Women's Land Rights & Privatization in Eastern Africa

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Falling Between Two Stools

How women's land rights are lost between state & customary law in Apac District, Northern Uganda

JUDY ADOKO & SIMON LEVINE

Introduction

As in other countries in Africa, there are two parallel and competing histories of land tenure in Uganda. The indigenous systems evolved to suit the needs of different local groups, or at least certain elite members in those groups, in a variety of different ecological and economic circumstances. They worked on rules which have never been written down, making it easy for outsiders to consider all these systems as 'customary tenure' a single, unchanging system of rules and administration. Another, written, history began with British colonialism. The British introduced a system of freehold title under which client chiefs and kingdoms (as well as missions) were granted formal land rights. All land which was not registered was considered by the British to be 'crown land'. Although customary tenure continued to operate on this land, the customary owners had little protection from the arbitrary expropriation of their property. The British colonial administrators regarded customary ownership as backward and a constraint to economic development, which by the 1950s they intended to replace with the 'modern' system of freehold.[1] However, colonialism ended before this could be implemented.

On independence in 1962, crown land became public land, which made little difference to most people. The old colonial opinions on the primitiveness of customary tenure were deeply engrained (and remain so today, as we shall see). As a result, Uganda, like many other newly independent countries, experimented with nationalizing land, another way of trying to replace the 'backwardness' of customary tenure with a 'modern' system. This was supposed to allow

for more 'rational' allocation of land. Still, the customary tenure systems continued to operate, though without legal status. From 1975, with the Land Reform Decree, land owners were effectively merely the occupiers of their land, which they held 'under sufferance' – meaning that possession of their land could be taken by the government whenever it wanted. Some land was indeed taken and given on leasehold to people who would now be termed 'investors'[2] – in practice often civil servants, businessmen or those with political connections. The real 'owners' of the land had no rights at all.

More recently, nationalization of land and other natural resources went out of favour in Uganda as in the rest of the world, and the 'backwardness' of customary tenure is instead now contrasted with the assumed superiority of private individual freehold. Land reform was a priority from the time the current government came to power in 1986. Several years were spent in policy research (see, for example, Agricultural Policy Committee (APC 1989a, APC 1989b, APC 1990), and there was active participation from the World Bank and other donors (see for example, Economic Policy Research Centre (EPRC), 1997). The result was the 1995 Constitution and 1998 Land Act which brought about two fundamental changes: all land was privatized; and customary ownership was given full legal recognition as private property.

Law and Policy

The privatization of land can mean many different things: in this paper we look at the impact on women's rights of two different ways of privatizing land. Privatization can simply mean that the State denationalizes land, giving up its ownership in favour of citizens, and giving up the State's rights to use or allocate land as it sees fit. All the land interests and rights which existed at local level would be recognized and respected. A second, narrower, sense would mean that the citizen's ownership of land is private and individual: the social obligations that went with ownership disappear, formal titles are given and land ownership is brought under the freehold system.

In Uganda, it is as though parliament and the government failed to agree on which privatisation they wanted. The land law which Parliament enacted in 1998 is clearly based on the first sense. In a very radical move, customary ownership of land is recognised as private property, together with the customary tenure system, which, with all of its rules and institutions, is given full legal status on all

land held under customary tenure.[3] The law sets up ways in which communities could own land communally on their own terms; and it allows people (individuals, families or clans) to have certificates proving customary ownership of land, without entering the freehold system. It also provides for communities, villages, families or just groups of individuals, to be able to own land together, by becoming a 'legal entity' called a *Communal Land Association* (CLA). The potential of the CLAs to protect women's rights is enormous.[4] The CLA must have a constitution, in which it can make whatever rules it wants about how land rights are shared and how land is to be managed. Land can be owned by a family (or clan), maintaining the stewardship role of the head of the family (or clan), without however giving them the land as their own personal property. Land rights of women on the basis of customary law can be written into these constitutions, thereby combining protection from customary and state judicial systems.

Parliament had also recognized that there are family members who depend on land without themselves formally being landowners. They could be vulnerable to the privatization of land, and in particular to an increased land market. Parliament considered their need for protection by enacting the 'consent clause',[5] which only allows the sale of land after consent is obtained in writing from the owner's spouse. The result should, in theory, be the best of all worlds: privatization has been enacted, which allows for a land market, but in combination with protective legislation. This should bring economic growth coupled with social protection, particularly for women. Furthermore, those who wish to remain in the customary tenure system can do so (see Nyamu-Musembi in this volume) and their rights must be upheld by the courts, irrespective of whether or not the land is formally titled. The existing protection of women in customary law thus remains, but with two additional advantages: first, those customary rules of protection now have full judicial force in state law; and secondly, protection has been added by bringing customary land into the framework of national law, because women now enjoy additional safeguards (notably from the Constitution and the consent clause).

Government policy has so far taken a different view of privatization. It has shown no interest in customary tenure or non-individuated rights, and has instead invested its resources in bringing customarily held land under freehold. This is because customary legal systems are embedded in a social context of rights and obligations. The government wanted to 'liberate' ownership from the very context

which gave people the right to make ownership claims in the first place. For the government, recognizing customary *ownership* was the regrettable – but unavoidable – side-effect of recognizing customary *owners*. This distinction between supporting customary ownership and recognizing customary owners has proved crucial with regard to women's rights. Despite a reasonably favourable environment for women's land rights in Uganda in both customary and state law, protection is failing precisely because privatization (and, with it, protection) has fallen between these two stools: customary law and state law.

In this context it seems reasonable to ask why the government recognized customary ownership after all, if it wants to bring all land under freehold? Recognizing customary owners is certainly welcome from a rights/justice point of view. But it was also a necessary first step to incorporate customary ownership into a privatized freehold system (by allowing conversion from customary to freehold ownership, and by giving titles to any customary owners who want them). Such a privatized freehold system, the government believes, is good from an economic point of view. The theory is well-known: a title holder, unfettered from the 'constraints' of customary law, can invest in his land with security that he will enjoy the fruits of his investment (the male pronouns here reflect the norm). Attention is avoided to the fact that these constraints are largely based on myths rather than proven deficiencies. The new title holder can now use his title to secure bank loans for investment in modernizing his agriculture. More importantly (for some policy makers), once there is secure title, an investor can buy his land with security, because the purchase and ownership will have legal protection. So, a land market will be created, through which land will go to those who can use it most productively. (Attention is also avoided to the fact that the economic assumptions behind the policy obsession with titling have long been critiqued on analytical grounds).[6] The Ugandan government set up a three stage process; first, customary ownership was recognized; second, owners can get certificates to prove that they are the legal (customary) owners of a plot of land. Finally, this land can be formally surveyed, to replace the certificate of customary ownership by a freehold title. Because surveying is expensive, costs need to be reduced by undertaking the exercise on a large scale. The government therefore invests most of its attention on land, and its funds, in a process of surveying at one time the land of anyone who wants it in certain districts in a process called systematic demarcation.

Eight years after privatization of land began in Uganda, what was the result? Has support for titling and a land market brought

economic change? And what has been the impact on the protection of women's rights of reinforcing customary protection within state law? In this chapter, we look at the evidence on the ground. In the first section, we examine what customary tenure systems mean in the context of Northern Uganda and how practices are changing. We then examine the main way in which women lose their rights to land. In the final part of the chapter we analyse why women have been so vulnerable and discuss the likely impact of further implementation of the government's policy on titling.

The following arguments are based on three years work on land rights in Apac District in northern Uganda, conducted by the *Land and Equity Movement of Uganda* (LEMU), a national NGO.[7] This has included three specific pieces of research, one conducted in Apac District (Adoko and Levine 2005a), and the other two in the sub-regions of Acholiland in northern Uganda (Adoko and Levine 2004) and Teso in eastern Uganda (Adoko and Levine, forthcoming). This chapter is based principally on the research in Apac, which took place during March and April in 2004, and looked at whether the hopes underlying the government's land market policy are well founded, or not. A team of six graduate researchers spent one month in Apac, spending three days in each of six sites, chosen to represent the spectrum of land issues, from rural to peri-urban to displacement. Community discussions were held about the government's land policy and trends in customary tenure, together with focus group discussions and individual interviews and a study of documentation relating to land sales. This was supported by meetings and workshops with clan leaders and local land judges in November and December 2004, to clarify the past and present rules of customary tenure. The other two studies have also informed this chapter.[8]

Case Study: Apac – the Socio-Economic Context

Apac district is typical of most of northern Uganda. The district is predominantly rural, and the population depends almost entirely on agriculture. Mechanisation is rare, so the only productive assets which most households own are land, some hand tools, and partly also livestock. Although such a setting is often described as 'traditional', the past few decades have seen profound economic and social changes. The local economy used to be based on cattle, but nearly all the cattle in the district were looted in the political instability of the late 1980s. The local economy has never fully recovered from this. Also

the production of the main cash crop, cotton, declined because of a combination of low world prices and the collapse of marketing structures – at least partly the result of Structural Adjustment Programmes (SAPs). Today, there is no obvious cash crop substitute besides traditional food crops. Population growth is very high with the population doubling every twenty years. One consequence is that the area of land owned by each family is decreasing, there is no longer free forest land which can be taken, but agricultural technologies have not changed to keep pace with this. In the last few years, there have also been changes in the way land itself is perceived: it is increasingly seen as an asset which can be sold – with far reaching social and economic consequences, as we shall examine below.

However, commoditization is not only an economic transformation. In an increasingly monetarised economy, economic goods have become divorced from the social norms in which they were set and which gave them value. This has affected how people see each other, as the personal and social ties, which were inherent in exchanges of goods and services, are weakened. While this process can be liberating for some people, it has inevitably weakened the social structure, for both better and worse. This social (clan)[9] structure was formerly the principle judicial system. The power of the clan has been decreasing since colonial times, as first the colonial power and then the independent state claimed a monopoly on the legal use of coercion. What remained for clan elders is recourse to social pressure to bring offenders of clan rules into line – but this social pressure is often weak today. It is important to stress the multiple roles of the clan in the past: as a social context for economic life, as the administrative and judicial system, and as the structure of social protection. The weakening of clan structure has therefore had far reaching implications for everyone in social, economic and legal terms – and since land rights are a product of these three domains, inevitably also for them.

LAND TENURE RULES AND LAND TRANSACTIONS IN APAC

It is often believed that under customary tenure land is owned communally – the 1998 Land Act even defines customary tenure as a system with communal ownership. Clan members in the case study areas often claimed that 'land belongs to the clan'. However, individual households have long had security of tenure within the clan rules on their farm land, and clans do not have the right to 'reallocate' farmland to another family. Yet individual or family rights do exist within a wider social context. This could either be held to be root

title or just a social domain of 'rights and rules' (the case varies widely in Africa). Such regimes lose a lot of clout when communal properties within the area decline dramatically in size or utility to community members, or disappear. Everyone we spoke to confirmed that they feel comfortable in their security of tenure: any constraints to investing in their land are due to economic factors.[10] When members of extended families farm together, they do so on each other's land only to make the work easier. They do not work together on communally owned land. Farm land is owned and inherited within the family, and the management of the land is passed on from father to sons.

If customary tenure actually means private family ownership as indicated above, closer examination is required of what is meant by 'belonging' in the phrase 'land belongs to the clan'. The confusion about communal or clan ownership comes from the claim by the clan to set the rules by which owners own land, and to set the social context within rights are claimed, by which the clan claims the village as its 'territory'. This sense of 'to belong' is much closer to the idea of sovereignty than of ownership, or of holding a 'radical title' rather than a freehold title. We can compare it with the government's claim to limit the sale of land to 'foreigners', or to set limits on what may be done on land (planning regulations, etc.) This is not a claim that the government 'owns' the land, to which a private citizen may have title. The confusion over this concept of 'belonging' is not merely of theoretical importance. Unfortunately a great deal of the state's attitude to customary tenure seems to stem from this mistranslation of the word 'to belong', resulting in a mistaken belief that ownership is communal.[11]

Customary tenure in the area has been constantly evolving (Opyene, 1993) and recent trends long pre-date a change in state land law. In Apac district, there used to be large areas of land which did not fall under any families ownership, but were genuinely 'owned' by the clan as a whole – grazing and hunting lands. These lands have gradually disappeared, and with it much of the clan's ability to impose social rules on its members. Family land is usually vested in the head of the family, who is the 'steward' of the land with the responsibility to look after the land in the interests of his (occasionally, her) family. Being responsible for the land is thus inseparable from being responsible for the welfare of the family, including of the future generations. Ownership, though, is becoming increasingly individualized and more family heads are dividing up their land between their sons, rather than passing on the land as a

single family holding to one son. This process is accelerated with an increase in land sales. Although customary law in theory forbade land sales, in practice they have taken place for many years – with the acceptance of clans. In more recent times the clans would claim the right to vet land sales, looking at the seller (why they wanted to sell the land, what the situation of the family would be after a sale) and the buyer (were they of the clan? friendly to the clan? people who should be accepted in the clan's village?). Sales to 'the right people' by a family which had a good reason for the sale, would be endorsed if the family could still look after itself after the sale.

In cases where a family lacks land for all its children, some turn to buying land in the village. This is particularly pronounced in Teso. However, this land is considered to have fewer family encumbrances than inherited land, and the clan elders would be more reluctant to stop a future sale of such land. (Nonetheless, the land is still 'clan land' and should be sold to a clan member). In general it can be noted that this process of individualization is more pronounced in areas with a higher density of population and a greater integration of the local economy into the national one. This comparison can be made, for example, between Gulu and Kitgum Districts, and between the Districts of Teso and Apac. In Gulu and Apac clan control seems weaker than that in Kitgum and Teso leading to an increase in land sales without clan permission. Once land is sold it is individually owned, usually by a man and clan control is removed.

Women's Land Rights under Customary Law

Does customary ownership allow for women to 'own' land? We consider this question as not very useful for a gender analysis and argue that it is more important to look at what rights different people have. On marriage, a woman normally enters the clan of her husband, thereby gaining rights to the land of the clan. The protection of her rights to land is the responsibility of her husband's family. If her husband takes other wives, she is still guaranteed enough land to provide for herself and her children. In the past, there was an assumption that every girl would marry, would thus leave her parents clan and join her husband's clan. Those few who remain unmarried or divorced have rights to be allocated land to use by their own parents' clan. If a woman's husband dies, the widow still claims social and economic protection from her late husband's clan. Until the spread of HIV/AIDS, the biblical practice of *levirate marriage* was

followed. This meant that a woman became one of her late husband's brother's wives, thus maintaining her rights to the family land. If she chose not to be remarried, she maintained full rights over whatever land her husband had allocated to her. The rights of a married woman are limited because though she has rights to be given land to use by her husband, she has no right to sell this land. However, under customary tenure, there was no right for a man to sell land either, because the land was 'under his stewardship' rather than his personal property. In practice, there were therefore fewer differences in rights to land between a woman and a man than is often presented in public discourse.

TRENDS IN LAND SALES AND ECONOMIC DEVELOPMENT

Although land sales long predated government land market policy, they are becoming more frequent. This growth in transactions in land owned under customary tenure, done without written documents, are hard to ascribe specifically to a government land market policy. Most sales in Apac now are what can be called distress sales – meaning sales that take place under pressure of poverty, usually with a likely long-term negative impact on the household's economy. Small portions of land are being sold to meet consumption expenditure by the poorest people, who earn their living to a great extent by hiring out their labour to others rather than by farming. These kinds of land sale are organized locally and often finalized in drinking places, usually by men. Women do not have control over these sales and frequently they do not even know about them until they see their husbands with money. Katy L.'s complaint reflected many others: 'Consent is never sought. You only see your husband buying something and when you ask where the money is coming from you are told to pack and go back to your home because you do not own land. We fear to talk because we have nowhere to go.' Men also admit they do not consult their wives. Peter O., at a meeting, was quite frank: 'Women have weird thoughts and suggestions and do not understand quickly, so it is not necessary to involve them in the land sales. I would rather involve the clan in the sale than the wives.' Mary A. also voiced the fear that many women have of complaining, but also opened up the reason why men do not inform wives about the sales – and why they fear the woman would object: 'Do not believe men when they say they sell land to send children to school. Men sell land to drink. Men do not only sell land, they sell crops as well without women's permission. Women fear to talk because of beating and quarrels at home. I am able to talk because I am a

widow.' The case study showed that most people allege that sales are usually made to raise money for drinking. In other cases, for example where the sale is to raise money for medical treatment, a substantial balance on the sale may still be used for alcohol. The direct result of these sales is a loss of land rights for women and children; also each sale of land makes future sales, and thus increasing landlessness, more likely. This kind of land sale should have been stopped by customary law.

Some sales involved landgrabbing, where one family member, for example, sold the family land without the knowledge of the rest of the family. Such sales were often to people with some power or influence – politicians or civil servants, for example – who proved able to override any attempt by the family to stop the sale. Given that the buyers are in many cases not primarily farmers, their interest in the land appears to be more for speculative than investment purposes. In our research we found no cases where land use had changed or investment had taken place.

A smaller number of sales are by wealthier people with larger land holdings. These sales are mostly for what could be called 'investment' purposes – to build lock up shops for renting, or grinding mills or to start a retail shop business, for example. In these cases the family retains enough land for its economic well-being and therefore these sales would probably have been allowed by clan elders under customary law, though possibly with restrictions on who could buy the land.

Customary tenure has for long been alleged to be an obstacle to development because it prevents the emergence of a land market. Evidence from the case study area clearly shows that this is not so but also that the growing land market in northern Uganda is not bringing about economic development. The land sales never come to the knowledge of 'investors' or 'progressive farmers', and since they involve only small plots of land, they would probably be of no interest to them. In almost all cases, the land continues to be used for farming as before. It is precisely these sales, for consumption rather than investment, and against the economic welfare of the family, which clan law should have stopped, because of the duty to protect women and children.

Why is the clan protection failing these women? Many factors combine, among which is greed. The first guarantor of women's rights is the family head of her in-laws: but these are often the ones who now violate her rights. Grace M.'s case in Aduku is common: 'My father-in-law gave me and my husband land, but later on sold it to someone else without informing us.' The final guarantors of

protection are the clan elders. Some are well meaning, but powerless, as Ruby A. testified: 'The land issues are sometimes solved by the clan leaders, but these days clan leaders are not respected.' Other elders have become inclined to seek personal advancement, since they cannot enforce protection anyway. In a community meeting Patience A. spoke out about the corruption of clan rule: 'If one is poor, the clan members will not assist you. Instead they laugh at you with your problems. It is only the rich who will be assisted.' In a different community meeting, Ruth O. told a similar story: 'Sometimes we go to the clan leaders to complain [when our husbands sell land for drinking], but they too do not assist, and yet we have to pay them [to hear the complaint].' One clan chief, who is also the chairperson of the sub-county Local Council (LC) compared the clan leaders and local state administrators: 'The behaviour of the clan leaders is very similar to that of the LCs, with both of them having an interest in money first.' Protection should theoretically have been strengthened by the privatization of the 1998 Land Act. In the following section we examine what is going wrong with land tenure reform in Uganda.

What is going wrong?

Government's assumptions were that customary tenure retards economic development. As a result, all land policy is based on the belief that the institutions of customary tenure can play no positive role – not even in protecting people's land rights. The power of the state administration began to overtake that of the clan authorities many years ago. Most people now involve the 'LC1' chairman[12] (the 'village chief') in land sales, because he is erroneously considered to give legitimacy to a land sale. People may approach either traditional land judges or the LC1 chairperson to solve a land dispute. The latter is believed (equally erroneously) to have more official legal power, so appeal may be made to him after consulting the traditional arbiter. However, in law, the LC1 has no authority in land issues whatsoever. Customary authorities were given the authority to settle land issues by parliament, without there being any specification of who this should be for any given ethnic group or clan. However, government's refusal to take this seriously has reduced the standing of customary authority among the population even further – to the extent where it can no longer exercise any authority. Government could have administered the law to give the decisions of clan judges

the full backing of the law through the police and courts, giving them the responsibility to implement protection of women's rights, as both customary law and parliament intended.[13]

A second difficulty surrounds the belief that people actually follow the law as parliament intends them to, and that the state is capable of making sure that they do. Many conditions need to be met for this to be true, including: that people interpret the law as parliament intended; that people can defend violations of legal rights, by knowing their rights and how to claim them; and that there is a functioning court system which is accessible to people and which protects people's rights fairly. In Uganda, none of these conditions holds. Knowledge of land law is almost entirely absent among the Ugandan population, and was no better among the LC1s. We found that few people know their rights and when they are told by someone more powerful that they have no rights, most simply accept this. This applies particularly to women, who keep being told that they cannot own land because they are women. In our research we did not meet a single woman who knew about the consent clause. This lack of knowledge is not limited to women only. It also applies to men and women alike whose land is taken by the state for building roads, when they are told that without title they are not entitled to compensation.

In other cases knowledge of one's rights does not improve the situation either. This is particularly true for widows who are often simply thrown off the land by their in-laws. They know that this is wrong, under both customary and state law, but lack the means to challenge these practices as P. A. recounts: 'I married in 1955 … I have one son. When my husband died 30 years ago, my father-in-law made me move to be near him … Now [my brother-in-law] has chased me from this land, claiming that it belongs to him. He arrested[14] my son and had him imprisoned.' This old lady had taken the case all the way to the District Tribunal. But even if the case is found in her favour, judgement is unlikely to be enforced, as the all-too-typical story of J. O. shows. J. O. is an orphan girl who heads a household of four other children in Kitgum. She recounts:

> Our father died of AIDS in 2000. His relatives began grabbing the land from my mother ... [They] mobilised friends with bows and arrows, and chased us away … My mother's brother went to the LC, the police, to Kitgum Court and Gulu High Court. The police went to arrest the people who had chased us away, but they just ran away from the village. Then, when my uncle planted crops for us on our land, the relatives came back and destroyed what he had planted. My uncle gave up and now we are all in the [IDP] camp.

Court rulings, if they cannot be bought, are simply ignored. It is rare for the police to intervene at all.

Another complication arises around the assumption that laws will be followed. This does not relate to whether or not people are law abiding: law-breakers exist everywhere and can be dealt with. However, we found that in many cases people do not break laws as 'criminals', but rather create a different 'legal' code from the one the legislature intended. They create new 'hybrid' legal codes by combining parts of different legal systems (in our case study, customary law and state land law), according either to their consciousness or their self-interest.

We encountered several cases of men who wanted to sell a small plot of land for money for drinking, but saw no reason to consult their wives, because they would probably oppose the sale. Their argument to justify their failure to consult their wives was that first and foremost, their claim to ownership of land is on the basis of customary law – usually, because they inherited it. They denied their wives ownership of any land, on the basis of two arguments: their being woman, and, moreoever, not born of the clan. Such an argument is a mutation of customary law, formed by adding 'modern' notions of individualized ownership. Actually customary law made the man the owner-custodian of the land with the duty to give his wife rights to the land.

Under customary law a land sale for the purpose of buying alcohol from the proceedings would not be allowed by clan elders. Being aware of this, men tend to appeal over the head of the clan elders to the LC1, the representative of the State Administration. He claims the right in state law to sell land for which he claims ownership through customary law. In this case it is state law which has undergone a mutation, because the 'real' state law says that land owned under customary tenure is governed by customary law – which would have forbidden the sale and given the LC1 no role in 'authorizing' the sale. The same process of hybridization seems to prevail among those administering land. We asked several LC1s for records of sales agreements and did not find a single case where a woman had signed her consent to a land sale. Most of the LC1s simply did not know about the consent clause – the main reason why it was not being enforced. However, when challenged about the validity of such sales, they argued that a woman had no right to oppose a sale, since 'women do not own land under customary law'. LC1s seem to be falling back on the corrupted version of customary law. If customary law were being followed, the LC1 would not have been involved in the land sale in the first place.

The term 'law breaking' is certainly inappropriate for this game of creating new hybrid 'rules' in order to suit one's position, since the people involved do not think of themselves as 'breaking the law'. The case study clearly shows that the practice of making law is not simply a matter of writing down rules. The threat to women's land rights has not come from unfair laws, but from a way of using rules which has evolved in a context where gender power relations remain unequal. This situation cannot simply be changed by re-writing rules. A concerted effort is also needed to change the inequality inherent in those relations – and that cannot be the work of parliaments alone.

Women's rights have also fallen victim to more implausible assumptions surrounding the question of land administration after privatization. The policy would only make sense if it was assumed that the state could put into place and also finance the necessary institutions of administration (and have these working by the time land was privatized, as intended, and without corruption).[15] In fact, over seven years after the signing into law of the Land Act, many of the institutions needed to administer land in Uganda are still not in place. Those which have been set up are so badly under-funded that they are hardly operational in many cases. By 2005, in much of northern Uganda *District Land Tribunals* (DLTs), which replaced the magistrates' courts for hearing land matters, had still not passed judgement on a single case. Because of lack of funds they often have to cover three or more districts, and do not work full time. The certificates for attesting to customary ownership of land are to be issued by sub-county recorders, after the ownership is verified by an area land committee: these committees have not even been set up. To date, the District recorders are still not in place and no certificates have ever been issued. The recorders are supposed to record all transactions on land with certificates of customary ownership (sales of registered land i.e. land with freehold or leasehold title are maintained centrally), but they have never been given the job of recording transactions on customary land, and nor has anyone else. This makes a complete nonsense of the consent clause, because if no-one has the job of ensuring that the wife's written consent is given, what is the point of making it mandatory? Women's rights, given by parliament, have been taken away by neglect in implementation. The communities' right to own land as a *Communal Land Association* (CLA) has also been taken away by neglect. CLAs are set up by the District Land Registrar, but the District Registrars are not in place, and so no CLA has yet been set up in the country!

It is easy to complain that funds are lacking in a poor country to set up a costly land administration. However, two points need to be made. First, spending is a question of priorities. The government has budgeted thirteen times more money for systematic demarcation in just four Districts than it has for support to all the sub-county institutions of land committees and recorders in the entire country (MWLE 2000). Neglect of support to customary institutions and customary land is deliberate, because government's main interest is in surveying land to bring it into freehold. Second, if the state does not have the money to set up these institutions, why did it legislate for them? The law could have chosen to work through an existing (if imperfect) administration, that of customary institutions, which it could have supported very cheaply. Instead, the state does not have the capacity to fill the vacuum that it has itself created. The result is that institutions which could protect women's land rights are either non-existent, non-functioning, unsupported, or they do not know or accept the law.

The possibility of promoting titling and the land market and at the same time protecting women's land rights rested on one more assumption, that probably escaped the attention of many law makers. Rights will inevitably be lost if there is no direct 'translation' of rights and claims to land when moving from one legal code (customary law) to another (state, freehold). It is obvious that in the two kinds of ownership rights are radically different – is this not the very reason why so many policy makers want to replace customary tenure with sets of rights which they believe are more conducive to 'development'? Titles are typically held by one individual. In a society where access to land is through the male line and where the power in gender relations is so unequal, titling means turning almost all land into men's personal property. That, however, was not the position under customary tenure where women's rights to use land were protected.

Theoretically, 'subsidiary' rights can be recorded as 'encumbrances' on a title. The work of consulting with all the rights holders to reach agreement is similar to the process which should be happening in the formation of CLAs. Since no interest has been shown by local or central Government in CLAs, it is hard to take seriously the idea that such a process will be undertaken properly in systematic demarcation and subsequent titling. Even if the will were not lacking, the resources clearly are.

Systematic demarcation is taking place in a very charged environment. A hunger for individual economic advancement, even at the

expense of one's own family, has been exacerbated by increased poverty, decades of war, the conspicuous lack of rule of law and rampant corruption as the only role model. The murders of close relatives for the sake of land grabbing are recorded regularly in the newspapers. Land boundary disputes are among the most frequent cases heard by local courts. There is insufficient trust between the vast majority of people and the institutions of the courts, the police and local administration (K2 Consult 2003). In such an environment, encouraging one person to claim personal ownership of family land is bound to cause conflict. In 2005, the case was reported in the local newspapers and in parliament by the minister for lands of government people carrying out the systematic demarcation exercise who were almost beaten to death in Aminit parish, Soroti district.

What State Law Makes Possible – a Conclusion

The Ugandan government could still choose to take customary tenure seriously. This does not involve abandoning a desire to see a gradual process of titling, but recognises an inevitably long transition period, during which most land remains under customary tenure. Every village in northern Uganda has customary land judges who are known and recognised. These men know the boundaries of each field and the ownership of all the land. A local, public process could be held to record this and delineate boundaries in 'customary' ways. It could be made mandatory to register all land sales, including those of customary land. The process could include giving the local land judges (or the state administrator who registers the sale) the responsibility to verify the wife's consent. Customary law could also be codified, so that everyone knew what land rights a woman, a widow, a brother and sister or an orphan had in each area. This could be the principle reference for customary authorities in adjudicating land matters. This would be a big change, because rights claimants would know what rights they could expect before hearing judgement. There would certainly be difficulties[16] and negative aspects as far as the customary authorities were concerned. However these processes would enable them to work more easily in partnership with the DLTs. Costs would be minimal for the state. One result would be that the Land Tribunal would have most of its caseload removed, because customary authorities would be the court of first instance for most land cases, with the DLT acting as an appeal court. (This would be some measure of protection for women

from corrupt or weak clan elders who connive in the violation of their rights.) The customary authorities could expect the DLT to call upon resources for state enforcement (police, courts) in order to give force to the customary judges' decisions. Another result could be that government would more easily achieve its desire to see land titled, though within a longer time frame. If there had been a long process whereby a community had agreed how land ownership was partitioned and how land rights were shared, and if this had been written down and served as a basis for titling, there would be less confrontation and conflict – and less violation of women's rights.

Such a partnership between clans and the state would not be easy. There is some overlap of interest – clan authorities want to protect their land from certain kinds of sale, and the state wants to protect vulnerable dependants from the same kinds of sale. Other areas have no such confluence of interest: clans often do not want land sold to people form outside the clan, whereas the state constitution forbids any discrimination on the basis of ethnic identity.

The *Land and Equity Movement in Uganda* (LEMU), a national NGO working to improve land rights for all, has proposed such a partnership in Apac District. Both district government and the DLT on one side, and the clan heads on the other, have shown enthusiasm for the idea so far. District government is passing by-laws with the aim to ensure that customary rules are followed and to bring in new procedures for land sales, developed jointly by customary authorities and the state administration. It is too early to say how far this partnership can go and what its impact will be, but the attitude of local government and clan leaders has been remarkably positive so far – born out of a shared realization that the current system, or lack of system, is simply not working.

Government has until now been similarly unwilling to take women's protection or customary tenure seriously. No attempts have been made to enforce the consent clause, or even to think of a system where the wife's consent could be registered. Nothing has been done to set up an administration for land which would help people, families and communities to protect their land and their rights. The state is weakening customary institutions, and no measures have been taken to help reinforce them even in areas where they could help implement state law and government policy.

Women are vulnerable not from defects in the protection offered by legislation, but in the actualization of that legislation on the ground. They are vulnerable to the twisting of legal codes, culminating in the slogan that 'women don't own land', which ignores the

land rights which women used to have under customary tenure. Protection is thwarted from two directions: government's unwillingness or inability to enforce law and support land administration, and prevailing gender power relations in society. The law cannot provide gender protection. Violations of women's rights, including land rights, will continue until power relations in society as a whole are equal and until government prioritises the administration of laws which are supposed to provide protection.

Titling of customary land is just starting and will almost certainly result in further massive loss of women's rights to land. The process of systematic demarcation is governed by the simplistic question 'who owns?', rather than the complex question 'who has what rights?'. The laws to protect women are there, but until the desire to implement them is there, they are meaningless. As they say, 'where there's no will, there's no way.'

Notes

1 East African Royal Commission 1955 Report. Cmd 9475
2 The use of the term in political discourse is significant in Uganda, as it is closely tied to corruption and the granting of special favours to certain individuals. Not every local person who puts his or her savings into a small business gets to be considered an 'investor'!
3 Land Act, 1998, 3 (1) (d): see also (b), (c) and (e)
4 They are not a panacea. There are several dangers in the power given by the Act to the CLA management committee, which are beyond the scope of this paper to analyse (see Adoko and Levine, 2005b).
5 Land Act 1998, section 40.
6 See, for example, Daley and Hobley, 2005; or, for an overview of the arguments relating to economic development and tenure systems in Uganda, Adoko and Levine, 2005a; compare also Nyamu-Musembi in this volume.
7 See www.land-in-uganda.org for more details on the organization, and for the full text of its research reports and policy papers, including an overview of the existing situation regarding land rights and administration in Apac.
8 The work in Acholiland examined the legal status relating to landowners and IDPs, and involved two months of field work by the authors and a team of six graduate researchers in July and August 2004. Over a hundred interviews were held with district officials, lawyers and politicians, landowners, soldiers – and hundreds of IDPs from twenty-three camps. Research in Teso was conducted in September and October 2005 in seven sites across five districts. It examined largely the same questions as the research in Apac, and included quantitative work on different kinds of land transactions which are taking place and their impact on land use.
9 It is not easy to give an exact definition of a clan, since the word can be used to cover wider or narrower communities. In Apac district, the principle clan, within which someone is not allowed to marry, is a patrilineal family network, typically extending to cousins of fourth or fifth grade.

10 Compare Englert 2005 in this volume. Ikdahl in this volume points at a different situation in an urban context.
11 During research for this study the head of one of the District Land Tribunals was heard arguing that all land ownership in his tribe is communal. This is obviously wrong and raises the question as to how the District Land Tribunal can protect a family's right to land, if the chief judge does not believe that families have any rights to land. Alden Wily (2006) discusses the distinction between 'communal property' (an estate in land) and communal land tenure (a community-based land administration regime).
12 The Ugandan administrative structure has villages, then parishes, sub-counties, counties and districts, or Local Councils (LC) 1, 2, 3, 4 and 5 respectively.
13 Where the two legal systems disagree, specific provisions of parliament and the constitution are superior. The District Land Tribunals would have to rule on this.
14 The brother-in-law was not a policeman, but an ex-priest. Interviewees recounted that if you know someone in the police or pay a sum of money, you can have someone arrested without any offence having been committed – a convenient method of extortion.
15 The question of corruption is well known. According to the national press, corruption is rife even within the National Land Registry, where forged titles can easily be obtained.
16 E.g. writing down a code makes it unchanging, whereas unwritten customary law is flexible, being recreated in interpreting each new case. Processes would be needed for changing a code, to respond to new needs and changing circumstances.

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