

4. Why is customary protection failing to prevent land grabbing?

Who has customary rights to land?

The protection given to the land rights of women, orphans and any other vulnerable groups in Northern and Eastern Uganda is probably as good as can be found anywhere in the world. Customary land law is based on three main principles. First, everyone is entitled to land, and no-one can ever be denied land rights. A second principle is that all inherited land is family land, never individual property. Customary land never belongs to men, it always belongs to the family: the man's role in 'managing' the land comes from his status as head of the family, and not because the land is his personal property. A third principle is that the clan maintains powers of oversight, to ensure that everyone is granted land rights and that the interests of children (and even the unborn generations) are considered. Thus, in order to sell land one needs clan approval, because the seller has to show that their children can still be provided for after land is sold, and the clan must ascertain that the whole family agrees to the sale.

As a result of these three principles, all women are guaranteed land rights. Single women claim land from their parents, married women through their husband from their parents-in-law. A widow becomes head of her family on her husband's death, and assumes the same role of 'manager' of the family land that her husband had held. (For a more detailed description of how each person claims land rights, see *What land rights do people have under the rules of customary tenure?*) Customary law thus builds in not only full land rights for everyone, but also a system of protection through clan oversight. This is most evident in the case of widows, where the clan must consult with the widow if she wishes them to appoint a 'protector' from the clan: the 'protector' is there to defend the woman's land, but cannot himself have any claim on it.

State law and customary protection

Customary protection of land rights was greatly reinforced in 1998, when Parliament reformed land law, giving full legal recognition to customary systems of ownership, and giving their rules and procedures the full force of State law. Additionally,

the State added its own minimum standards – e.g. a wife has to consent before her husband can ever sell family land ('the consent clause'), and customary rules only have legal force if they do not discriminate against women. Parliament also criminalised the deliberate taking of another person's land, putting the full force of State law and its machinery of justice in the service of protection of land rights.

Protection in practice

A coalition of organisationsⁱ recently researched the reality of land rights violations in seven Districts in northern and eastern Uganda. The situation that was discovered is quite frightening. In Lango, most widows and almost all divorced women face land rights violations. In Acholi, land rights problems are already very common as people try and return home from their displacement in IDP camps. Only in Teso was the situation somewhat better, though here too the machinery of land justice and administration was not working well. (More details on the seriousness of the situation can be found in the accompanying papers in this pack, *How does land grabbing happen?*)

Widows: Widows face several threats to their land. Often, their in-laws simply take over the land, and many widows do not have the physical strength to resist. Clan authorities tell themselves and others that they protect widows well, but in practice they often side with the land grabbers (the in-laws), or they may simply ignore the case. Where they do rule in favour of the widow, the in-laws may simply ignore their decision, and nothing is then followed up. (In Teso, where respect for a clan decision is much stronger, widows felt much more secure in their land rights.) A widow does not want to risk the wrath of the clan by going to the State courts for protection. Even if they do, justice is very difficult to achieve (see the accompanying paper in this pack, *why is the legal system failing to protect people's land rights?*). A widow is supposed to have the choice of having a 'protector' from the clan, but this role has become very tarnished.

ⁱ LEMU, NRC, LCF, ICU, Justice & Peace, LWF and Trocaire

The role may or may not combine a sexual role, according to the widow's choice, and does not give any claim over the widow's property. Today, younger widows are harassed by men from the clan, with no thought of protecting the widow, but only of exploiting her, both sexually and taking over her land. The clan remains silent (usually telling outsiders that the whole practice has ceased because of HIV), and widows fear to talk openly about the whole institution.

Children born outside marriage: Children born outside marriage have equal rights to land: if the father accepts paternity, they receive from him, and, if not, from the mother, who becomes a family head and receives land from her parents. In practice, they are now seen as competition for a scarce resource by both families. The father's family rejects them, especially if they grow up with the mother. As a result, the mother wants to send them off to their fathers – often complete strangers for the children – when they are very young. The mother's family may 'encourage' this, since they want to deprive them of land. Even if the father refuses them, they may be thrown out as adolescents on the excuse that they are 'badly behaved'. (It is hardly surprising if an adolescent who has been made to feel unwanted from birth shows a certain rebellious streak.) Clans are not intervening, in fact each clan is often looking to push the children off on to the other clan. None of the three ethnic groups studied has a 'supra-clan authority' capable of intervening and adjudicating between the clans' claims.

Unmarried women: An unmarried woman should receive land from her parents. However, the cultural 'expectation' that she may still marry never goes away – even when she is old! – and so a mature woman may still be treated as a 'girl' and denied a proper allocation of land. If she has children, she should be considered a family head and given land rights like her brothers. This is never respected, indeed her brothers are the ones who most often prevent this. Some clans intervene with the family to ensure that her rights are respected.

Orphans: Orphans inherit their parents' entire estate, and their father's family have no claims. Even an uncle who is taking the children as his

own has no claim to their property, which he must hold in trust for them. In practice, it seems to be common for orphans to lose land to their unclesⁱⁱ. Younger children may simply not be told what land their parents owned – this is a particularly serious problem in Acholiland, where most children have not grown up on the land. Uncles may sell off the children's land and few orphans know the details of land ownership and land rights. The clan authorities do, of course, know exactly which land the orphans own, and are supposed to control sales, so their failure to stop this is usually deliberateⁱⁱⁱ.

How can this be happening?

There are many reasons why land grabbing is so rampant and why the vulnerable so often face rights violations. Part of the problem is the lack of a land administration system for customary land. There are many weaknesses in the State land justice system which also encourage land grabbing^{iv}. However, weaknesses in the work of the customary authorities is also contributing to the seriousness of the problem. Comparisons from one region to another and from villagers comparing the situation from one clan to another in the same village both pointed to the same conclusion: where customary authorities are serious about protecting land rights, the situation is very much better than otherwise.

Detailed examination of how the customary authorities, including an analysis of the records of disputes which they had heard, pointed to the following problems that need most urgent attention.

ⁱⁱ We were able to discover the frequency of several other land rights violations, but not this one, because we did not have easy access to all the orphans in any village.

ⁱⁱⁱ In some cases, this may well amount to a criminal offence and in other cases they may have civil liability for negligence in their legal trusteeship.

^{iv} Problems in the land administration and justice are analysed in detail in the accompanying papers, "why is the land administration failing to protect land rights?" and "why is the legal system failing to protect people's land rights?"

Many clan leaders don't know customary law. Customary law was not written down until recently. It is both an oral tradition and a flexible one, with customary authorities using basic principles to 'solve' each individual dispute. However, there is no system for teaching these principles to clan authorities or for ensuring they understand them. Although the Langi and Acholi have a 'hierarchy' within their clans, the senior leaders (*Rwot, Awitong*) have not been active in supervising or supporting the village level authorities in their land dispute resolution. As a result many simply believe many of the same mis-conceptions that are so often repeated, particularly around women's land rights. Now that codes have been agreed by all clans and written down, there is no excuse for this to continue.

Customary authorities don't know their roles: There is no 'training' or 'induction' for customary authorities, e.g. the members of a (village level) clan land committee which adjudicates on land disputes. Culturally, they are supposed to be proactive in ensuring protection of rights, but in practice they wait for cases to be brought to them. They are not given guidance on how best to play a positive role by the clan hierarchy. This is unfortunate.

Customary authorities don't know their powers: The legal framework in which customary authorities act was completely changed by the 1998 Land Act, which essentially made them part of the State Justice system for land matters. Unfortunately, no-one has explained this to the customary authorities! They do not know how they relate to the State institutions such as LCs or LC courts, often erroneously believing the LC1s are a higher authority on land than they are. They do not know how to use State courts to enforce their decisions.

Generalised confusion over clan's powers and roles: The customary authorities are not the only ones who are confused about their roles and powers. Local courts do not know what status their adjudication decisions have and so can simply re-hear a case from the beginning instead of starting with the judgement of the customary authority and

hearing an appeal. This allows anyone who loses a case at the customary forum simply to ignore it and to try their luck at another court – leading to de-motivation on the part of the customary authorities. The State has simply never sat down to decide on a simple system for integrating the two sets of authority so that they can work together. This is long overdue.

Corruption in the clan:

Customary authorities have not been immune to the cancer of corruption in Ugandan society. Clan authorities in Lango openly admit taking bribes when hearing cases. Although this is a criminal offence, there has never been any supervision and disciplinary action taken either by the State or by the clan hierarchy.

Erosion of clan's powers and respect:

In an environment where there is a competing State administration that appears to have more powers, where there is confusion about roles and responsibilities and where too many clan authorities are seen to be passive and corrupt, it is no surprise that respect for the clan system has eroded in many places. (This was heightened in Acholiland, where the clan authorities lost all authority in IDP camps.) In the absence of a system of enforcement, clan power rests solely on respect, and when it squanders respect, it squanders its own powers. This is clearly seen in the contrast between Teso and Lango. In Teso, the clan is respected and it is hard to ignore their decisions. In Lango, respect has eroded and their decisions are routinely ignored.

What can be done ?

Although the situation is extremely worrying, it is also clear that a few very simple and inexpensive measures could transform the working of customary protection of land rights. Much of the solution lies in the clans' own hands.

- *Dissemination of customary law*

Now that authorised land codes ('principles, practices, rights and responsibilities - PPRR') have been written for Acholi, Lango and Teso, it is important that they are used by all customary authorities. This requires

dissemination and some basic training by the higher clan hierarchy. A system is also needed for making sure that they are used properly and consistently. This must include a system for developing new 'case law', by creating forums for clan leaders to discuss new or difficult cases in order to achieve consensus on the application of known principles (i.e. 'precedent').

- *Clan protection to be proactive*
Clan authorities need to understand that they have a responsibility to protect rights and not only to hear cases when fees are paid. They can transform the respect with which they are held by their communities by showing that they are proactive in protecting their clan members. The clan hierarchy has the responsibility for ensuring they understand this role and for holding them to account.
- Recommendations for tackling specific problems
 - o There are major abuses around the institution of "widow inheritance", because nothing is discussed openly, leaving the widow vulnerable to exploitation. Clans should formally hear a widow's choice at the appropriate time, record this and make sure it is respected by all.
 - o There is currently no forum for hearing disputes where one clan is against another, whether at an individual level (e.g. children born out of marriage) or at a clan level (e.g. disputes currently occurring in Amuru). Unless the clans as a whole can find a way to establish such a forum, e.g. using the higher

cultural organisations or a system of choosing leaders of neutral clans for binding arbitration, then these cases will inevitably be heard only in Magistrate's Courts, where customary law is not known, and they will lead to continuing resentments and conflict.

- o Some legal questions need resolving at a level that all will have to accept. One of particular importance are case brought against occupants of land by people claiming prior ownership. There is no established customary rule for saying in what circumstances land should be restored to a previous occupant who had left the land years before.
- *Creating a State – clan partnership.*
Although the State law recognises the clan authority, dialogue for a real partnership has never happened. Both sides know that working alone, they can never solve land disputes. Willingness to work together is there, all that is lacking is a clear policy direction and clarity on a structure that integrates the two systems.

The clan's only power is from respect, and respect can only be given freely, and never coerced. Respect must be earned. Clan authorities must realise that their influence and importance will only survive if people feel that the clan has an importance in their lives. If the clan is seen to be working to create social harmony and justice, then it will have a strong future. If it fails to respond to the challenge presented by the rampant land grabbing and conflicts that are currently destroying people's lives, then it will disappear – and deservedly so.