

# **Understanding and Strengthening Women's Land Rights Under Customary Tenure in Uganda**

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## INTRODUCTION

Debate surrounding how to strengthen women's land rights in Uganda has gone on for a long time. Because of the underlying assumption that under patrilineal customary systems of land tenure men have individualized land rights, the women's land rights debate tends to center on the conception that customary systems are discriminatory against women. Most of the proposed solutions resulting from this conception therefore concentrate on the need to do away with custom and apply laws that establish equality of individualized land rights between men and women.

This change is suggested primarily for customary land tenure which, in Uganda, is one of four co-existing land tenure systems<sup>1</sup>. The proposed solutions generally take one of three approaches: 1) change the law to mandate equality of land rights through co-ownership between husbands and wives; 2) pass a law that legalizes cohabiting women so they may have the status of wives; and 3) economically empower women to purchase their own land.

However, to improve and strengthen women's land rights under customary tenure in Uganda, the issues must be carefully framed by and analyzed within the social contexts that women live in. Solutions must therefore be thoughtfully targeted to address the specific factors that weaken women's land rights under custom. Solutions must also be crafted to ensure that they can be implemented within the context of women's lives – in other words: within the context of customary paradigms in rural villages, where the state justice system may be highly inaccessible.<sup>2</sup>

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<sup>1</sup>These four types of tenure are: Freehold, Customary, Leasehold, and Mailo. (Land Act 1998 (Section 2-3) The 1995 Constitution - Article 237.)

<sup>2</sup>Research undertaken by Land and Equity Movement in Uganda and the International Development Law Organisation found that, as perceived by community members, when a widow's land rights are under threat, customary leaders are overwhelmingly the ones who step in to protect her rights (55%) as opposed to local state actors (22%).

This paper briefly describes women's land rights according to customary law in Uganda and then outlines the vulnerabilities faced by different categories of women. Understanding the particular challenges each group faces demonstrates how a one-size-fits-all solution is inadequate for creating appropriate and effective policy. The paper concludes by proposing context-sensitive solutions carefully crafted to address each group's specific issues.

## VULNERABILITIES SHARED AMONG ALL WOMEN

Over 80% of the land in Uganda is administered according to local custom. In this framework, land is passed on to children through inheritance and managed by the family unit. It is important to understand at the outset that under custom, everyone who is born, married into or accepted as a member of a family has automatic land rights. This is true for both girls and boys, men and women.<sup>3</sup> What changes is the land management responsibility, which is passed on to members of the family through the actualisation of events such as marriage (for boys), divorce (for wives who return to their homes), death of husband (for widows), death of fathers (for heirs), or death of brothers (for uncles managing the land of orphans). It is critically important that policy makers correctly understand this basic tenet of customary land ownership: land is held in trust by the family, for all past, present and future generations, with the current adult occupants responsible for managing it, in the role of trustees.

Unfortunately, over time, this management role has become confused with actual individual land ownership, bringing about confusion, misconception, distortion and abuse. In other words, the trustees have turned themselves into owners, in the process disenfranchising weaker family members<sup>4</sup> in the trust.

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<sup>3</sup>Land rights may also be acquired by purchase.

<sup>4</sup>These family members often include women, young orphans, boys born out of marriage, people living with HIV, the disabled and the aged.

In the past, tribes and families acquired land by fighting for the territory, with the weaker groups losing their land to the strong. Although most wars over land ended many years ago, in the current context of rising land values, growing land scarcity and increasing competition for land, this dynamic plays out in multiple ways today, both within families and within communities. A degree of "strength" in different forms remains essential if one is to enjoy their rights to a given piece of land. "Strength" is therefore a critical element in land rights security.

Activists and policymakers alike overlook the importance of strength and the vulnerability that comes for all categories of women and children, who in principle have less "physical strength" or "social strength" than adult men. A study on family and community land grabbing<sup>5</sup> revealed that people without physical strength, wealth, political connections, and/or knowledge of laws and legal procedures are more likely to be victims of land grabbing (at the hands of those with physical strength or elite status). This is the root cause of why most of the victims of land grabbing are women, children, the old, the disabled and the sick; it is also the main reason that the land grabbers are brothers-in-law, uncles, wealthy business owners, the educated, and the politically influential.

Customary laws concerning land tenure and inheritance originally recognized this vulnerability and proactively and specifically provided for the protection of women and children by their stronger family members. For example, the much-abused practice of "widow inheritance" was *originally* designed to allow the widow to remain on her land, fully protected and cared for within the arms of her husband's family. The tragedy of today, however, is that in the context of rising competition for land, the very people given the responsibility to protect land rights of women are the ones who have begun to dispossess them of their land: widows lose land to brothers-in-law, heirs, and

inheritors; unmarried sisters lose land to their brothers and sisters-in-law; young nephews lose land to their more powerful uncles.

Women's land rights' vulnerability under custom is exacerbated by the inherent fact of women's transience: women move from their maiden families to their marital homes (or cohabiting homes) and sometimes back again to their maiden homes. In a patrilineal system, women are therefore "a variable," not a constant, in family relations. This means that when she marries or partners, a woman must leave behind all of her social supports (relatives and friends) and begin building new relationships in her husband's home and community.<sup>6</sup> Should her husband or in-laws become unsupportive, she will lack the protection she needs to claim her property rights.

In the past, when families lived closer together, if a husband was abusive or his family mistreated her, a married woman or widow could call upon the support of her own family, living nearby. But today, when many women are marrying men far away from their home communities, women increasingly have to rely entirely on the goodwill of her marital relatives, not her maiden family. Exacerbating this vulnerability is the breakdown of the community as a social safety net and the weakening of "traditional ways" – today, neighbours and community leaders are less likely to intervene to protect women's and widows' rights<sup>7</sup>.

In the light of this analysis, the solution is not to do away with custom, but to re-invigorate customary responsibilities and protections. How to do this is discussed below.

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<sup>5</sup>Conducted by a consortium of NGOs led by the Land and Equity Movement in Uganda. Research found that 50% to 75% of widows were found to have been dispossessed, or to have experienced their land being under attack. Research also found that 80%-90% of divorced women and unmarried women had lost their land or were fighting to hold on to their land.

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<sup>6</sup>It is important to realize that in a rural community; therefore, almost every adult woman has come from somewhere else, whereas almost every adult man is native to that village. This creates a situation where every woman must forge new bonds of social support. For younger wives, these bonds are still new, and being tested, and women may be afraid to "rock the boat" on many levels.

<sup>7</sup>Land grabbing research carried out by LEMU and others in Lango, Teso and Acholi.

## DIFFERENT CATEGORIES OF WOMEN HAVE DIFFERENT VULNERABILITIES

In addition to the lack of relative strength and the loss of social protections due to moving between families, different categories of women experience additional vulnerabilities specific to their status as a widowed, unmarried, separated, divorced, cohabiting, or married woman. Unfortunately, concern for land rights has mainly centered on married and cohabitating women, leaving aside the more nuanced analysis of each of these different "types" of women, each of which are uniquely susceptible to land rights abuses.

**A widow's** vulnerability stems from the assumption that, according to custom, once a woman marries and moves to her husband's family, she will not leave that land for the rest of her life, even if her husband dies. As explained above, if a woman's husband dies, customary law provides for her through the office of the "widow inheritor." The inheritor's role is to help the widow in terms of work, protection, and providing for children. It is important to note that according to custom, management rights over the family's land pass directly from the husband to the widow, *even if* there is a "widow inheritor."

Today, threats to widows' land rights come from two main sources:

1. Self-interested family members who act in bad faith to gain from the widows' vulnerability, by either pretending to be a genuine inheritor or through grabbing her land; and
2. HIV, which leaves the widow vulnerable if no relative shows an interest to "inherit her" because they suspect she has contracted HIV. The widow may then find it necessary to pick an "inheritor" from outside her husband's clan. Although customary laws allow a widow to choose an inheritor from outside the clan, such a move may turn the clan against the widow and weaken her land rights.

After her husband's death, a widow may choose to continue to live in her marital home without a man in her life, return to her maiden home, or pick an inheritor within her husband's family or from outside the family<sup>8</sup>. If she returns to her maiden home, she can choose to remarry within an entirely different family. A widow (unless she is childless or is threatened by violence or witchcraft) will most often choose *not* to return to her maiden home, due to the reality that there is most likely not much land left for her at home (as families apportion their land to sons, on the assumption that all daughters will marry and not divorce). Moreover, due to rising land scarcity within families, complex internal family dynamics may contribute to a hostile situation, wherein her brothers and their wives may be reluctant to share the family land with her. The end result is a feeling that she "cannot go home."

Moreover, when a widow leaves her marital home, she puts her children's inheritance rights to their father's land at risk; if the children are not physically present on their father's land, they may lose their land claims to land-grabbing uncles or other "stronger" male relatives. Widows therefore often put their children's welfare and inheritance rights before their own interests and needs, thus increasing the likelihood that even with hostile or usurping in-laws, a widow will choose to stay on her marital lands. Her situation would improve if she remarried, but her chances for this are often slim either because she was previously married, may have children, or is likely older than normal marrying age. A widow may thus have little choice but to stay in her marital home, suffering abuse.

**Unmarried girls'** vulnerability has its origin in the assumption that "all girls will marry and not divorce." Today, this normative assumption is treated by many families as "truth." Customary law says that an unmarried girl has the same

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<sup>8</sup>Although customary law allows a widow to pick a man in her life from outside the clan, this is still resented by the husbands' family and can become a reason for mistreating the widow. But widows would normally not choose a man from outside the clan unless the clans have "let them down" - i.e. no one proposes to her. Some widows might deliberately pick a man from outside the clan if she suspects her husband died of AIDS as a way to keep her brother in laws alive to look after her children.

rights to her father's land as one of her brothers. But unlike other heads of families who are allocated land upon marriage (for a boy), death of a husband (for a widow), or divorce (for a married woman), there is no such "event" to trigger the allocation of land to an unmarried girl. "Not marrying" is not a definite "event" like marriage, death and separation. Rather, families continually hope that the girl will one day marry, despite her increasing age. Thus, when land is allocated to other family members, the unmarried girl does not receive any, as it is assumed she will eventually marry and receive land rights from her husband.

**A divorced woman's** vulnerability is similar to that of a widow, except that a divorce does not allow a woman the option to remain at her marital home. Under customary law, a divorced woman must move back to her maiden home, leaving her children behind. In most cases, the children will decide to follow her, but unlike the widow, the divorced woman does not have the option to safeguard her children's inheritance by staying at her marital home. She is instead expected to get her land allocation from her father or mother if either are still alive and have any remaining land, or from the brother who used her dowry to marry.<sup>9</sup> Yet upon return, a divorcee's brothers might use the presence of the children (whose land rights come from their father's family) as justification to chase her from the family home.

LEMU's study on land grabbing found that fathers and mothers usually do allocate some of the family's land to a divorced woman who returns home. However, the data showed that in these instances, the woman's brother(s) and wife/wives often conspire against her to deny her land rights so that they can claim more land for themselves. Sadly, under custom, it is precisely a woman's brother who is supposed to protect her and provide for her should she be forced by circumstance to return to her maiden home.

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<sup>9</sup>Under custom, dowry paid to a sister is used for her parents to pay for their sons/her brothers' marriages. Families where there are no girls or where the girls do not marry may be assisted by other clan members. Failing to marry can therefore bring wrath from the family, especially from the brothers who expect to marry.

**A separated woman's** vulnerability is much the same as the divorced woman. However, a man may use separation as a way of acting against his wife's and children's interests: if a husband wants to sell the family's land, and the woman is against the idea, he may create a separation and send the wife away, on the pretext of ending their marriage, to enable him to sell the land in her absence. Although both customary law and Uganda's Land Act (1998)<sup>10</sup> prohibit this, a separated wife often is powerless to take action to stop such a sale.

**A cohabiting woman's** vulnerability begins at her partner's death. Under customary law, when a man lives with a woman without marrying her and she dies in his home, he must pay dowry.<sup>11</sup> If it is the cohabiting man who dies, the woman may be chased from the home with their children. Again, in the past this did not occur as frequently as it does now in the context of increased land value and competition for land. Furthermore, a cohabiting woman is particularly vulnerable if her partner chases them from their home. In this event, like the separated woman, the cohabiting woman will be forced to return to her maiden home with her children, where her brothers may wrongly deny her rightful access to land. In the past, parents would discourage men's irresponsibility by putting pressure on cohabiting men to declare their intention to marry their daughters, or pay a penalty to claim the child born out of marriage. These days, however, families do not tend to hold cohabiting men to account, and the cohabiting (but unmarried) girls bear the consequences.<sup>12</sup> The clans need to step forward to play this accountability-enforcing role.

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<sup>10</sup>S.39 of the 1998 Land Act; S.1 0 of the Lango Principles, Practices, Rights and Responsibilities (PPRR).

<sup>11</sup>In fact, the family of the girl will not allow burial to take place until dowry is paid.

<sup>12</sup>Cohabiting and not being married is considered "bad behavior" and may bring social judgments on her. Any children from this partnership would be "grudgingly" given land rights because they were born out of marriage. If a man refuses to pay dowry, a woman is expected to come back home. She is looked down upon if she remains with him. Staying away from her maiden home while cohabiting also jeopardizes her chances of getting land allocation from her maiden family. Not "bringing in" dowry also means she has no brother to protect her, as this is the role of the brother who uses her dowry to marry.

**A married woman's** vulnerability stems from power imbalances and possible domestic violence within her marital home. Although Uganda's Land Act (1998) establishes restrictions on the transfer of land by a spouse without the written consent of a wife, not all women know of these rights or have the power or access to justice to fight against their husbands' decisions<sup>13</sup>. Should a woman disagree with her husband's desire to sell family land, her husband may use violence or coercion to subdue her. As explained above, a husband may also pretend that he is no longer interested in his wife – seeking a separation – long enough for him to sell their land.

A married woman also becomes vulnerable when her husband wants to take a second wife. To provide land for the new wife, he will generally take land from his first wife.<sup>14</sup> Any resistance to this action is treated by him and his family as "jealousy," not as a denial of land rights.

## PROPOSED SOLUTIONS

The different categories of women and their different vulnerabilities suggest that both policy and activists would be wise to move away from prescribing a one-size-fits-all approach in principle and solution. Rather, decision makers should seek to understand women's vulnerabilities within the social context of customary laws and put in place strategies to both support justice in the fair and equal application of customary laws as well as reduce women's vulnerabilities within customary contexts, in a manner linked to women's varying marital status. For example, although customary law does not give land rights to a divorced woman in the marital home, it does ensure land rights in her maiden home. Such rights should therefore be enforced to ensure that all women, no matter their marital status, have strong land claims – and can return

"home" to adequate land of their own, should the circumstances of their lives dictate.

To ensure appropriate solutions, policy makers and women's rights activists must endeavor to understand customary land laws correctly. As described above, land rights for all categories of women are *already* provided for under customary tenure laws. However, efforts are needed to fortify women's strength so that they are able to better protect and enforce their land claims. The solution is therefore not the inappropriate imposition of rights from freehold tenure onto customary lands – but a more nuanced, culturally-appropriate modification of customary rights to ensure women's equal rights within the customary legal framework. This is particularly important in a rural context within which women turn more than half the time, to customary leaders to help them protect or enforce their land rights.

As explained above, customary tenure assigns the responsibility to safeguard the land rights of women and children to their male relatives: brothers, brothers-in-law, inheritors, uncles, fathers, and fathers-in-law. Today, however, many men are failing in their responsibilities and are even perpetrating abuses against those they are supposed to protect. Policy should therefore not villanize customary laws, but rather acknowledge that men are disregarding their customary obligations, and take steps to both recognize men's customary duties and consistently hold men to account, through proactive enforcement of state and customary laws.

The customary laws and responsibilities for customary land among the Langi, Iteso, and Acholi peoples of Northern and Eastern Uganda have been unanimously agreed by consensus and written down by their cultural Institutions. Thus, instead of perpetuating the myth that "customary tenure does not allow women to own land" (this theory is now often quoted by male land grabbers to justify their actions), activists can now use these documented customs to uphold the established customary rights of women. Activists and sensitized clan leaders may also monitor against any discrimination present in these written customary laws. As it

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<sup>13</sup>Customary tenure does not allow sale of land without consent of all family members and clan oversight.

<sup>14</sup>There is now a case reported by a District Police Commander in a workshop with the Police in Oyam District, Lango Region where the clan decided a husband cannot take land from a wife to give to another wife.

now stands, customary authorities review their customary laws every year and have proved themselves to be adaptable and ready to accommodate necessary changes.

For those areas of Uganda where customary laws are not yet documented, policymakers and women activists should promote efforts to have them written down. This is already proposed in the new National Land Policy (NLP). Once customary laws strengthening women's land rights and underlining men's responsibilities to protect and defend women's and children's land rights are adopted by consensus by customary leaders and written down, then customary laws can no longer be manipulated by land grabbers to legitimize their bad faith actions.

Writing down the law is not enough however. Securing and improving *evidence* of a woman's rights to land reduces her vulnerability and provides additional landscape-based proof of her rights. Such "physical documentation" can be of use to women and children challenging land grabbers in front of clan committees and in a court of law. For example, traditional institutions in Lango and Teso recommend planting particular boundary trees agreed upon by the clans as a valid land marker. They suggest planting these specific boundary trees before there is conflict and before husbands, fathers, or fathers-in-law die and women and children become vulnerable<sup>15</sup>.

Boundary trees are useful evidence when the land can be visited during a case by customary authorities, but they are less useful when the case is heard in a court of law far away from the land. Thus, a second solution is for families to draw simple maps of their land, showing its size and location (as bordered by neighbors' lands, trees, roads, streams, and other landscape-based evidence) and signed by all the family owners, neighbours, and Area Land Committees, to be used as evidence of their land rights in a court of law. Copies of these maps should be given to many people to keep.

<sup>15</sup> The same chosen tree is called "Ejumula" in Teso, "Omara omara" in Lango and "Jathropha" in English.

Where the traditional institutions fail in their responsibilities, the government must step in through police enforcement of women's customary rights. Local police should be trained to understand relevant formal and customary land and inheritance laws, to fairly and equitably address land-related crimes (such as those listed in S.92 of the *Land Act*), and to enforce court judgments of land cases. Currently, the majority of police believe they do not have a role to play in land matters (because of administrative directives, not because of the state law).<sup>16</sup> However, "stealing land" is indeed a crime<sup>17</sup>, and police need to understand land rights and land grabbing for them to prosecute such crimes effectively.

Finally, there is now emerging case law in customary tenure that can be used to enhance efforts to protect women's land rights. A case from the High Court of Uganda - as well as the customary laws of the Langi, Teso and Acholi - holds that customary marriage takes place even when dowry is not fully paid; any marriage celebration is sufficient.<sup>18</sup> Creating case law that echoes and enforces customary law on an issue such as this will help to strengthen women's rights in all fora. Policy makers and women's rights activists should leverage such precedents and promote their universal use and acceptance. They must also monitor the implementation of customary laws to identify discrimination and identify changing contexts in which customary rules should be re-evaluated, debated and updated by all stakeholders. Furthermore, they must be vigilant in monitoring if and when customs are distorted or deliberately abused to disenfranchise and dispossess women and other vulnerable groups.

In sum, rather than working against custom, policymakers and activists should be creative in identifying a range of culturally-appropriate solutions within custom that can successfully strengthen, defend and protect women's land rights.

<sup>16</sup> Policemen and policewomen's questions and statements made during various police training workshops run by LEMU in 2010.

<sup>17</sup> S.92 of the *Land Act*

<sup>18</sup> Case of Evalyne Aciro and Alfred Bongomin Versus Obina Civil case No. 20 of 1997

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