated that customary occupation of land was at "sufferance" only, and the right of occupation could be removed. This apparently subtle change in terminology was important: rights holders under customary tenure had effectively become merely 'occupiers' of land they had existed upon for generations. The real 'owners' of the land, were left with no rights at all.

A fundamental revision of Uganda's land law was a clear and understandable priority for the NRA Government that came to power in 1986, and which remains in Government today. This took effect in two key pieces of legislation. The first is the 1995 Constitution, which both reinstated private property (by vesting all land in the citizens of Uganda) and recognized customary tenure as one of the four tenures by which land in Uganda can be held, the others being freehold, leasehold and Mailo. The Constitution also made provision for an optional right for landowners holding land under customary tenure to be able to apply for and acquire a certificate of ownership. It also permits customary land to be converted to freehold. The detailed mechanisms for these practices were codified in the Land Act 1998.

Following on from the Constitution, the Land Act explicitly recognizes customary tenure. This has two major implications and departures from previous practice. Firstly, without the need for formal papers, citizens who have always been considered locally to "own" land now have legal recognition of this fact:

Customary land is legally owned, but does not require registration to gain recognition of this status. Secondly, the law requires that land subject to customary tenure be governed according to local custom, which is to say by the customary (traditional) rules of the clan. Importantly, the Act also makes specific provision for the rights of vulnerable people:

> *"27. **Rights of women, children and persons with a disability regarding customary land"** 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 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void."* (Government of Uganda, 1998)

The articles referred to (33, 34 and 35) are those in the Constitution that set out the specific rights of women, children and people with disabilities. Through paragraph 27 of the Land Act, the law is offering additional protection to those who customary rules may not adequately protect.

The Constitution and the Land Act remain in force today[2]. On paper, the terms of the law seem favorable to the co-existence of customary tenure with other tenure types. Indeed, under this legislation, customary land tenure has remained the most predominant tenure system out of the four tenure systems in Uganda; the Ministry of Lands, Housing and Urban Development estimates customary tenure to comprise approximately 80% of land in Uganda (by area).

1.3 Implementation of the 1995 Constitution and the 1998 Land Act

It is important to consider the context for the legislation made in the late 1990's regarding land. Two key principles were part of the discussions preceding the enacting of the Land Act. The first was that land policy should favor economic development, in which agriculture was considered to have a significant role. The second was that existing land rights should be protected. In keeping with international practices of the time, the policy objective was to move towards the individualization of land ownership as

[2] The law set out in the Constitution and the Land Act was supplemented in 2013 by the publication of the National Land Policy. Whilst this policy is of obvious significance to land matters, this paper will first comment on the efficacy of the legal measures currently in place, before turning to matters of policy.

had been espoused by the Royal Commission. It was anticipated that this would lead to the creation of a land market, improve incentives to invest in land, and facilitate land transactions. In these circumstances, it is argued, landowners would be able to use their land as collateral to access finance, and this virtuous cycle will encourage investors to partake in the newly created land market, stimulating commercial farming and economic development. These views are still widely held by institutions such as the World Bank, which in turn has influenced the Ugandan Government, seeking to follow international best practice. As a result, this view has informed laws and policies in Uganda, including the Land Act. However, in recognition of Uganda's history of customary ownership, the Land Act's move towards individualization was supposed to nonetheless recognize existing property rights, rather than to seek to replace the system outright. It is important to note this context, however, to understand that that the recognition of customary tenure in the Land Act was undertaken in the context of enabling the move towards an efficient land market, with the intention of improving Uganda's development prospects. The contradictory goal of simultaneously recognizing, and seeking to replace customary tenure, is at the heart of the provisions of the 1998 Land Act.

In practice, the existing perceived supremacy of freehold tenure was not compromised by this recognition of customary tenure as an 'equal but different' tenure. However, the recognition of customary tenure has two major consequences:

i) It brings customary tenure into the framework of state law, allowing it to be regulated by changes to law. This is illustrated by the attempts to make the two systems compatible in overriding any potentially discriminatory practices. This marks an important change, making customary law subservient to state law.

ii) By bringing freehold and customary tenure into a single framework, it made it possible to transfer a piece of land from customary law to State law (but not the reverse) – potentially removing customary law altogether, apparently without having violated anyone's rights.

Taking these points together, it is difficult not to conclude that the intention of the Land Act's recognition of customary rights was backwards looking only: to recognize existing rights in order that they are converted, but not to promote this traditional method of tenure into the future as a distinctively different and common tenure system. Despite the promising text of the Land Act, it is crucial to consider both the letter and the spirit of the law and how these affect the customary land tenure system.

2. Types of Land and its Governance

2.1 Governance of Land Under Customary Tenure

In order to properly understand the impact of the Land Act and subsequent government policy upon customary tenure, it is important to understand the nature of customary tenure system itself. Customary ownership simply means that someone owns the land because their community accepts that they own it. This would traditionally have been because they were the first to settle in an unoccupied place, but now is more likely (due to population growth) to have been inherited. Customary land can also (in some circumstances) be bought from others who have inherited. In any event, the defining factor is that ownership does not rely on documents to demonstrate legitimacy. Under this traditional system, the governance of land claims, and recognition of ownership was determined by the family and community, where it was well-known who had rights to which pieces of land. To those conditioned to European approaches to tenure, this appears to be an unusual and overly informal approach. However it is worth considering that after all, a tenure system is any system by which people recognize and uphold claims to rights in land. The written nature of western tenure systems is just one example of this in practice, and one that has only arisen in the last few centuries, responding to changing approaches to land. The customary system traditionally worked because of the local nature of livelihoods in many parts of north and eastern Uganda: there is sufficient continuity amongst communities to recognize long held claims to land, and an established structure of institutions to regulate the system.

The key governance institutions of customary tenure are as follows:

> **Apex Bodies**: these were created after the passing of the 1995 Constitution. Their legal existence is not very clear, but they exist to provide a regional forum for the heads of clans, thereby linking all the clans in a region and providing a 'voice' for each clan. Examples of apex bodies are Iteso Cultural Union, Lango Cultural Foundation, and Ker Kwaro Acholi. However, in some regions such as Teso, the link between the clans and the Apex body currently is not very clear[3].
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> **Clans** – A clan is a group of people who do not marry amongst one another. In the past, clans would have lived in the same geographical areas. Today, migration has taken place and often the clan members are scattered all over the regions. The clan works together to protect

[3] While all clans are natural and do not need any registration to be a legal body, Apex bodies are usually registered.

community land such as grazing, hunting, forest lands. All the clans in the geographical areas would elect those to manage the community land. One person would be nominated to manage the community land, known as 'Won Tim' (in Lango), whilst members of the clan with cattle would form a committee to manage the grazing land.

Clan Committee: Committees operate at various administrative levels, and positions on the committee are elected. They range from the lowest level of Village to the highest level of the Apex body. The roles of the clan institutions are mainly to hear land disputes.

Head of family: An individual who manages family land in trust for the whole family. In a marital home, the position is usually occupied by a married man, but is taken by his widow in the event of his death. Unmarried or divorced women can also occupy the position.

The heir or protectors: These are usually male members of the family nominated at the death of the married man. Their main role is to protect the land of the widows and her children.

Parents/those who allocate land: Parents have the responsibility to protect the land rights of the family members and to protect the land from irresponsible land sales. They also hold heads of families to account to ensure that they do not abuse the land rights of family members.

Maternal and Paternal Uncles: These members of the extended family take responsibility to hold in trust the land of orphans of their siblings, as well as taking care of the orphans. They are required to pass the land to the orphans when they become adults.

Although the clans lead governance of customary land, it requires the interaction of all of these institutions to work together to uphold rights and responsibilities, through a network of obligations. The primary responsibilities in the management of customary land are:

i) To protect the land right of all clan members, especially those of women and children;

ii) To protect family land of their members from irresponsible sales. (This function is performed through ensuring consent is given by all the family before the land is sold and by the parents/or the person who allocated the land to the family);

iii) To manage the head of families to ensure they do not abuse the land rights of other family members;

iv) To ensure community land is used sustainably and is not sold by any member;

v) To put in place customary laws to be followed;

vi) To ensure boundaries are marked, and

vii) Through the individual clan committees of each clan, to amicably resolve land disputes to restore peace in the family.

This traditional management approach relied on oral laws and systems that provided flexibility that catered for land rights for all family and community members, including those not yet born. These customary management methods were better able to accommodate the reality of sustainable rural land management and the societal importance of family obligation than the individualized freehold system.

2.2 Types of Customary Land

The nature of land held under customary tenure is widely misunderstood. A particular misconception is that all land held under customary tenure is owned communally. This has led to the terms 'customary land' and 'communal land' occasionally being treated as synonymous. This is an unhelpful error, but nonetheless one that has been perpetuated. Many practitioners consider communal ownership to be detrimental to economic development, theorizing that it removes incentives to invest in improvement of the land, due to a lack of individual security. Putting aside whether this argument is accepted, it is important to note since it has shaped attitudes to customary land, particularly where it is assumed that 'customary' is equal to 'communal'.

Yet, LEMU's experience shows that most land held under customary tenure is owned privately by families (as farm land) and by communities (as grazing, forest or hunting land). There are strict rules about who can use the land and under what conditions. Family land is inherited within the family, and the management of the land is passed on from parents to children and their family members, but kept within the family, and to that extent, private. Contrary to misconceptions about customary land being communal, and therefore at risk, people feel very secure on their land. After all, tenure security is a matter of perception, not merely fact. As a result, even without titles, customary landowners are happy to invest in this land if they can afford the risk and if an investment is deemed worthwhile. These

conclusions came out very strongly from two pieces of research conducted by LEMU, in Apac (Adoko and Levine, 2005) and in Acholiland (Adoko and Levine, 2004).

Customary land comprises these three types: individual, family land and community. This multiple-approach system promotes sustainable and resilient agricultural methods by sharing access to resources that do not need to be protected for individuals. Careful management and self-determined rules protect shared resources from over-exploitation.

During dissemination workshops[4] by LEMU for stakeholders in Lango and Teso in 2013 the participants estimated the prevalence of the different land types (by percentage) as follows:

> 85% is family land that is managed in trust by the heads of families for the benefit of all family members. This is acquired through inheritance;
>
> 10% is community land[5]. Rights to access this land are inherited; and
>
> 5% of land is individually owned. This is predominantly land that has been purchased;

Customary land governance is mainly concerned about family and community land. It is less concerned with individually owned land. This is due to its limited extent within customary tenure, but also because:

> a) If the purchaser of private land is a man, the land automatically becomes family land when he marries. This is even the case even if he purchased the land before marriage. Because women move to the husband's family at marriage and change their clans accordingly, women are the only people (besides the few men who choose not to marry) who can own land they purchase individually into perpetuity, if they so choose.
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> b) Purchased land is considered to be the sole property of the person who bought it. Since it was not given to the owner through inheritance or any other social process, the land does not come with social obligations, meaning that other interests in the land, especially that of wives and widows, are less likely to be recognized. It is likely that the owner will want to keep the land outside of clan control to permit more freedom when it comes to selling the land.

[4] Disseminating the National Land Policy, which is considered further in section 3.3
[5] The exception to this is land in the Acholi and Karamoja regions, over 15% of which is communally owned.

2.3 Customary Tenure Under the Land Act

Prior to 1995, the formal legal position was that locally accepted claims to land were nothing more than a local arrangement, and they had no legal status. The change with the Constitution and Land Act is that these claims, arranged locally within the communities living there, now have full legal recognition.

As already noted, in Northern and Eastern Uganda, customary land law and land administration has traditionally been the responsibility of the clans. The clan has the duty to protect the land and its integrity for the future. It must protect the rights of all clan members, including future generations. Applied to land governance, this means that the clan is responsible for setting rules for the transfer of rights and responsibilities, and adjudicating or mediating any land disputes. At family level, each family head is responsible for protecting the rights of all the family members, but it is the clan's responsibility to hold them to account and to ensure that the rights of the vulnerable are protected.

The Land Act was notable for giving this recognition, which was welcomed. However, in giving recognition to customary law, the State should have also given proper recognition to the existing system of rules, institutions and authorities that were already working to administer land, to respect rights and to solve disputes. Instead, the state only recognized the responsibility of clans to "determine and mediate" land disputes. It would have been a shrewd move to better incorporate the clans role in governance: the State has no effective administration or judicial presence at the grass roots in these areas. Nor did it have the resources or the necessary personnel to establish systems that were capable of handling the work involved in administering land across the country. This is made starker by the State's failure to establish administrative and judicial systems capable of governing the 20% of land in the country that is registered, or titled, and not subject to customary rules.

Whilst the law recognizes customary practices, it does not legitimize them, having made the State (Local Council) Courts the first courts in any instance. Indeed, rather than legitimizing and strengthening existing customary institutions, new, civil institutions were created (District Land Boards and Area Land Committees) with the sole purpose of converting customary tenure to freehold. With these changes, the Land Act effectively created two parallel justice systems, with different but unequal tenure systems.

3. Impact of Changes in the Management of Land Under the Land Act

3.1 Reflecting Family Land in the Land Act

Section 22 (2) of the Land Act recognizes the family as a legal person and makes the "head of family" the representative of the legal entity. Further provisions in the Land Act make it possible to apply for freehold title to customary land (whether held by individuals, families or communities). As written, the act does not create any requirement for the head of the family to act in trust for the whole family, and is simply a representative. This creates the risk that the family head (most often interpreted to be a man, though widows, unmarried and divorced women are also heads of families) could convert the land to titled land in his or her name in their role as representative, and then be protected by S.59 of the Registration of Titles Act 1924 which says the name in Title can only be challenged if there is fraud, and that "no title shall be defeasible by reason or on account of any informality or irregularity in the application". Once a title is issued, even if by means contrary to the principles of the Land Act, the title cannot be cancelled. By establishing legislative provisions with insufficient definition or control, there is a dangerous possibility of legitimizing practices contrary to customary law.

3.2 Reflecting Communal Land in the Land Act

The Land Act recognizes that community land is owned by communities, and makes provision that it is set aside for "purposes as may be traditional among the community using the land communally". Community land is typically used for collecting water, fishing, gathering firewood, collecting materials for building (such as spear grass, clay, sand and rock), cutting papyrus, collecting wild fruit and vegetables, harvesting honey and white ants, grazing animal, and hunting. Traditionally, rules governing use of these communal land and resources (when to use land, how to use land, restrictions on which resources can be taken, and prohibition of any activities) were managed by an appointed individual, or by a committee of those with significant cattle holdings, on behalf of the community. As with all traditional customary governance, these rules were conveyed orally.

Under the Land Act, the law permits communities to apply for a Certificate of Customary Ownership (CCO) to document their land interests. In order to do this, they must first apply to become a legal entity by registering as a Communal Land Association (CLA), with an elected committee to represent the community. Once a CLA is registered and documented, they then have the option to either apply for Certificate of Customary Ownership (CCO) or a freehold title. A deeper study of the laws on CLA's reveals a potential risk in this approach. The Land Act requires that it is the elected management

committee members who become the body corporate, together with the Association. If land is subsequently registered as provided for by the Land Act in these names, it is possible that land could move from communal ownership to control by the management committee. It is assumed this was an unintended consequence, rather than a policy objective, but it demonstrates some of the weaknesses in attempting to legislate for customary tenure without considering (or fully understanding) the consequences.

Furthermore, establishing the CLA in the first instance requires the approval threshold of 60% of the community, which significantly risks alienating those that did not agree to the new approach (which could comprise up to 40% of the owners). The Land Act also provides for individual members of the community applying to own part of the land individually. This reflects the policy interest in favor of individual land holding. It also reflects a lack of understanding held by policy makers that these community lands are best used as communal resources.

3.3 Reconciling Fundamental Differences

Customary law has, by its nature, not been written, relying instead on oral conveyance. The Land Act did not attempt to define customary law, or to provide for its recognition in State courts, instead recognizing separate forums for customary matters. Section 3 of the Act stated simply that the laws governing land should be the "rules generally accepted as binding and authoritative by the class of persons to which it applies". Whilst the Land Act clearly had intentions to recognize customary land tenure, a detailed analysis of the Act by those with a thorough understanding of the operation of customary tenure shows that Uganda's lawmakers have not adequately understood the intricate power balances involved. Although the customary system itself prospered when not codified by state lawmakers, since the Land Act, it has seen a gradual weakening of its traditional governance. The difficulty arises in trying to reconcile two fundamentally different systems of land ownership.

Of the management responsibilities of the clans listed above at 2.1, only the responsibility of the clans to "determine and mediate" land disputes was explicitly recognized in the Land Act. Section 88 of the Land Act says clearly that all disputes on land held under customary tenure should be resolved according to customary law, and that the customary authorities have the power to determine and mediate in those disputes. At face value, this is a positive change from customary tenure not being recognized in law, prior to 1998. However the Local Council Courts Act 2006 created another parallel court system, the Local Council courts, including in those areas of customary land tenure. This effectively runs parallel to

the traditional land justice clan systems. The Land Act attempted to give authority to traditional institutions, but did not provide sufficient detail to legitimize its operation, unlike the Local Council courts, which were explicitly brought into law.

By permitting the parallel operation of two systems, those family and community members who seek to individualize their holdings of customary land are able to grab family and community land and break away from the customary laws by appealing to another framework. This is what is seen in reality on the ground. In addition, even where customary laws are written down, they are not applied by courts, despite being lawfully "binding and authoritative" on those governed by them. Many courts continue to operate under misconceptions about the nature of customary land, rather than seeking to understand and uphold its principles as required by the law. Indeed, many Ugandans, have continued to claim that "customary land tenure does not allow women to own land" rather than to make use of the customary land laws, even where these are documented to the contrary.

With the assistance of LEMU, the people of Lango, Teso, Acholi and Kumam regions have documented their customary laws in documents called 'Principles, Practices, Rights and Responsibilities' (PPRR[6]). These books were created (amongst other reasons) to assist the state courts in applying customary tenure. In LEMU's experience, however, discussions with some members of the District Coordination Committees in certain districts to propose the use of these books was met with continuous rejection, claiming that these customs are discriminatory. These claims are made without having read the PPRR, which includes clear protections for vulnerable people.

One key gap in the provisions of the Land Act relates to consent for land sales. This is an area in which the law could have provided invaluable support to the operation of customary tenure. Because of the obligations under customary tenure to maintain land for future generations, it is important that consent of affected individuals is sought prior to the sale of customary land. It should not simply be the decision of an individual that the land is removed from the land that was available to the family or community. If this is allowed to happen, there is a risk that people will become unwittingly landless. The state system makes provision to require the consent of spouses, whilst the customary system requires the consent of the family and of the clan, showing a further difference in the approaches. Furthermore, ideally, the Land Act would have given specific responsibility to a body (either under the state or the traditional system), to verify the necessary consents. Although an official form for registering a spouse's consent has belatedly

[6] For further information see the various "Principles, Practices, Rights and Responsibilities" (PPRR) Books found at www.land-in-uganda.org

been produced (in 2004), with no-one mandated to look at these forms, they are currently meaningless for sales of unregistered land. In any case, they have been created as a stand-alone document, rather than as part of any sales agreement format, making it much more likely that they could be ignored. With little attention paid to this area, in practice consent is usually neither sought nor given (Adoko and Levine, 2007), or is instead claimed to have been given orally which is difficult to prove.

3.2 The Impact of Undermining Traditional Land Tenure Management

3.2.1 Decreasing Authority of Customary Institutions

Traditionally, the greatest responsibilities of the clan were to ensure that land did not leave the clan, that allocation of land for use was made to all those who needed the land, and that the land was held with the idea of 'stewardship' and was being protected for the future generations. The greatest beneficiaries of this protection were women, children and the future generation, since their rights were proactively protected. Under the state system, people only have recourse for injustice by pursuing a case in the courts. This is not possible for many vulnerable people, neither financially nor in terms of social pressure.

For various reasons (including attempts to write customary law into state legislation) clan control over land has progressively weakened over the past decades. Whilst customary governance is now recognized, the State maintains a monopoly on the use of coercion. Since elders and clan chiefs cannot arrest or punish an offender, their authority remains only one of social pressure, or of fines. However, even fines are not enforceable. A person who puts individual economic gain above social acceptance lies outside the control of the clan, and those seeking to put their own benefit above that of the community are able to side-step the traditional systems.

Customary laws were created over years of self-determination, with communities agreeing how they would govern themselves in order to promote social harmony. This is the fundamental basis of any law-making society. However, once those laws are seen as less relevant (for example, due to there being another forum for dispute resolution) those laws lose their force. This is what has taken place by partially incorporating the customary system into the State system. As well as creating alternative forums for people to choose from, the parallel system has reduced the clan's ability to offer the social protection that has historically been so crucial. The state administrative system has undermined - but not fully replaced - the customary authorities, and has not been able to replicate the checks and balances that evolved over many years in the customary system. This gives particular power to those seeking to

'dodge' their obligations under customary law by appealing instead to a Local Council court. The weakening of customary institutions is somewhat self-fulfilling: the more the institutions are weakened, the more likely it is that people will seek redress in the state authority system, itself overwhelmed with case backlog.

The major effect of this trend is that the elders are now less likely to stop the selling of land on which married women, widows, children of minority age and orphans reside even if they have not given consent to sell the land. They are no longer able to fill the protection role that Parliament thought it had strengthened through legislation – and ironically, the legislation has actually served to weaken the protection that had previously existed. LEMU's work with communities in the north and east of Uganda has seen this lead to a number of outcomes[7], considered below.

- Increase in conflicts

There are many conflicts around customary land. These arise mainly from border disputes when others overstep boundaries, often deliberately. This type of conflict is particularly common during the rainy seasons, when people are farming and land is under particular pressure. Some of these conflicts end up in state courts, and are slow to be resolved due to large case backlogs. LEMU is currently undertaking research into the lengths of time it takes for cases to be resolved in court, which is due to be published later this year.

Conflict also arises where people who left their village many years ago are returning to their former land, with the hope of reclaiming it and selling it. Often, they find that other families have settled on this land, creating a conflict as to rightful ownership. Conversely, circumstances have arisen where landowners have gifted land to others (or to institutions). Following the death of the gift-giver, the descendants have sought to take this land back, arguing that the 'gift' is no longer in force. These circumstances arise because such agreements are traditionally verbal, which requires both sides to maintain the agreement in good faith. Many of these disputes are within families and communities who are related. If the disputes are handled by the state, the adversarial nature means that one party will win and another will lose. The winning party is often the more powerful party, who is better able to marshal the resources required for a legal dispute. Even after resolution (in the form of a court ruling), they parties will have to live in the community as "enemies". Conversely, the clan justice system is about equity, restoring relationships and

[7] Conclusions drawn from LEMU mediation cases 2011 – 2016. Research into these cases is ongoing, with analysis expected to be published later this year.

peace. Keeping dispute resolution at clan levels, where it is proximate to the people that are affected helps to maintain social cohesion and can better reflect the circumstances (and equity) of each case.

- Sales of Land Without Consent

The failure to create a mechanism to ensure that appropriate consent is given prior to the sale of land is particularly serious. The old customary system had provisions for protecting the rights of women and children in families and communities on clan land. These provisions were never written down, but they were part of the social obligations of living within the clan, and they were enforced by clan elders. With the increased prevalence of the Local Council courts, and the consequent diminishing legitimacy of clan power, customary protection has been eroded, without equivalent state measures being put in place. Because policy makers did not properly understand the protections that were offered under customary tenure, the very Act that was intended to bring in better protection has actually eroded rights. No state officers or institutions are carrying out any functions associated with supporting landowners by customary tenure, instead leaving the system to its own devices.

Consequently, community and family lands are increasingly being sold. Although some land sales have always taken place, in the past an important principle was that land was 'God's gift' to be used and left for the future generation. The clan's role ensured this by preventing land sales except in circumstances of extreme need[8], which reduced the risk of landlessness. The creation of a landless class in Uganda would require a significant structural shift in economic terms. Land is the only asset that many people hold, and in the north and east of Uganda, there are few opportunities for employment outside of agriculture. The very fact of increased sales of land is already leading to a change in the perception of land, and the role it plays. Whilst customary land that has been sold is still held under customary tenure, people's attachment to land acquired in a transaction (rather than through inherited right) is fundamentally different, and particularly distinct from the customary tenure system decades ago, leading to a gradual erosion of the principles of customary tenure.

[8] An example of the circumstances in which sales are permitted in one region is set out in the Teso PPRR (available at www.land-in-uganda.org). Permitted circumstances include the event of serious illness, or where land is being sold to allow for reinvestment elsewhere.

- Land Grabbing by Powerful People

LEMU's experience and research[9] has shown that the categories of people who are typically victims of land grabbing are women, especially widows, children, the elderly and the disabled. It is unsurprising that it is often the vulnerable that are exploited. Land grabbers are predominantly men (especially brothers in law who grab land from the wives of their dead brothers); wealthy people (especially business people); those in formal employment; politically connected people and educated people. There are three key types of vulnerability that are exploited by a party to a land conflict who has more power, namely:

i) **Exploiting physical/social weaknesses** - The exploitation of physical weakness is particularly prevalent against women, but particularly those without immediate family protection, such as widows, divorced or unmarried women, or those in cohabitation. This exploitation also takes place against children, particularly orphans. Both of these types of power demonstrate the importance of social protection: those that are weakest are those whose family structures have been affected.

ii) **Exploiting the oral nature of customary tenure -** Customary tenure is an oral system of governance premised on truth, good will, trust and the protection of land rights of vulnerable people. Despite this, often the land grabbing party in a conflict will demand of the victim that they prove their claim to land by producing written evidence (such as land sales agreements or written evidence of land gifts given) dating as far back as 60 years ago by parties long dead. This would be challenging in any event given the oral nature of customary tenure, but to make matters worse, often the dispute is deliberately initiated at an opportune time, such as the recent death of a husband. The weakening of the clan structures makes their testimony less likely to be forceful in this scenario.

iii) **Exploiting the differences between the state and customary land laws** – State law says that customary laws will apply to customary land, unless they are discriminatory to women, children and the disabled. However there are cases where state and customary laws differ, and a family owning land under customary tenure may *choose* to apply state laws instead of their customs while the opposite family chooses to apply the custom. For example, customary law sets out the land rights of a child born out of marriage as follows. If the biological father recognizes the child to be his own, the child is entitled to the father's family land. However, if the biological father denies that the child is his, then the child's rights come from the family of the biological mother. The Children's Act 2003 gives sole responsibility for the child to the biological father. It has been known for the

[9] As yet unpublished research undertaken on mediation cases undertaken by LEMU in the period 2011 – 2016

families of a child to alternately quote state law and customary rules to seek to avoid taking responsibility. The effect of these crafty choices by the two families is to grab land from both the child and the mother who then become landless, and clan-less, contrary to the principles of customary tenure.

3.3 Provisions of the National Land Policy on Customary Land Management

After many years of in-depth consultation, the Ministry of Lands, Housing and Urban Development published the National Land Policy (NLP) in February 2013. This provided a beacon of hope for traditional administrators of customary tenure. The NLP itself recognized that the aims of the Land Act had not been fulfilled, and that both it and the Constitution have been "criticized for destabilizing and undermining [customary tenure's] progressive evolution". The 2013 NLP acknowledged that for a long time customary land tenure was regarded as inferior to freehold, and despite its equal legal recognition in the 1995 Constitution, it had been considered as merely a precursor to freehold title, pending registration and conversion. The NLP sought to rectify this, promising to recognize customary tenure on its own merits, to establish a land registry system for rights under customary tenure, and to issue Titles of Customary Ownership conferring land rights recognition equal to freehold. Notably for the topic of this paper, the NLP also promises to "ensure full judicial backing for traditional institutions as mechanisms of first instance in respect of land rights allocation, land use regulation and land disputes for land under customary tenure" and that the "Government of Uganda will strengthen traditional land management and administration institutions". Codifying this policy position is an important step in the protection of customary tenure, and in principle has the potential to restore the standing of the traditional institutions, as well as allowing customary tenure to evolve on its own terms. What now remains to be done, four years on from the publication of the policy, is to amend the laws that are contrary to this policy, and implement laws to bring these policy intentions into being. To date, LEMU has not seen the momentum that was established by the NLP be translated into effective action.

3.4 The Implementation of the NLP: Will it Support the Evolution of Customary Tenure?

It is worth turning to consider whether the attitude of policy makers and Government towards customary land tenure has changed enough since the Land Act to permit the implementation of the NLP in favor of the evolution (rather than replacement) of customary tenure in practice.

To review the progress that has been made, attention should be paid to those areas of the policy that have been operationalized. Chapter 8 to the original policy sets out an implementation framework, recognizing

that "implementation involves the conversion of policy principles, statements and strategies into a comprehensive program of land reform". The priorities in the framework are setting up the administrative means by which it is proposed the policy is advanced, and ensuring the dissemination of information it contains.

Two years on from the publication of the NLP, the Ministry of Lands, Housing and Urban Development published an Implementation Action Plan (in March 2015) to identify the areas of prioritization in the period 2015/16 – 2018/19, described as the first three years of operation. This suggests that the MLHUD did not consider that the policy was operative until 2015. However four years has expired since the publication of the policy, and it is worth reviewing progress in these areas.

The Implementation Plan identifies a total of 131 'short-term' actions to be addressed in the 'first three years' under 12 headings. This is an ambitious program over three years. The heading that is allocated the most funding over the three years is 'Regularizing and securing land rights'. Of the 8 actions listed under this header, the most pertinent to customary land is to "roll out and scale up systematic land demarcation and titling of customary land rights". LEMU's opinion is that a lot is required to first design a title that can accommodate customary land rights, and has written on this topic in various unpublished papers[10].

Whilst the sentiments behind the NLP are positive, as has been seen from the practical implications of the Land Act, the true test of efficacy is the outcomes felt by citizens. To be brought into force, the NLP requires new legislation to be drafted or existing legislation to be amended. It should go without saying that such legislation then needs to be upheld, however in Uganda, this has not always been the case. Two land-specific examples illustrate this well. Firstly, the Land Act brought into force District Land Tribunals to determine disputes. The Tribunals were created, but were not sustained due to a lack of funding, meaning that there is an institution created in extant law that does not exist. In fact, the NLP recognizes this, and sets out an intention to reinstate Tribunals. Similarly, the Constitution requires that in the event of any compulsory acquisition of land, possession cannot be taken before payment of prompt, fair and adequate compensation. There are many instances reported in Uganda of land being taken ahead of claimants being paid, including where land was taken years ago, and compensation not yet paid[11]. Justifications given for the lack of payment are usually related to a lack of funds. It is surprising to many

[10] For example: "Is documenting customary land system against the NLP?" (unpublished).
[11] For recent accounts of land taken without payment of compensation, see: http://www.monitor.co.ug/News/National/Kabarole-residents--protest-over-land-compensation-delay/688334-3494046-151b2ib/index.html and https://unwantedwitness.or.ug/busaana-residents-decry-delayed-land-compensation/

western practitioners that a law can be contravened in this way, with a lack of funding used as a justification.

It will be important to monitor the implementation and upholding of any legislative changes that come about as a result of the NLP. As yet, no legislative changes have been put in place, which itself offers an initial comment on the progress made since 2013. Work that has been undertaken to date includes the drafting of a gender policy, and the commissioning of consultants to draft a land acquisition, resettlement and rehabilitation policy. Noting the NLP's important recognition that implementation requires the translation of principles into action, the publication of additional policies does not bode well, particularly if the existing law is not working well in practice. It is within this context that we are only cautiously optimistic about the enactment of the National Land Policy to support the evolution of customary tenure.

4. The Opportunity for the Customary Land Tenure System to Contribute to Economic Growth

In its current form, customary land tenure does not facilitate an efficient land market. This is because it does not typically offer independently verifiable evidence of land rights beyond the immediate community, and unlike titled land, the state does not guarantee buyers that the information on the title is correct, as provided for the by the Registration of Titles Act 1924. The Government needs to fill this gap, and appears to recognize that this is the case based on the NLP's intention to regularize customary land rights. However, implementation of the policy in the past four years since publication has been limited. From our perspective, the starting point is understanding the tenure system and governance. The Government therefore has an uphill task to first understand and respect the differences in customary land tenure systems in order to design and operationalize appropriate systems.

Despite the previous lack of support for customary land tenure by policy makers, two realities persist. The predominant type of land in Uganda remains customary land, and an unsupported land market exists for land under customary land tenure. Any policy support to improve the land market under customary land tenure is likely to have a massive and positive impact in the lives of the owners and on the economy as a whole. The reverse is also true: continuous neglect by not supporting the land market under customary land tenure also means missed and lost opportunities in the following areas:

> **Potential lost revenue -** The Government loses revenue because customary land transactions are currently unregulated. The fee charged for land transactions (usually 10% of the sales price) is all lost by the Government to the local councilors and the clans.

High risk of disputes - Less than one third of rental agreements are written. This leaves the majority of people vulnerable to land disputes. Even in cases where there is some documentation, the documents often lack important information (date, size, and location of the land) rendering the documents insufficient when disputes arise from these land transactions. If the Government regulated customary land rental to ensure standard documentation and registration of land transactions, then less land would be in conflict. Renting customary land improves access to land for users while producing income for customary land owners.

Protection of rights - Women's land rights have been adversely affected by the Land Act, due to insufficient enforcement of the consent clause (and in particular, since it did not detail responsibility for confirming that appropriate spousal/family/clan consents are given when family land is sold). With no government regulation of land sales, rentals, or acknowledgement of the clan's role in ensuring consent, it is difficult to ensure consent of families, especially of wives, women, and children. LEMU research (Adoko and Levine, 2005) showed that wives are only viewed as "witnesses" in land transactions. This leads to land grabbing from women and children when land is sold.

5. Conclusion and Recommendations

5.1 Can Two Different Legal Systems Apply Side by Side?

Revisions to Ugandan land law in recent decades have created a situation where state law is to be implemented alongside customary tenure. Since 1998, the law has recognized customary tenure as a legitimate system within a system. In reality, the clans implementing customary tenure have no way to enforce their decisions without the State apparatus supporting them. Although the formal recognition of a customary tenure was long overdue (given it's significance in Ugandan history, and its relevance to so many communities), as has briefly been discussed, there are a number of ways that creating this hybrid system has not been the ideal outcome for customary landowners.

Unpublished LEMU research into land grabbing showed how it is not possible to have two systems existing side by side without each affecting the other. State law has poorly interpreted customary law, in its refusal to recognize the individual land rights of a woman in a family. "Customary" tenure is adapting, as notions of ownership change and as people are able to choose to which system they wish to appeal at which time, according to their interests. It is unclear to what extent this interaction was anticipated in the policy that created it. This process of change exposes another contradiction within the Land Act's

recognition of customary land law. In a situation of rapid change, where rules are contested, the law then breaks down, because there are no rules left which are accepted by all as binding and authoritative and advantage can be taken of those that are vulnerable.

The institutions of customary tenure are not currently providing the necessary contribution to the development of Uganda, although this is not to say that they cannot do so. The clan systems for land administration and justice have been progressively weakened, for many reasons, some of which have been explored here. Clan authorities have no power to enforce their decisions, and as the local economy is increasingly monetarized and integrated into a national (and even global) economy, social norms are more often abandoned in favor of personal profit. The role of the clans is gradually being taken over by Local Council courts, but in practice, this means that there is a huge vacuum, since Local Council courts have no training (or moral authority) to arbitrate in customary land disputes. Access to the state judicial process remains almost impossible for most people; this was a role that customary governance used to take. Whilst the move towards a market economy is not necessarily a bad thing, its accelerated adoption has led to the theft of family and community land by individuals. It is this rate of change, and the efficacy of governance institutions that will determine its success, and who are the winners and losers.

In customary law, 'ownership' also implicitly meant stewardship: the obligation to manage land in the interests of others, women and children, and future generations. In an increasingly individualized society, power of land is instead being concentrated in the hands of the household head (male) as an individual, removing the associated obligations. The system which traditionally protected women and children has grown weak precisely when it is most needed – and in a situation where state systems are unable (or unwilling) to take over the responsibility. The resultant absence of authority in land administration is one of the most serious problems facing people in the north and east of Uganda today. Every village has stories of land grabbing, disputes over boundaries, disputes over ownership between and within families, dependents chased off land, dispossessed widows and orphans, with limited opportunities for recourse. The State cannot bring order to this situation in the short or medium term, because the task is simply too big and the resources, in trained personnel and funds, are too few.

5.2 The future of Customary Tenure

There are many who believe that customary tenure belongs in the past, and that over time the 'modern' system of freehold with title should replace it as the only land ownership system across the country. The view that it is unchanging is not correct – one of the benefits of an oral, un-codified system is that it is

created by the very people it affects, and that it can adapt to reflect equitable outcomes in changing circumstances. The principle of customary land, reflecting the interests of communities and families, is not straightforward to reconcile with a freehold system.

The desire to replace customary tenure with freehold is based on assumptions regarding the land market, and the efficiency with which the system can be administered by the state. However it must be noted that the freehold system in Uganda has many problems itself, particularly relating to incidences of title fraud. Freehold is not infallible, and requires a comprehensive and non-corrupt system for its benefits to be felt.

It is unlikely that development partners, such as The World Bank and the Government of Uganda, will want to fund the evolution of customary land tenure that allows families and communities to continue owning land due to its perceived economic inefficiencies. However, the NLP commits the government to some protections of customary land. The Government has not performed this duty well over the years but now has an opportunity to do so as mandated in the NLP.

The work of LEMU is based on the view that whatever the merits or otherwise of customary tenure, it is inevitably going to be the dominant system in Uganda for a very long time and because of this, policies and laws need to support its legal system.

5.3 Recommendations

Recognizing customary tenure and permitting the self-determination of communities in land matters should not mean abandoning people to their own devices. With some support, the institutions and rules of customary tenure could bring in a welcome degree of order and law in the land sector. The customary institutions can be brought within the State system by simple and low cost measures that require only the political interest and will. As part of this process, the Ministry Of Lands could support and recognize a process of settling boundaries (local 'systematic demarcation') through the customary system and marking them in locally agreed ways (e.g. with trees of certain local species) . Communities could be encouraged to develop sketch maps of family and community land ownership, to be well prepared in case of any dispute, or to better protect them in the case of proposed compulsory acquisition. Local registries, charged with maintaining a register of all transactions, could keep registers of transactions on customary land to reduce the risk of verbal agreements being reneged upon. A clear policy could be laid down that customary judicial authorities would have the mandate to judge land disputes, and that the state structures such as the police and the courts would help enforce their decisions. This would be the overdue realization of the legal recognition given to customary tenure by the Land Act.

The traditional institutions in Uganda should be made aware of the welcome provisions of the NLP in order that they demand the implementation of the NLP in favor of the evolution of customary tenure, and not conversion. The imposition of economic principles on traditional family and community-based systems creates tensions that cannot be satisfied by forcing a freehold system to account for all types of landholding. In order to create a long-term sustainable approach to land, customary tenure should be permitted to evolve at a pace that is acceptable to the communities relying on it.

References

Adoko, J. and Levine, S (2004) Land matters in displacement – The importance of land rights in Acholiland and what threatens them. Kampala, Uganda: Civil Society Organisations for Peace in Northern Uganda (CSOPNU).

Adoko, J. and Levine, S. (2005) A Land Market for Poverty Eradication? A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication. Kampala, Uganda: Land and Equity Movement in Kampala (LEMU).

Adoko, J. and Levine, S. (2007) Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda. Kampala, Uganda: Land and Equity Movement in Kampala (LEMU).

East Africa Royal Commission (1955) East Africa Royal Commission, 1953-1955, Report Presented by the Secretary of State for the colonies to Parliament by command of Her Majesty. June 1955. London: Her Majesty's Stationary Office.

Government of Uganda (1995) Constitution of the Republic of Uganda [as amended]

Government of Uganda (1998) Land Act

Ministry of Lands, Housing and Urban Development (2013) National Land Policy. Kampala, Uganda: MHLUD

Ministry of Lands, Housing and Urban Development (2015) The Uganda National Land Policy Implementation Action Plan 2015/16 – 2018/16. Kampala, Uganda: MLHUD