universität wien

DIPLOMARBEIT

Titel der Diplomarbeit

"Caught between Customary and State Law: Women's Land Rights in Uganda in the Context of Increasing Privatization of Land Tenure Systems"

Verfasserin

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angestrebter akademischer Grad

Magistra (Mag.)

Wien, 2012

Studienkennzahl lt. Studienblatt:	A 057 390
Studienrichtung lt. Studienblatt:	Individuelles Diplomstudium Internationale Entwicklung
Betreuerin:	Mag. Dr. Birgit Englert

Acknowledgements

First and foremost, I would like to thank my supervisor, Mag. Dr. Birgit Englert, for her support, encouragement and guidance through all stages of this thesis, as well as our talks and her enthusiasm for my topic.

My very special thanks go to Esther Obaikol, Judy Adoko and Michael Mpalanyi for their kind assistance and support in the preparation of my fieldwork in Uganda. I am further grateful to all my interview partners in Mbale, Apac and Ntungamo and my research assistants David Mabonga, Humphrey Okilla and Priscah Tumusiime for a wonderful time in the field. I also want to express my heartfelt gratitude to everyone at the Uganda Land Alliance for making me feel so welcome at their organization.

I also wish to thank Jade Lim, Maria Cacenschi, Anna Wiltschnig, Milena Gauss, Mariam Sanfo, Eby Amamgbo and Lisa Freudenthaler for their friendship and constant encouragement throughout this endeavor.

Special thanks also go to Jude Sentongo for his inspiration and encouragement over the past four years.

I am further grateful to my entire family, first and foremost my grandparents, Waltraud and Gerhard Winklhofer, my aunt, Gudrun Winklhofer, as well as my uncle and aunt, Günther and Silvia Schwarz, for their kindness, support and patience.

Lastly, but most importantly, I want to thank my parents, Claudia Winklhofer and Wolfgang Gärber, for always being there for me, supporting and encouraging me in all my endeavors. To them I dedicate this thesis.

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1 Introduction

In much of rural Africa land constitutes the primary source from which millions of people derive their daily livelihoods. This is also the case in Uganda where land is by far the most productive asset with agriculture accounting for 43 percent of the national gross domestic product, 80 percent of employment and 85 percent of export earnings. Representing 80 percent of the agricultural labor force in the country, women are the backbone of Uganda's economy producing up to 60 percent of cash crops and 80 percent of food crops (cf. FAO 2010, UNDP 2012). However, despite their essential contributions to the national economy, only few women enjoy secure rights to the land they till. In fact, with control and ownership of land mainly concentrated in the hands of men, women's access to land is crucially dependent on their relationship with a male, usually a father, husband, brother or son (cf. Nyakoojo 2002: 4, Rugadya 2007: 1).
In principle, customary land tenure, which continues to be the most widespread form of landholding in Uganda, explicitly recognizes women's vulnerabilities arising from their dependence upon male family members and proactively provides for the protection of their land rights in both, their maiden and matrimonial homes. However, in a context of increasing land scarcity, rapid population growth, progressing commoditization and privatization of land, the customary safeguards ensuring women's tenure security have largely been eroded. Male family heads that under custom are required to hold land in *trust* for all past, present and future generations have increasingly turned themselves into individual land owners, gradually depriving weaker family members of their rights in family land. In consequence, women's access to land has come to depend a great deal upon the goodwill of their husbands or male relatives (cf. Adoko/Akin/Knight 2011, Adoko/Levine 2008).

In the 1990s Uganda underwent a major land reform exercise that, in line with contemporary economic thought and international donor policies, was premised on the understanding that there is a causal link between private property rights and economic growth. Unsurprisingly, the ensuing land legislation was clearly aimed at facilitating the transition from customary tenure to a formalized land tenure regime based individual freehold ownership (cf. Joireman 2007). At the same time, however, the Ugandan Government made a conscious effort to redress the gender imbalances existing in land access and ownership. Acknowledging that “women's inadequate control over livelihood assets such as land […] remains one of the root causes of poverty” (MGLSD

2007: 7), the government put in place a gender-responsive legislative and policy framework strengthening women's land rights and prohibiting customary practices denying women access to, ownership of or occupation of land (cf. Tripp 2004: 5). Moreover, in addition to the protective statutory provisions, the customary rules safeguarding women's interests in land now have full judicial force in national law and are to be upheld also by state courts due to the legal recognition of customary tenure (cf. Adoko/Levine 2008: 102f.).

However, even though the legal environment has never been more favorable to women in Uganda, the situation on the ground is still far from satisfactory. Abuse of women's land rights is particularly widespread in the rural areas where it is not uncommon for widows to be chased away from their matrimonial land, for divorced and separated women to be denied access to land in their maiden homes and for married women to be dispossessed of their land by their husbands (cf. Adoko/Akin/Knight 2011).

It is this enormous gap between law and practice that has inspired this thesis and led me to ask the following question:

> *Why do women in the rural parts of Uganda repeatedly fall victim to land rights violations if both customary and statutory law contain particular provisions aimed at safeguarding their interests in land?*

The overall aim of this thesis is to give greater visibility and voice to rural women in Uganda so as to provide a better understanding of the different land-related vulnerabilities currently experienced by them, despite the favorable legal environment.

Drawing on existing literature and field evidence collected in Mbale, Apac and Ntungamo Districts in Uganda, the thesis seeks to analyze the different aspects governing women's land rights while at the same time exploring the reasons for women's insecurity of tenure in the Ugandan context. Special emphasis is thereby placed on the differences that exist between different "categories" of women, as field research has clearly indicated that in a customary setting women's vulnerabilities vary considerably according to marital status and changing family circumstances – which is why vast generalization is to be avoided.

The text starts with a discussion of the main theoretical assumptions underlying recent land reform efforts in various African countries and the different ideas that debates surrounding the issue of gender and land rights have been based on.

After an outline of the historical evolution of land tenure in Uganda in Chapter 3, Chapter 4 gives a detailed account of the Ugandan land reform process, addressing the legal changes brought about by the new land law and assessing the extent to which women's interests have actually been incorporated into the new legislative and policy framework.

Chapter 5 then gives an overview of the general characteristics of customary land tenure regimes and the different factors contributing to their evolution, before subsequently discussing the principles of customary tenure in Uganda, paying particular attention to the different rights granted to women under customary law.

Finally, discussing the data collected during fieldwork in Uganda and surveyed from the existing literature, Chapter 6 takes a closer look at the actual situation on the ground. After a short reflection on the process of field research, the chapter goes on to provide a detailed analysis of the various factors determining and influencing women's access to and control over land in practice, while at the same exploring the existing threats to women's land rights under both, customary and state law.

2 Theoretical Framework

2.1 Theoretical Background to Land Reform and Privatization in Africa

The aim of this chapter is to first give an overview of the most important theoretical threads that recent land policies of many influential donors in the area of development cooperation have been based on before critically assessing the impact of these theoretical assumptions on the ground.

2.1.1 Capitalism, Property Rights and the Evolutionary Theory of Land Rights

As in numerous other African countries throughout the 1990s, land reform in Uganda was enacted in accordance with the understanding that there is a direct link between formalized property rights and economic growth. This nowadays broadly accepted "wisdom" was put back on the development agenda by the Peruvian economist Hernando de Soto whose main argument it is that well defined property rights are not only the key to economic development but also play a core role in poverty eradication (cf. Joireman 2007: 463). In his book *The Mystery of Capital* de Soto argues that many parts of the non-Western world have not been able to benefit from the capitalist system due to the fact that property relations in developing countries are often governed by informal norms (cf. Nyamu-Musembi 2008: 18). As a result, assets such as land and housing remain unrecorded and therefore "cannot readily be turned into capital, cannot be traded outside of narrow local circles where people know and trust each other, cannot be used as collateral for a loan and cannot be used as a share against an investment." (de Soto 2000: 6)

How to alleviate these ills? The answer, according to de Soto, is simple: The establishment of a system of private property rights will enable the poor to transform their "dead capital" into liquid capital because, once properly documented, assets are no longer invisible in the marketplace (cf. ibid: 210f.). Drawing on the evolution of property rights in the United States, de Soto sets out certain steps that need to be taken in the developing world in order to incorporate the informal property rights of the majority into the formal legal system (cf. Hunt 2004: 173f.). The underlying assumption is that the poor are already rich and that it is simply the lack of institutional structures that prevents them from "unlocking" their wealth currently immobilized in social relationships. The creation of what is called "meta property" in de Soto's terminology as a result of formalization will consequently provide the poor with the paperwork of

title necessary for them to realize the surplus value of their assets. The suggested benefits of formal title include increased availability of credit, higher rates of investment and a rise in agricultural productivity (cf. Joireman 2007: 463ff.).
In his work, de Soto juxtaposes today's property relations in Third World countries with those of the United States before the nineteenth century and England prior to the industrial revolution, stating that unless developing countries decide to take the same road as the West did and establish a formal property rights regime, their people will remain "trapped in the grubby basement of the pre-capitalist world." (de Soto 2000: 56) To the extent that de Soto deems the introduction of a formal system of clearly defined property rights a necessary precondition for economic growth and progress in a capitalist world, his ideas bear a strong resemblance to the Evolutionary Theory of Land Rights according to which, in a context of rising land scarcity and population growth, informal communal property rights are eventually replaced by a system of formalized property rights for reasons of economic efficiency (cf. Nyamu-Musembi 2008: 23f., Platteau 1996: 31).

The basic assumption underlying the Evolutionary Theory of Land Rights is that under communal land tenure externalities such as increasing land value, rapid population growth and commercialization of agriculture will inevitably lead to increasing incidents of land disputes given that communal land ownership fails to include the right to exclude others from the use of land. The idea is that as land conflicts multiply and related court litigation costs increase, a growing demand for individualization and formalization of property rights will emerge. The government, in response, is expected to implement administrative reforms providing for land titling and registration in order to minimize the potential for conflict and increase land tenure security (cf. Platteau 1996: 31ff.).
The benefits derived from formal title suggested by proponents of the Evolutionary Theory of Land Rights do not differ significantly from Hernando de Soto's assumptions: Secure property rights are expected to reduce transaction costs in land transfers and facilitate the subsequent emergence of a land market. The increased possibility to convert land into liquid capital through sale and to pledge land as collateral for bank loans will then, in turn, encourage investments much needed in order to enhance agricultural productivity as land is becoming increasingly scarce. Also, the formalization of property rights is thought to have a positive impact on the

government's revenue since legally protected and formally recognized land rights will result in a reduction of public expenditure on court litigation while at the same time providing the state with a base for tax collection (cf. ibid.: 36f.). In short, the Evolutionary Theory of Land Rights presumes a linear progression from communal land tenure to individual control of land as certain externalities such as population pressure and increasing competition for land arise and raise the need for greater agricultural productivity.

Considered by many to be of universal applicability, this theory has been employed in the analysis of land tenure systems across the planet, including those of many African countries, placing "all societies on an evolutionary ladder on the basis of criteria such as mode of political organization, the degree of rationality in their legal systems, and degree and complexity in division of labour." (Nyamu-Musembi 2008: 24) As such, it served as a justification not only for the widespread expropriation of land during the colonial era, but also for the land reforms and land titling programs that were implemented throughout Africa in the years and decades to follow (cf. ibid.: 24).

Evolutionist thought also played a core role in the colonization of Uganda where the 1900 Buganda Agreement, concluded by Sir Harry Johnston on behalf of the Queen of England, imposed the British principle of private ownership upon the local population. This, obviously, was much to the delight of Sir Frederick Lugard, a leading colonial theorist of indirect rule, who in response stated that the introduction of private property was "of immense importance" and credit was due to "Mr. Johnston" for introducing "this great fundamental principle of civilization into savage Africa." (Lugard, qtd. in Buell 1928: 591)

2.1.2 The World Bank's Land Policies

Despite its tendency to simplify complex economic and legal issues, de Soto's argument has found favor with many donors engaged in development cooperation – and this regardless of the fact that belief in a causal relationship between formalized property rights and economic growth had been abandoned in the beginning of the 1990s as the failure of previous land reform experiments based on formalization could no longer be denied (cf. Englert/Daley 2008: 7, Nyamu-Musembi 2008: 18).

The aim of this section now is to assess the extent to which the international land policy agenda has actually been influenced by the theoretical assumptions presented above.

The focus will thereby be on the World Bank as the most influential player of the donor community whose policies usually set the standards for future lending programs and therefore do not simply shape the land policy discourse, but are most importantly likely to have a significant impact on the ground (cf. Ikdahl et al. 2005: 30).

Ever since the issue of land reform has become a primary concern for the international donor community, the World Bank's emphasis has been on privatization and land titling (cf. Manji 2003: 98). In its 1975 *Land Reform Policy Paper* the Bank identified formal land titling as a necessary precondition for economic development and therefore called for the abandonment of communal land tenure systems in favor of freehold tenure. Similarly to de Soto's assumptions as well as to those of the Evolutionary Theory of Land Rights this was expected to facilitate the emergence of a land market while at the same encouraging land redistribution on grounds of efficiency and equity (cf. Whitehead/Tsikata 2003: 80f.). Forms of customary land tenure were then referred to as static "systems" incapable of change and therefore incompatible with economic development and progress (cf. Englert/Daley 2008: 4, Yngstrom 2002: 23). During that time land reform efforts were almost exclusively focused on Asia and Latin America. In the 1980s, however, continuous food crises and famines across Sub-Saharan Africa drew the World Bank's attention to the African continent. The root of the problem was quickly traced back to the indigenous forms of land tenure that allegedly constituted a serious constraint on agricultural productivity (cf. Platteau 1996: 29).
Accordingly, in its 1989 Report *Sub-Saharan Africa: From Crisis to Sustainable Growth* the World Bank promoted the idea of land titling in order to create incentives for investment so as to increase the agricultural output and facilitate the emergence of land and credit markets. However, when titling soon failed to generate the desired outcomes there was no longer an economic justification for the replacement of customary with freehold tenure (cf. Whitehead/Tsikata 2003: 81f.). As a consequence, customary forms of land tenure were re-evaluated. Away from the static picture drawn in the years before, customary practices of land tenure were now portrayed as dynamic and autonomously evolving in response to emerging market impulses. This clearly reflects evolutionist thought regarding the emergence of private property rights in the face of external changes (cf. Platteau 1996: 30). While the primary aim of land reform, namely the privatization of land tenure systems, remained unchanged, the World Bank now promoted a new approach to the matter. Instead of gradually abolishing customary

land tenure, the World Bank started to advocate for the legal recognition of customary land rights under formal state law (cf. Englert 2005: 5).

In its 2003 report *Land Policies for Growth and Poverty Reduction* the World Bank's driving motivation is still the privatization of land tenure and the establishment of a formal property rights regime in order to facilitate credit and investment (cf. Englert 2005: 2). In line with Hernando de Soto's argument the report states that a "society's ability to define and, within a broad system of the rule of law, establish institutions that can enforce property rights to land as well as to other assets is a critical precondition for social and economic development." (World Bank 2003: 7) Although it is admitted that past policy advice based on the idea of a perfect market was highly inappropriate and misplaced in the African context given the specific conditions of different countries, the emphasis is still on the market model as the key to economic growth and poverty reduction (cf. Ikdahl et al. 2005: 31). Similarly, it is recognized that customary land rights as they are found in large parts of Africa are often "very secure, long-term, and in most cases inheritable and can be transferred within the community." (World Bank 2003: 53) However, the World Bank still draws on the Evolutionary Theory of Land Rights referring to the different bundles and forms of rights and entitlements existing under customary law as representing stages of an evolutionary process at the end of which property relations will be determined by the concept of absolute and individual ownership (cf. Ikdahl et al. 2005: 32).

It has become clear that the World Bank's stance on land policy issues has been heavily influenced by both, the ideas underlying the Evolutionary Theory of Land Rights on the one hand, and Hernando de Soto's assumption of a causal relationship between private property rights and economic growth on the other hand. In spite of the fact that the focus of the 2003 Policy Research Report is on secure property rights, rather than privatization and formalization as such, it is important to be aware that terms such as "secure rights" or "well-defined property rights" as they are found throughout the report do not simply serve an analytical purpose but also "have a normative content, indicating desirable processes and outcomes." (Ikdahl et al. 2005: 32). Therefore, even though the rhetoric might have changed, the underlying goal has clearly remained the same.

2.1.3 Putting Theory into Practice: A Critical Assessment

This section serves the purpose of critically examining the viability of the theoretical assumptions as incorporated into the framework of recent World Bank policies on land in the African context.

Customary vs. Private Property Rights

According to Hernando de Soto the governments of developing nations need to overcome the constraints of legal pluralism and integrate the assets held by their people into the formal legal framework unless they want to "continue to live in anarchy." (de Soto 2000: 30)

Associating the absence of formal property rights with anarchy, de Soto's theory introduces a very narrow understanding of legality in which informal orders are regarded as extra-legal or outside the law. The fact that informal legal arrangements such as neighborhood relationships continue to be a determinant of property relations also in the Western world, is thereby neglected (cf. Nyamu-Musembi 2008: 21).

What many proponents of formalization fail to realize is the fact that the introduction of formal property rights does not mean that informal rules simply stop to exist. In fact, "[w]hen formal title is introduced it does not drop into a regulatory vacuum; it finds itself in a dynamic social setting where local practices are continually adapting to accommodate competing and changing relations around property." (ibid.: 22).

Both de Soto and the World Bank acknowledge that property rights are a social construct and that property is not "merely the assets themselves, but consensus between people about how these assets should be held, used and exchanged." (World Bank 2003: 22) However, they either fail to recognize or choose to ignore the fact that in countries with strong property rights today this consensus gradually emerged from within and was not imposed from the top down. Considering that a formalized property system can only function where it is socially recognized and accepted, the assumption that the introduction of formal title will automatically transform the way people interact with each other is more than questionable (cf. Easterly 2006: 79, Nyamu-Musembi 2008: 22). The matter of social recognition and acceptance of property rights is particularly important in cases where states lack the institutional capacity to enforce the newly introduced legal framework. The underlying assumption that once established, property rights will be enforced and defended might be true for states that exert effective control over their territory, but in many developing countries this is not the case (cf. Joireman

2007: 467). Furthermore, in an environment of poor law enforcement the shape and content of formal title is likely to be adapted to the local context and may differ significantly from policy makers' initial intentions (cf. Nyamu-Musembi 2008: 23).

Another argument frequently brought forward in favor of formalization is that, being outside the formal law, informal rules and arrangements are a source of great insecurity. According to the World Bank's 2003 Policy Research Report this is due to the fact that informal rules only protect community members and cannot effectively be enforced against outsiders (cf. World Bank 2003: 32). Therefore, without well-defined property rights, so the argument goes, "individuals and entrepreneurs will be compelled to spend valuable resources on defending their land." (ibid.: xix)

Due to the Evolutionary Theory of Land Rights this sense of insecurity will eventually evoke demand for private property rights, especially as externalities such as land scarcity and population pressure increase the incidence of land disputes and related litigation costs. So basically, in line with this understanding, the introduction of formal property rights is the logical next step in the climb up the evolutionary ladder (cf. Platteau 1996: 31ff.). However, more often than not the conception of demand as employed in the Evolutionary Theory of Land Rights does not reflect the reality on the ground. Quite the contrary, in Africa, increasing land scarcity and commercialization have not resulted in a homogenous demand for formal property rights, but have at the same time provoked a "proliferation of customary claims and counter claims over land, and struggles over how 'custom' is defined." (Yngstrom 2002: 24) Adherents of the Evolutionary Theory fail to take into consideration that the "non-final" character of informal rules can also be of advantage to the poor as it allows for a redistribution of resources through negotiations at the local level (cf. Chimhowu/Woodhouse 2006: 348).

Impact of Formal Title on Credit and Investment

One of the leading arguments in favor of formal title is that secure property rights will enhance access to formal credit and create incentives for investment, which in turn will have positive repercussions on agricultural productivity and economic growth (cf. Deininger/Binswanger 1999: 255f.; Lastarria-Cornhiel 2009: 9). Citing an example from Ethiopia, the 2003 World Bank Policy Research Report explains how in an environment of tenure insecurity households have little incentives to invest in agricultural productivity as a result of focusing their limited resources on establishing visible boundaries in an attempt to defend the land in their possession. However, once formal titles have increased tenure security and can be pledged as collateral, so the

argument goes, the newly available funds can be used for other purposes such as agricultural investment (cf. World Bank 2003: xix, 38).

Empirical studies in Africa, however, suggest that the impact of formal titling on the availability of credit is largely negligible. In fact, evidence from Niger, Kenya and Tanzania has shown that a formalized property rights regime does not necessarily facilitate access to credit, especially in areas where credit is limited overall (cf. Joireman 2007: 465). In the Ugandan district of Kigezi, where the colonial government had introduced a pilot scheme of systematic land registration, collected data has similarly discredited the alleged link between titling and credit access. Actually, most of the limited credit used in the district was obtained through informal sources and by non-registered landholders (cf. Platteau 1996: 60). Consequently, even the World Bank recognized that

> [f]ormal land titling and registration […] are more likely to have strong credit market impact in situations where informal credit markets are already operational and a latent demand exists for formal credit that cannot be satisfied because of the lack of formal title. (World Bank 2003: 48)

The reasons for the minimal improvement of smallholder's access to credit despite formal titling can be found on both, the supply and the demand side. On the part of formal sector lenders the prospect of high administrative costs associated with screening applicants and inspecting collateral, especially in hardly accessible rural areas, is likely to have a negative impact on a lender's willingness to administer credit. Moreover, loan risks in agriculture are significantly higher than elsewhere given the sector's vulnerability to natural hazards (cf. Hunt 2004: 182). Expected difficulties in foreclosure constitute another reason contributing to the reluctance of banks to give out credit. This point is of particular importance in environments where judicial structures are weak and inefficient. Adding to that, once land has been foreclosed, the possible costs of realizing the assets held may pose another considerable challenge, especially in rural areas where the presence of strong kinship ties is likely to complicate the process of auctioning off the mortgaged land of defaulters to outsiders (cf. Platteau 2000: 59ff.). As a result, many commercial banks throughout Africa have largely excluded small-scale borrowers from their lending programs (cf. Hunt 2004: 182). On the demand side, it is mostly the high risk of foreclosure and subsequent loss of family land that keeps smallholders from taking out commercial bank loans (cf. Nyamu-Musembi 2008: 27f.).

Finally, empirical evidence also failed to establish the link between formal titling and agricultural productivity. In fact, according to Nyamu-Musembi (2008: 28) "holders of

unregistered land have made equally productive investments." Moreover, a possible increase in the ability to invest as a result of titling does not necessarily imply that investments will be made in the area of agriculture. This is especially true where certain enabling conditions such as available technology and infrastructure are missing (cf. Platteau 1996: 66).

Impact of Formal Title on Land Market Dynamics

Apart from enhanced access to credit and higher shares of investment, the emergence of a land market is often referred to as another major benefit of a formalized property rights regime. In fact, it is argued, that in the absence of clearly defined property rights the high transaction costs resulting from uncertainty keep efficient producers from acquiring more land and can therefore lead to an inefficient allocation of land within a society. Thus, by reducing transaction costs and thereby increasing the transferability of land, a system of secure property rights is expected to produce a burgeoning land market and encourage the reallocation of resources from less to more efficient producers (cf. Joireman 2007: 466).

Such a perspective bears two severe shortcomings. First, there is an implicit assumption that a land market can only function in a system of formal and therefore legally protected property rights. Contrary to this view, however, informal transactions in land do take place also in the absence of a formal market and continue to exist in spite of formal title. Consequently it does not come as a surprise that the assumed relationship between formal titling and transfers in land could not be proved by empirical evidence.

Second, another important issue many proponents of formalization fail to realize is that in large parts of Sub-Saharan Africa land is much more than simply an asset with cash value and often associated with a number of social and cultural meanings. Apart from being the main source of livelihood often supporting wide family networks, land is also considered a symbol of political power and social prestige in many societies. Given the high value attributed to land, most sales under customary arrangements take place only in emergency situations when certain expenses mostly for educational or medical purposes need to be covered and no alternative source of income is available (cf. Walubiri 1994: 152, Nyamu-Musembi 2008: 29f.). Moreover, in the absence of insurance markets, as this is often the case in many rural parts of Sub-Saharan Africa, the local community is usually called upon to ensure the well-being of its members and thereby fulfills an important insurance function for destitute individuals (cf. Platteau 1996: 51f.). Accordingly, social institutions of rural communities such as clan elders or

family members are often consulted before land is actually sold in order to avoid ill-considered decisions. In societies where land is so strongly embedded in the social structure of a community, the idea that the introduction of formal title will all of a sudden increase the occurrence of land sales, alter the way people perceive land and change the dynamic of already existing informal land markets is more than questionable (cf. Nyamu-Musembi 2008: 31).

Policy makers and advocates of formalization fail to realize that people's behavior and desires are influenced by both the historical context and their cultural background. Even though customary land tenure arrangements in various African societies have evolved and adapted to external changes over time, many of them still adhere to certain principles of former institutions, especially regarding the transfer of land. Therefore, "the notion of land as a (freely tradable) commodity remains deeply alien to most African people." (Platteau 1996: 69)

Impact of Formal Title on Tenure Security

While formalization of property rights may indeed reduce tenure insecurity for some, evidence has clearly indicated that it is at the same time likely to create new uncertainties for others.

This is even admitted by the World Bank (2003: 23) in its Policy Research Report which states that even though the benefits of formal title "are to a large extent non-rival […] it is possible to exclude some individuals or groups from access to these benefits."

The exclusion of certain categories of people is mostly due to the narrow understanding of registrable interests commonly applied in registration programs (cf. Nyamu-Musembi 2008: 32). In fact, with titling schemes focusing primarily on individuals, subsidiary rights in land held by other people and protected under customary law often do not get translated into state law and are consequently lost in the registration process. In practice, this has proven particularly detrimental to women and pastoralist groups whose customary claims to land are to a large extent derived from rights enjoyed by others (cf. Adoko/Levine 2008: 115, Platteau 1996: 40). The situation is further exacerbated by the fact that formalization of land tenure systems is likely to result in a substantial weakening of customary institutions which play a core role in the protection women's land rights and those of other vulnerable groups (cf. Nyamu-Musembi 2008: 34).

To make matters worse, many African countries lack both the financial means and the institutional capacity to properly update land records when required. This is particularly alarming in view of the fact that where cases of succession and transfers of land go

unregistered, new uncertainties and potential for conflict are likely to be created. However, it is not always the state that is responsible for discrepancies between records and reality; often it is the people on the ground that, adhering to customary rules, see no need to report transactions in land (cf. Platteau 1996: 48).

An additional concern often voiced is that the process of registration and titling may be manipulated by a country's elite to its advantage. This fear is not far-fetched considering that especially where landholders themselves must bear the costs of registration, it is the well-to-do citizens of a state that are most likely to benefit from titling programs (cf. Platteau 2000: 67f).

Moreover, in countries characterized by dual legal structures comprising both statutory and customary elements opportunistic behavior is likely to occur if clear boundaries between the different legal structures are lacking. In fact, in such an environment people commonly resort to "forum shopping", meaning that in case of conflict parties turn to different courts at the same time basing their arguments on whichever legal code is more appropriate in an attempt to acquire the desired outcome. In practice, while beneficial to some, the selective use of different institutions often bears severe consequences for those unable to manipulate the different legal codes to their advantage (cf. Englert/Daley 2008: 11f., Whitehead/Tsikata 2003: 95).

2.1.4 Concluding Remarks

There is no doubt that de Soto's work has provided the debate on the significance of formal property rights for economic development with a new impetus and this regardless of the fact that the assumed link between privatization and economic growth has been discredited by empirical evidence for a long time. Presuming an inevitable transition to formal property and comparing contemporary Third World realities with past realities in Western countries, he brings back the idea of a linear progression from communal to individual ownership as presented by the Evolutionary Theory of Land Rights (cf. Nyamu-Musembi 2008).

This kind of thinking has tremendously influenced the land policy agenda of numerous influential donors, most importantly that of the World Bank. Although the Bank has adapted its stance on how to approach the matter of land reform, the goal underlying the rhetoric has not changed: privatization of land tenure systems in order to enhance access to credit markets, encourage investment, and facilitate the emergence of a land market (cf. Englert 2005).

However, given the numerous shortcomings of the theoretical assumptions underlying recent land policies, it does not come as a surprise that many land reforms carried out under the watch of the international donor community have failed to generate the expected outcomes. On the contrary, policy makers across the African continent now find themselves faced with a number of unwanted consequences that clearly call into question the actual viability of property rights theories (cf. Hunt 2004).

2.2 Gender and Land Rights

The following section serves the purpose of shading light into some of the main ideas that different threads of discussion on women's land rights have been based on.

2.2.1 Women in Agriculture

One of the main ingredients for much of the debate focusing on women's rights to land has been the nowadays widely acknowledged fact that women account for the majority of labor in agricultural production in most African societies (cf. Englert/Daley 2008: 1). In fact, it is estimated that women provide between 80 and 90 percent of the work in domestic food production and over 70 percent in the production of cash crops (cf. Nzioki 2002: 7).

The high share of female labor in the agricultural sector has its origins in the colonial period during which the patterns of agricultural production were altered fundamentally in order to meet European production needs. The introduction of taxes required of men only coupled with the systematic denial of access to local markets in some areas forced male household members to emigrate in order to earn cash working at colonist-controlled plantations or other colonial enterprises. Some of them were even subjected to forced labor.

This withdrawal of male labor force from domestic food production had serious implications for the division of chores within the African household as colonial policy conferred the sole responsibility for subsistence production upon the woman (cf. Koopman 1995: 13ff.). Adding to the increased labor burden for women at home, the introduction of cash crops brought about another significant change affecting power relations at the household level. In line with the colonial conception of gender roles the money earned in exchange for cash crop production was directly given to the male head of household while women's family labor remained unremunerated. Due to the fact that

money often doesn't get shared among household members in the same way food items do, the distribution of income within the family came to be a potential source of conflict (cf. Whitehead 1994: 40). Thus, in other words, "commercialization caused a breakdown in the established gender roles and consequently increased the significance of marital bargaining." (Sorensen 1996: 609)

When in an attempt to escape the emerging male dominance at home some women started to migrate and look for employment in town, this development was met with strong resistance on the part of colonialists who depended on women's labor force for food and export production. Therefore,

> [w]hen conflicts arose between the need to increase colonial taxes, foreign exchange, and profits by intensifying women's labor and the desire to protect women from excessive oppression, the basic economic logic prevailed: patriarchal power over women was upheld in the interests of colonial profits. (Koopman 1995: 16)

As a result, the colonial concept of gender roles led to increased male control over land and further encouraged the subjugation of women in society (cf. Lastarria-Cornhiel 1997: 1320, MISR 2002: 74). All these factors eventually contributed to the emergence of what is now commonly referred to as "feminised agriculture" (cf. Safilios-Rothschild 1994: 54).

2.2.2 Different Approaches to Women's Land Rights

Development and Efficiency Concerns

While the recognition of women's share in agricultural work constitutes a welcome development, the way this has been exploited in current discussions on women's land rights is more than questionable and also bears a number of serious implications for women concerned.

One of the main arguments frequently brought forward in favor of securing women's access to land is that there is a direct link between women's land tenure security and poverty reduction. Accordingly, it is claimed that in an environment of secure property rights agricultural productivity tends to be positively affected as women are more likely to invest in the land they are cultivating knowing that their investments will be returned (cf. Kapur 2011).

This view is also reflected in the argumentation employed by international donors, including the World Bank. In fact, in its 2003 Policy Research Report, the World Bank

argues that neglect of women's rights to land is not justified "as the literature provides no evidence of inferior efficiency by women farmers; indeed a study from Côte d'Ivoire, for example, demonstrates that women's efficiency is not significantly different from that of men." (World Bank 2003: 58) Therefore,

> attention to women's land rights will have far reaching economic consequences where women are the main cultivators, where out-migration is high, where control of productive activities is differentiated by gender […] Greater control of assets by women often translates into higher levels of spending on children's education, health and food. (cf. ibid.: xxvi-xxvii)

Instead of simply granting women the right to land on the basis of them being humans, the World Bank chooses to justify the promotion of women's land tenure security with social and economic reasons placing the emphasis on the positive impacts on society as a whole. The strong focus on the economic benefits derived from the protection of women's land rights in areas "where women are the main cultivators" inevitably raises the question "whether the World Bank sees no need to emphasise women's rights to land where they are not the main cultivators as the economic benefits are not going to be worth it?" (Englert 2005: 20)

In fact, taking a closer look at the World Bank's land policies, it becomes clear that the Bank's promotion of economic development is largely based on the assumed availability of female agricultural labor. For years, the World Bank has been praising the efficiency of owner-operated farms in contrast to those depending on contractual labor due to their access to highly motivated family labor. However, it has so far been ignored that, in reality, family labor is likely to mean female labor and that the high levels of efficiency are the result of family labor being unremunerated (cf. Manji 2003: 101f.). Moreover, taking the household as the smallest unit of analysis the World Bank masks the fact that gender relations often involve a significant amount of coercion and that in many cases women's labor is not exactly highly motivated, but actually far from voluntary. Instead of questioning this situation as such, the World Bank promotes the idea that based on family ties women's labor is more motivated, and hence more efficient, than waged labor. In other words, "[r]ather than trying to get rid of patriarchal, feudal gender relations, the World Bank plans to encourage them in the name of economic development." (Manji 2002: 2)

Basing the argument in favor of women's land rights on the economic efficiency of female agricultural labor "may be a valid point within an analytical framework where economic growth and poverty reduction are inherently linked." (Ikdahl et al. 2005: 34)

The fact, however, that such reasoning is coming from the World Bank is particularly alarming in this context. Being the most influential member of the international donor community, the World Bank's policy documents cannot simply be dismissed as standard reference papers as they are likely to have a strong influence on the contents of future land policies and lending programs and therefore bear serious consequences for the women on the ground (cf. ibid.: 30).

The Human Rights Based Approach

Despite the fact that the dominant arguments in favor of women's land rights have largely been based on the efficiency of women's agricultural labor, a new approach has been taking shape during the past decades addressing the matter of land rights from a human rights perspective.

Drawing on the existing body of international human rights law, this approach aims at the alignment of international development cooperation with human rights principles in order to "temper the impact of free-market forces that over the years have reinforced unequal distribution of resources and created poverty." (Ikdahl et al. 2005: 15) Even though in a strict legal sense the right to land does not constitute a human right as such, it is critical for the realization of other human rights granted under international law such as the right to life, food and livelihood without discrimination (cf. ibid.: 18f.). Alden Wily (2006: 14) even goes so far as to state that "[s]ecurity of land tenure is arguably the most important human right of those who need that land to survive, having no other means of production."

Therefore, it is not far-fetched to approach the issue of land reform from a human rights perspective given its impact on the distribution of land within a society. There are, however, a number of conceptual ambiguities in linking the land issue with human rights considering that land rights do not easily fit the distinction drawn between civil and political human rights on the one hand, and economic, social and cultural rights on the other. The tension inevitably created between the political and civil rights of those who own land and do not necessarily need it and the economic, social and cultural rights of those who need land, but do not own it, is yet to be resolved. However, regardless of its shortcomings, providing a new perspective from which to analyze and determine the moral weight of competing claims to land, the human rights based approach bears significant potential for the protection of women's land rights as it

emphasizes the various rights granted to women under international law also in relation to land (cf. Bibaako/Ssenkumba 2003: 241).

One of the core principles embedded in most human rights instruments is the principle of non-discrimination which sets significant standards for the elimination of gender-based inequalities (cf. Ikdahl 2008: 47). First embedded within the *Universal Declaration on Human Rights 1948*, this principle was reaffirmed in the *Vienna Declaration and Programme of Action 1993*. Besides stating that "human rights of women and the girl-child are an inalienable, integral and indivisible part of universal human rights", Article 18 of the Vienna Declaration explicitly identifies the eradication of gender-based inequalities as a "priority objective of the international community." Women's rights were also addressed within the framework of the *International Covenant on Civil and Political Rights 1966* which provides for equality before the law irrespective of sex (Art. 26) and accords both men and women equal rights and responsibilities in marriage (Art. 23).

Of all the conventions pertaining to human rights, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) pays the most attention to women's rights and entitlements. Whereas the preamble of the CEDAW recognizes the general importance of gender equality stating that "the full and complete development of a country, the welfare of the world and the course of peace require maximum participation of women on equal terms with men in all fields", Article 16 of the Convention explicitly addresses the issue of land reform. Paying particular attention to the situation of rural women Article 16 (2) includes the right to "equal treatment in land and agrarian reform as well as in land resettlement schemes."

Of particular relevance to women's land rights in the African context is the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (AfPRW) as adopted by the African Union in 2003 (cf. Ikdahl et al. 2005: 14). In Articles 15 (a) and 19 (c) the AfPRW explicitly addresses the issue of land rights, emphasizing the state's obligation to protect "women's access to and control over productive resources such as land and guarantee their right to property" (Art. 19 (c)).

Regarding the matter of land reform proponents of the human rights based approach take a generally positive stance towards land titling and formalization of property rights as a way to protect women's rights to land (cf. Ikdahl 2008: 47). However, it is recognized that if legal reform is to benefit all members of society equally, the state needs to take into account existing gender inequalities inherent in property relations on

the ground and provide protective legislation where required. Setting out certain standards and guidelines that are ideally to be translated into national law, the international human rights framework is supposed to provide policy makers with the guidance necessary to master the complex process of privatization. Core importance is thereby attributed to the premise of according women equal rights in law (ibid.: 56).

The Equity Concern

The human rights based approach has actually influenced most of the advocacy work carried out by many women's rights movements in the African context. However, apart from employing human rights rhetoric, many feminist lawyers across Africa and Uganda in particular have based their argument in favor of women's land rights also on concerns of equity (cf. Nzioki 2002: 15, Tripp 2004: 11). Given that women provide most of the agricultural labor force for food and cash crop production, activists have argued that their sheer contribution to the national economy has earned women the right to land. According to the so-called "sweat equity argument", as formulated by the Ugandan women's rights activist Dora Kanabahita, women should be granted the same rights to lands as enjoyed by their husbands as compensation for their efforts and time spent working in the fields and households (cf. Asiimwe 2001: 180).

2.2.3 Debates on Gender and Land Rights in the African Context

In the African context debates focusing on women's land rights have been heavily influenced by the existence of a dualist legal structure of formal and customary law. While there is a general consensus among gender-policy advocates that the issue of women's rights to land is of primary concern, views diverge on how to best approach the matter in order to actually enhance women's tenure security.

Legal Reform as Key to Women's Tenure Security?

While international policy discourse has re-discovered "the customary" as a potential basis on which to improve tenure security, many African feminist lawyers have chosen to go a different direction, addressing the issue of gender inequality within the legal sphere. Drawing on international conventions they have taken up a rights-based approach, stressing that women's right to land constitutes a human right and therefore deserves legal protection. Consequently, their main focus has been the enactment of legal reform in order to replace allegedly discriminatory customary practices and grant

women the legally recognized right to own, inherit and purchase land in their own name (cf. Tripp 2004: 1f.).

With regard to customary law, feminist lawyers have drawn most of their attention to the ways in which customary practices are currently discriminating against women, dismissing customary institutions as sites of male dominance over females. The reasons for the subordinate position of women under customary systems are traced back to the colonial period. In fact, it is commonly argued that as a result of the imposition of the Western concept of individual land ownership the safeguards once enjoyed by women under customary law have largely been eroded and therefore can no longer be relied upon in the struggle for women's land rights (cf. Whitehead/Tsikata 2003: 90f.). Consequently, women have been encouraged to get land titled in their own name in order to acquire legal recognition of their customary rights which, often regarded to be of secondary character, tend to get lost in the process of formal registration (cf. Englert 2005a: 46, Hilhorst 2000: 195).

There are, however, a number of serious limitations in the use of law and legal reform as instruments pushing for social change and gender equality that are to be considered. Foremost, it cannot be assumed that the mere incorporation of women's rights to land into the legislative framework will actually change practice on the ground (cf. Hilhorst 2000: 195). This point is of particular relevance in many parts of the developing world, where formal systems and state institutions are not accessible to everyone or where the state simply lacks legitimacy among its people (cf. Chirayath/Sage/Woolcock 2005: 5).

Moreover, many feminist lawyers fail to take into account that even where the state's ability to enforce the law is not impaired by a lack of institutional capacity or legitimacy, legal changes are likely to be met with strong resistance on the part of males, not only at household level but also within the judiciary system. It needs to be kept in mind that the mere fact that authorities are aware of the relevant statutory provisions does not automatically imply that they are going to apply them in women's favor (cf. Kapur 2011, Whitehead/Tsikata 2003: 93). The assumption that the major challenge in regard to gender equality is the widespread ignorance in regard to statutory provisions thus underestimates "the strength of factors such as inequalities in social relations and institutional and cultural biases which prevent women from succeeding in making claims and sustaining them." (Whitehead/Tsikata 2003: 93) As a consequence, gender relations on the ground often continue to be determined by custom in spite of legal reform and protective legislation. It is therefore crucial to distinguish between law

and practice since equality in law does not necessarily translate into gender equality in ownership, nor does formal ownership guarantee a person's actual control over their property (cf. Rugadya 2007: 4, 9).

Other than that, feminist lawyers have been repeatedly accused of being out of touch with the reality rural women in particular are currently faced with. This has been the case also in Uganda, where the minimal success of the women's movement, headed by the Uganda Land Alliance[1], has often been attributed to its adherence to Western concepts of female autonomy and individuality that are in stark contrast to traditional African values and therefore often met with resistance. As Jaqueline Asiimwe (2001: 187) explains

> [i]n traditional African society, the individual is not autonomous, nor does she possess rights above and beyond those of the rest of society. An individual's place in society is fixed by a defined role or status in a greater whole, be it the family, clan, tribe, or community. The emphasis is on duties rather than rights, mutual obligations rather than individual advancement. Accordingly, when the women's movement advocates for women's rights, which are already considered Western and individualistic, it is accused of elevating women over and above family or society.

The Land and Equity Movement in Uganda (LEMU)[2] is therefore pushing for a paradigm shift in the battle for women's land rights away from the fight against tradition and custom to a struggle for the customary rights of women which do exist, but are frequently being violated. Promoting the notion of culturally embedded rights, however, means to accept the fact that, strictly speaking, men and women are not "equal" under customary law given that they have different rights and responsibilities as family members. Yet, this gender inequality is not the result of discrimination, but considered appropriate in the face of local culture (cf. LEMU 2008: 1f.).

Land Rights Protection through Customary Law?

Given the many shortcomings and inherent limitations of the rights-based approach, some policy advocates have tried to elaborate a bottom-up approach stressing the

[1] The Uganda Land Alliance, as established in 1995, is a membership consortium of national, regional and international civil society organizations and individuals, lobbying and advocating for fair land laws and policies that address the land rights of the poor, disadvantaged and vulnerable groups and individuals in Uganda (cf. http://ulaug.org/about-us).

[2] The Land and Equity Movement in Uganda aims at uniting the efforts of local people, local government and local civil society institutions to make land work for the poor. Its overall goal is to make sure that the right policies, laws and structures are put in place, so that everyone can have fair access to land (cf. http://www.land-in-uganda.org/).

potential of customary arrangements to improve women's tenure security. One of the main arguments brought forward in favor of customary based land reform is that customary arrangements are more flexible in the sense that they allow for different forms of access whereas statutory law, focused on the concept of individual ownership, has often failed to adequately capture subsidiary rights. It is further argued that customary institutions have considerable advantages over state run institutions imposed from the top down given that they are less costly and deeply rooted within social relations and local values (cf. Whitehead/Tsikata 2003: 88). This point is particularly valid where states lack the capacity to ensure law enforcement in practice and structures of the formal justice system are largely inaccessible to the majority of the population (cf. Chirayath/Sage/Woolcock 2005: 6). However, the question of enforcement is not only relevant when addressing the capacity of state structures; if land reform is to build on customary arrangements it is essential that all local communities actually possess the institutions necessary to enforce the new provisions on the ground, otherwise new uncertainties are likely to be created (cf. Firmin-Sellers 1995: 867).

Moreover, given the fact that the community level is also a site of power relations, it must be borne in mind that negotiations over land access at the local level do not necessarily result in favorable outcomes for all community members. While much of the current policy discourse has been accentuating the positive aspects of customary arrangements, the negotiability of land rights under customary law can put certain community members at a significant disadvantage. Negative consequences are particularly likely to arise for certain categories of women such as widows and divorcees that often lack the social power and support to successfully assert their interests (cf. Whitehead/Tsikata 2003: 89). This is due to the fact that within customary arrangements women's claims to land are usually mediated through their relationship to a male which, in turn, affects their bargaining power within their communities. Where land is passed through the male line, major decisions in regard to land are mostly taken by men (cf. Hilhorst 2000: 181f., Kapur 2011). In fact, "[w]hile women have ways of bringing their views to the attention of such authorities, they usually do not participate in decision-making." (Hilhorst 2000: 181)

In order to avert negative consequences for weaker community members resulting from local level negotiations, some have advocated for the codification of customary rules so as to "[make] it a matter of fact what customary law said, rather than a matter of debate." (LEMU 2008: 2)

Such an approach, however, also has its downsides considering that the codification of customary law is likely to result in the ossification of fluid customary principles that, in fact, derive their very legitimacy from their negotiability (cf. Daley/Englert 2010: 7).

Where Does All This Leave the Women?

On the one hand we have seen that addressing women's land rights in the legal sphere has largely failed to generate the desired outcomes and improve women's tenure security on the ground. On the other hand, however, a bottom-up approach building on customary law also bears a number of significant risks, especially if power inequalities on the ground are not adequately addressed.

While the policy discourse of the last decades has been going back and forth on whether to approach the matter of women's land rights through customary or statutory law, Daley/Englert (2010: 6) have suggested to take a more pragmatic approach to the matter, pointing out that "any strategies to support and promote women's land rights must be suited to, and responsive to, the situation on the ground." Accordingly, there is no one-fits-all solution; different contexts call for different strategies. Whereas in some areas customary institutions can positively contribute to women's tenure security, in other regions where customary authority is weak an alternative approach might be more appropriate. Moreover, customary and statutory law are not mutually exclusive; on the contrary, legislation does not necessarily need to replace customary arrangements, but can be a useful vehicle to gradually change and update custom as local context evolves (cf. ibid.: 6ff.). Therefore, as Whitehead/Tsikata (2003: 102) put it, "the issues facing women, in terms of law and their rights, is not whether to choose statutory or customary law, but how to maximize their claims under either, or both."

At this point it also needs to be stressed that the picture frequently drawn of African women as oppressed and in need of assistance does not reflect the reality on the ground. While the debate on how to best approach the matter of women's land rights has remained unresolved, women have been continuously elaborating new strategies to secure their access to land and assert their interests. However, vast generalization and the portrayal of women as passive have made them and their efforts in the struggle for land rights largely invisible. Too bad, since the strategies employed by women on the ground could provide the current debate with new inputs and a base for future policies to build on (cf. Englert 2005a: 40f.).

3 Historical Perspective to Land Tenure in Uganda

Contrary to what one might think, the matter of land tenure privatization has not only recently entered the land policy discourse, but has been playing a crucial role ever since the consolidation of colonial rule in Uganda. Therefore, in order to understand the current land tenure system in Uganda it is important to first consider the history of Uganda's land law and tenure policies (cf. Mugambwa 2006: 1). As is the case in many other African countries, Uganda's current land law is the result of two competing forms of land tenure that have been coexisting alongside each other ever since the introduction of formal law by British colonialists which, initially, was supposed to eventually replace local land tenure arrangements, commonly referred to as "customary tenure". However, due to the fact that colonialism ended before this could be realized, customary law has up to now continued to operate side by side with statutory law (cf. Adoko/Levine 2008: 101).

In order to get a comprehensive understanding of how Uganda's land law has evolved over time, it is useful to divide the country's land tenure history into three parts: the land tenure system prior to, during and after colonial rule.

3.1 Pre-Colonial Land Tenure Arrangements

In pre-colonial times, due to varying practices of customary tenure differing from one community to another, no single land tenure system could be identified in the area now referred to as Uganda (cf. Walubiri 1994: 155).

In a large part of pre-colonial Uganda land relations were based on a system of feudalism, meaning that access to land was controlled by an oligarchy in the hands of which political power was concentrated (cf. Rugadya 2002: 6). This was also the case in the kingdom of Buganda, which controlled much of the territory of central Uganda, where all land was held by the Kabaka, the king of the Baganda, on behalf of and in trust for his people. Accordingly, "the only possible source of rights relating to land was the Kabaka himself; all such rights […] were deemed to stem initially from a royal grant." (West 1972: 130) Generally, the land tenure system prevailing in Buganda at that time was characterized by four different categories of rights of control over land (cf. Rugadya 2002: 6).

The so-called "obutaka" rights pertained to clan and ancestry lands and were generally vested in the head of a clan who had the right to reside on these lands, whereas other

clan members only had the right to be buried on ancestry land after their death. Even though butaka land was held by individual clan heads rather than the clan itself, it would be fallacious to confuse this form of tenure with private ownership. Despite the fact that the clan head had the power to allocate use rights to clan land and receive profits from it, consent of the clan was always to be obtained in case of any land transfers. Moreover, upon the death of a clan head butaka land was not passed on to his children, but to his successor (cf. Odoki 1992: 1).

The term "obutongole" denotes the rights over land granted by the Kabaka to his chiefs in return for military and administrative services. In most cases the land involved was actually clan land that had been taken by the Kabaka for exactly this purpose (cf. Buell 1928: 590). The grantees had the right to use and benefit from the land allocated to them and exercised the same rights towards peasants on their lands as the clan heads did on butaka land (cf. Odoki 1992: 2). However, due to the fact that "obutongole" rights were directly bound to the chief's political position, he could only enjoy them while still in office (cf. Carter 1910: 114).

The individual hereditary rights referred to as "obwesengeze" formed the third category of rights of control over land in pre-colonial Buganda. These individual rights which could be acquired by a chief or an individual tenant stemmed from either original grant by the Kabaka or long and undisputed occupation of the land in question. Unlike the "obutongole" these rights were not of political character and could therefore be passed on to the heirs of the rights-holders (cf. Odoki 1992: 2).

The peasants, accounting for the majority of the Baganda population, had the right to get a piece of land for occupation under a chief of their choice. While the chief was responsible for the welfare and security of the peasants living under his control, the peasants, in turn, were to pay tribute to their chiefs and occasionally provide their labor force. Consequently, these occupational rights enjoyed by peasants and referred to as "ebibanja" were very much dependent on the maintenance of the correct social and political behavior (cf. ibid.: 2).

Land tenure arrangements similar to those of the Baganda kingdom could also be found in the kingdoms of Ankole, Toro, Busoga and Bunyoro (cf. Rugdya 2002: 6).

In all of the arid and semi-arid regions of Uganda where water and pasture were usually scarce, access to land was determined by a complex network of bonds and agreements within larger social units. As transhumance was frequently practiced in these areas, families tried to access land along their cattle corridor, rather than seeking access to a

piece of land within a particular community or lineage (cf. Lastarria-Cornhiel 2003: 1). In non-feudal sedentary communities where agricultural practice was common, land relations were governed not only by the network of social relations, but also by the specific uses to which different parcels of land were put. This was the case in most riverine communities as well as in large parts of the South of pre-colonial Uganda (cf. Rugadya 2002: 7).

Despite the fact that land relations were often unique to specific communities and tenure arrangements varied from place to place, some basic similarities underlying the different land tenure practices in pre-colonial Uganda can be identified, some of which have survived up until today. Foremost, an individual person's access to land was generally mediated through their clan and family. While they could not freely dispose of the piece of land assigned to them, they had the right to use their holdings as they thought best. As a result, "there were no landless people in the pre-colonial communities of Uganda." (Walubiri 1994: 155)

However, the clan and family structures were not only responsible for the allocation of land, but also for the settlement of land-related disputes. Moreover, the clan or family had the right to prohibit the transfer of clan land to outsiders and declare void any transaction that had taken place without its consent (cf. Odoki 1992: 2). The general community had the right to access communal lands for water, firewood, salt licks and grazing purposes (cf. Walubiri 1994: 155). From this it can be concluded that whatever the differences in customary land tenure arrangements across the regions of pre-colonial Uganda, none of the different communities recognized the concept of individual land ownership. What customary tenure did (and still does) acknowledge, however, was the existence of individual rights to possess and use land subject to the approval of the clan or family (cf. Rugadya 2002: 6).

3.2 Land Tenure in Colonial Uganda

When the British colonized Uganda in 1894, they introduced a system of indirect rule based on the philosophy of protectorate rather than colony or direct rule. However, due to a number of questions pertaining to the Crown's actual power over protectorate land as well as the future structure of Uganda's economy, it was not until after 1920 that a clear and consistent land policy was adopted by the colonial government (cf. Morris/Read 1966: 3f.). By then, the Crown's power to dispose of land had been defined

and it had been decided that Uganda's economy would be built on small peasant agriculture instead of focusing on a plantation sector controlled by European settlers (cf. Carswell 2007: 28f.).

However, land relations in Uganda had been significantly altered even before the adoption of the final land policy in the 1920s. In several agreements between the British authorities and local rulers stemming from the early years of the protectorate, the colonial power granted a number of native freeholds in the kingdoms of Toro and Ankole as well as private estates called mailo in the Buganda kingdom (cf. Rugadya 2002: 7). The remaining land not held under title was declared Crown land which according to the Crown Land Declaration Ordinance 1922 (qtd. in Buell 1928: 600) was defined as follows:

> All lands and any rights therein in the Protectorate shall be presumed to be the property of the Crown unless they have been or are hereafter recognized by the Governor by documents to be the property of a person or until the contrary thereof be proved as hereinafter provided.

In practice, this meant that radical title was vested in the colonial government, rendering all users of these lands tenants of the British crown (cf. Rugadya 2002: 7).

As a consequence, land relations in colonial Uganda were governed by four different forms of landholding, three of which were newly introduced by the British regime.

The mailo system of land tenure resulted from the Buganda Agreement 1900, by which British rule was established over the Buganda kingdom. The question of land was addressed in Article 15 of this historic agreement which divided land in Buganda amongst the Kabaka and the royal family as well as the protectorate government (cf. Walubiri 1994: 156). Adding to that a number of so-called "mailo estates" were granted to numerous chiefs and other notables over which they exercised absolute ownership rights. Two different types of mailo tenure could be identified – while private mailo estates were personal estates, official estates were held only during the continuance in office of a particular chief (cf. ibid.: 158). As a result of the Buganda Agreement approximately half of Buganda was formally privatized regardless of the fact that much of the land involved was already settled by peasants who, from now on, were considered tenants on private property. Despite the fact that their usufructuary rights were not even legally recognized, tenants on mailo land were obliged to pay ground rent consisting of two different types. While "busuulu" rent was paid for the land itself, "envujjo" rent was paid for those acres of land where cash crops were cultivated (cf. Lastarria-Cornhiel 2003: 2). While for a long time landlords had the power to arbitrarily

increase busuulu and envujjo rents, the Busuulu and Envujjo Law 1928, standardizing the rates of ground rent, considerably improved mailo tenants' tenure security (cf. Buell 1928: 597, Walubiri 1994: 157)

The system of freehold tenure was first introduced in the Kingdoms of Toro and Ankole where under the Toro and Ankole Agreements 1900 and 1901 a number of chiefs were granted ownership rights over private and official estates of land. These freeholds, however, were highly restricted as allodial title was vested in the protectorate government (cf. Odoki 1992: 6). As a result of the Crown Lands Ordinance 1903 empowering the acting governor to alienate Crown land, a few grants in freehold were also made to European planters as well as European and Asian merchants (cf. ibid.: 158). Adjudicated freeholds constituted another form of freehold aimed at encouraging natives to register and obtain titles for customary land used and occupied by them. Pilot schemes of systematic adjudication were subsequently carried out in Kigezi, Ankole and Bugisu in the late 1950s, but eventually abandoned due to various complications arising from the onset of independence (cf. Lastarria-Cornhiel 2003: 3; Walubiri 1994: 159).

In addition to mailo and freehold tenure the British also introduced a system of leasehold tenure that could be either private or statutory. Leasehold tenure is based on an agreement between a leaser and a lessee granting the lessee exclusive possession of the leaser's land for a certain duration of time mostly in exchange for a viable rent (cf. Rugadya 2002: 8).

Due to the fact that Crown land was still available for the occupation and use by Africans in accordance with native customs and principles, customary land tenure continued to operate on the ground constituting the fourth type of landholding prevalent during the colonial era (cf. Morris/Read 1966: 4; Odoki 1992: 4). By definition customary tenure refers to

> a system of land holding governed and regulated by customary principles and in the majority of cases sanctioned by customary authorities Council of Elders, Village Chiefs, Village Headmen […] Under this, the owner has user rights. The owner may be an individual or a community, in the latter case, the land is then said to be held on a communal basis. (Odoki 1992: 5)

The establishment of British colonial rule in Uganda and the introduction of new types of land holding associated with it had a severe impact not only on previously existing land tenure arrangements, but also on social relations as a whole. This was particularly obvious in the case of Buganda, where, completely ignorant of prevailing native tenure

systems and the division between butaka and butongole land, the British entrusted the Lukiiko, a part of Buganda's traditional political administration, with the distribution of land among its occupiers. It had slipped the attention of British authorities that the Lukiiko was dominated by holders of butongole land that now saw the opportunity to increase their political influence in Buganda through the acquisition of land that had formerly belonged to the clans. As a result, some of the butaka lands were actually divided up amongst members of the Lukiiko. Adding to the consequent redistribution of land within Buganda, the conferment of individual ownership rights and absolute control over land to mailo owners further disrupted the kingdom's social order as the notion of individual ownership was in stark contrast to the customary principle that a land holder, while enjoying certain rights to land in his use, was at the same obliged to the Kabaka, the clan and the tenants on his land (cf. Buell 1928: 595ff.). All these alterations led to a significant weakening of clan authority and were naturally met with strong unease on the part of the clan heads who felt that "making private property out of the land that had given order and meaning to the nation had altered social and political relationships in Buganda at every level." (Hanson 1992: 246)

3.3 Land Tenure Upon Independence

Upon independence in 1962 the land tenure system as established by the colonial power was largely retained. Though a few minor legislative changes aimed at the decentralization of land control and management were enshrined within the framework of the 1962 Constitution as well as the 1962 Public Land Ordinance, they did not actually bring about any fundamental changes in Uganda's land tenure system (cf. Walubiri 1994: 164).

Consequently, it was not until 1975 when Idi Amin passed the Land Reform Decree that the land question was seriously put back on the government's agenda. Enacted without any public debate or prior warning, this decree substantially changed the legal foundation of Uganda's land tenure system. All land in Uganda was declared public land, vested in the central government and administered by the Uganda Land Commission (cf. Mugambwa 2006: 7; Mutyaba 1998: 7). With the aim of introducing a uniform tenure system of leasehold, all existing mailo and freehold estates were converted into leaseholds of either 99 or 199 years depending on whether they were vested in individuals or public bodies (cf. Rugadya 2002: 8). In addition to that, any pieces of legislation regulating the relations between landlords and tenants including the

Busuulu and Evujjo Law 1928 were abolished and tenants were exempted from paying busuulu, envujjo or other customary rents. Regardless of the fact that tenants could now occupy their land without having to pay ground rent, they were still faced with great tenure insecurity as the Land Reform Decree had rendered them tenants at sufferance, meaning that their tenancies could be terminated on six months notice in consideration of some form of compensation (cf. Walubiri 1994: 166).

However, even though the 1975 Land Reform Decree represented the most radical position on land tenure in post-colonial Uganda, its effects were hardly felt by the people due to the fact that customary arrangements continued to govern land relations on the ground, even without legal status (cf. Adoko/Levine 2008: 102).

4 Statutory Land Law in Uganda

4.1 The Post-1990 Land Reform

4.1.1 Background to the Land Reform Process

The history of the land reform carried out in Uganda in the 1990s and culminating in the enactment of the 1998 Land Act dates back to the early 1980s when the Ugandan Government came to recognize the importance of agricultural policy in the rehabilitation and development of the agricultural sector. At that particular time land relations on the ground were severely affected by great tenure insecurity, a high incidence of land disputes as well as the increasing degradation of land. In an attempt to counter these developments the government set up an Agricultural Policy Committee in agreement with the World Bank in 1983 for the purpose of formulating, co-ordinating, directing and reviewing programs and key policies in the agricultural sector. This was to be carried out with the support of the Agricultural Secretariat of the Bank of Uganda (cf. McAuslan 2003: 3; Nyangabyaki 1999: 4). Consequently, when Yoweri Museveni's National Resistance Movement gained power in 1986, the issue of land reform constituted a priority concern for the new government (cf. Hunt 2004: 176). In the following year, after having conducted a number of studies and surveys, a working group recommended that the Land Reform Decree of 1975 be reexamined and a comprehensive national land policy conducive to agricultural development be formulated (cf. McAuslan 2003: 3).

Thereupon the Makerere Institute for Social Research (MISR) was asked to undertake a detailed study on Uganda's land tenure and agricultural development in conjunction with the Land Tenure Center of the University of Wisconsin-Madison (LTC) under the auspices of the Ministry of Planning and Economic Development. Sponsored by both the World Bank and USAID studies and field surveys focusing on customary and mailo tenure were then carried out in several districts including Luweero, Masaka, Mbarara, Bushenyi, Tororo, Kampala, Mbale and Mukono. In fact, the final draft of the 1998 Land Act was largely based on the recommendations drawn from this very study (cf. Hunt 2004: 176; Mugambwa 2006: 9).

Due to the fact that the study was financed by the World Bank and USAID it does not come as a surprise that its recommendations clearly reflect dominant economic thought prevailing at that time. Published in January 1989, the report following the study

advocates the promotion of freehold tenure throughout the country, the creation of a land market and the use of land title as collateral for bank loans. It was recommended that the Land Reform Decree 1975 be abolished and all mailo land be converted into freehold. Adding to that, it was suggested that all mailo tenants as well as customary tenants and leaseholders on former public land be enabled to apply for freehold and get their land titled (cf. McAuslan 2003: 3). Stating that "land tenure rules have a very important effect on agricultural development by determining the process of allocating land among individuals" the study report highlights the importance of a land market and concludes that "[a]ny national policy that seeks to enhance the level of land investment and productivity must avoid reducing access to land by the progressive farmers who are disproportionately responsible for the investment that now occurs." (MISR/LTC 1989: 81) At the same time, however, it stresses the importance of protecting the access to land of people who do not have any income opportunities outside the agricultural sector. Still, the motivation behind this reasoning is clearly driven by economic and efficiency concerns as it is stated that "forcing people off the land prematurely will actually hinder the process of economic development." (ibid.: 82) In line with the specific recommendations outlined above it is argued that Uganda's future land tenure system should be based on the following goals. First, the emergence of a functioning land market should be encouraged so as to enable progressive farmers to gain access to land and increase their productivity. Second, people should not be forced off the land as long as there are no alternative jobs available in the non-farm sector since this would be counterproductive to economic progress. Third, land reform should be geared towards establishing a single and uniform land tenure system for the country (cf. MISR/LTC 1989a: 30f.).

However, as pointed out by many, the MISR-LTC study held a number of serious shortcomings right from the beginning. Most of the criticism voiced was referring to the narrow terms of reference, the limited geographical scope of the study as well as to the fact that many of the conclusions were simply not derived from the actual findings (cf. Nyangabyaki 1999: 6). This was most obvious in the case of Luweero District, where field evidence failed to establish the presumed link between access to credit and higher shares of investment. Instead of reconsidering prior assumptions, the significance of this finding was downplayed stating that "the even higher investment index for unsuccessful loan applicants is *simply* a coincidence." (MISR/LTC 1989: 80, italics added) One of

the early critics of the study was the Center for Basic Research (CBR)[3] in Kampala that summarized its critique as follows:

> Because of the narrow empirical base of the research, the three stated objectives of the proposed land bill – encouraging the smooth functioning of a land market, discouraging evictions from the land and a uniform land tenure policy for the whole country – reflect ideals which are generalised and abstract, and in practice mutually contradictory. Instead of reflecting the reality of the land question in Uganda, they are imposed on that reality in an apriori fashion. (CBR, qtd. in Nyangabyaki 1999: 7)

Despite the widespread criticism in regard to the study a technical committee was set up in 1990 in order to turn its recommendations into actual legislation. After carrying out a number of public consultations and capturing the views of the Ugandan population, a first land law was drafted in 1993 that was primarily aimed at seeking a balance between freehold tenure and state control. Meanwhile the process of constitution making had already gotten under way with the land issue posing a primary concern (cf. McAuslan 2003: 3f., Mwebaza 1999: 2). It is therefore necessary to consider the constitutional provisions on land at this point in order to comprehend the further developments leading up to the final draft of the 1998 Land Act.

4.1.2 The 1995 Constitution

As indicated above, the issue of land reform constituted a priority concern in the drafting of Uganda's new Constitution as enacted in 1995. Whereas the question of land is explicitly addressed in Chapter 15 of the Constitution, there are a number of other constitutional provisions setting out guiding principles relevant to the matter.

The preamble to the Constitution comprises 29 national objectives and directive principles of state policy. Addressing the role of the state in development Objective XI (iii) states that "in furtherance of social justice, the State may regulate the acquisition, ownership, use and disposition of land and other property, in accordance with the Constitution." Objective XXVII (I) dealing with environmental issues provides for the state to "promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations." Moreover, Article 26 holds that "every person has a right to own

[3] Centre for Basic Research (CBR) in Kampala, Uganda was established in 1987, registered as an educational trust, and later as a Non-Governmental Organization (NGO) in 1988. CBR has since conducted a significant amount of research and disseminated its research results through publications (books, working papers, occasional papers, workshop proceedings, policy briefs) available in CBR library (cf. http://www.cbr-ug.net/index.php).

property either individually or in association with others" and explicitly protects any person from deprivation of their property. Expropriation is only justified in cases where this is "necessary for public use or in the interest of defense, public safety, public order, public morality or public health" and "prompt payment of fair and adequate compensation" is provided.

While the provisions outlined above set certain standards regarding the state's power to intervene in private property relations, it was the constitutional provisions embedded in Chapter 15 that brought about a significant alteration in the land holding arrangements in Uganda. Stating that "[l]and in Uganda belongs to the citizens of Uganda" Article 237 (1) abolishes the Land Reform Decree 1975 under which all land was vested in the Ugandan Government. This provision fundamentally changed the nature of land tenure in Uganda given that now, for the first time since colonial intervention, radical title to land is vested in the people, rather than the state government. In practice this means that Ugandan citizens are now granted the legal right to own land in itself and not just a mere interest in the land. Prior to this and in line with the principles of English common law, Ugandans were mere tenants of the state holding land only at the will of the government (cf. Ovonji-Odida et al. 2000: 13).

In line with Article 237 (3) of the Constiution land in Uganda shall be held under freehold, leasehold, mailo or customary tenure.[4] With respect to customary tenure Article 237 (4) provides for all Ugandan citizens owning formerly public land under customary tenure to "acquire certificates of ownership in a manner prescribed by Parliament" that "may be converted to freehold by registration." This provision is wholly in keeping with the free-market approach advocated in the 1989 MISR/LTC study on Uganda's land tenure and agricultural development (cf. Coldham 2000: 67f.).

Clauses (8) and (9) of Article 237 protect bona fide and lawful occupants of mailo, freehold or leasehold land against eviction and direct Parliament to enact a law "regulating the relationship between lawful or bonafide occupants of land [...] and the registered owners of that land." In fact, a source of potential conflict ever since the enactment of the 1900 Buganda Agreement, the matter of landlord/tenant relations posed a priority concern in the drafting of the new Constitution. However, as can be seen, not a lot of effort was actually put into the resolution of the contentious issue.

[4] It needs to be pointed out that, in practice, mailo tenure is equivalent to freehold tenure. According to Patrick McAuslan (2003: 5) who assisted in the drafting process of the 1998 Land Act the reinstatement of mailo tenure resulted from the recognition that "the symbolic significance of mailo land was too great to be ignored by the Constitution."

Providing bonafide and lawful tenants on mailo, freehold and leasehold land with a moratorium against eviction, the Constitution simply froze their status-quo, leaving the determination of the actual nature of the relative rights enjoyed by registered owners and their tenants for Parliament to sort out (cf. McAuslan 2003: 5).

Apart from the substantial changes in land ownership, the Constitution also provides for the establishment of a decentralized system of land administration and dispute settlement. At national level Article 238 establishes the Uganda Land Commission that in hierarchy is to be followed by the District Land Board set up at district level as provided for under Article 240. While Article 242 reaffirms the authority of the Ugandan state to enact legislation regulating the use of land, Article 243 requires Parliament to establish Land Tribunals responsible for settling any land-related disputes. The two remaining articles of Chapter 15 deal with the question of mineral rights and environmental issues, directing Parliament to make laws regulating mineral exploitation (Art. 244) and protecting the environment (cf. Art. 245).

In conclusion it can be noted that the 1995 Constitution brought about a fundamental change in Uganda's land holding system and tenure management. However, some of the most contested issues – first and foremost the matter of landlord/tenant relations – remained unresolved. As a consequence, the new Constitution was met with great suspicion and even outright rejection from some quarters. In fact, the parliamentary debate on the Land Act that was to follow generated so much controversy that at one point government even feared civil unrest (cf. Mugambwa 2006: 50).

4.1.3 The Land Act Chapter 227, 1998

In fulfillment of the parliamentary mandate created by the 1995 Constitution, the 1998 Land Act provides the institutional framework for the land reform in Uganda. Due to the controversy surrounding the new Constitution, the debate on the Land Bill was followed with great interest across the country. When the first draft of the Land Bill which was clearly in favor of freehold tenure became subject of public debate in 1997, it was heavily criticized by many interest groups that feared a reduction in their rights and tenure security (cf. Hunt 2004: 176). In an attempt to reconcile the contradictory pressures to liberalize the land market on the one hand and enhance security of tenure on the other hand, five versions of the Land Bill were drafted before it was finally enacted as the Land Act in 1998 (cf. Mwebaza 1999: 2). Adding to that, the drafting

process was further hindered by the fact that there was no comprehensive land policy setting out any guiding principles for land-related legislation in Uganda. Insofar as a national land policy existed at that time, it had to be pieced together from the 1995 Constitution, other related laws, government statements and presidential pronouncements. As a consequence, Uganda's 1998 Land Act was not premised on any official land policy document or white paper (cf. Mwebaza 1999: 2f., Nsamba-Gayiiya 1999: 9). Its most important features and provisions are now to be discussed in more detail.

Customary Ownership

One of the salient objectives of the 1998 Land Act is to provide all land users with security of tenure as well as to redress historical imbalances and injustices in land ownership and control (cf. Rugadya 2002: 11). This is of particular significance to customary tenants on formerly public land that prior to the 1995 Constitution had never been recognized by the law and therefore had constantly been at risk of eviction (cf. Mwebaza 1999: 3).

In accordance with Article 237 of the 1995 Constitution, Section 2 of the 1998 Land Act affirms the legal recognition of customary tenure holding that "all land in Uganda shall vest in the citizens of Uganda and shall be owned in accordance with the following land tenure systems – customary; freehold; mailo; and leasehold." Section 3 (1) defines customary land tenure as a system of land ownership regulated by customary principles and confined to a specific area of land and a specific class of people. Furthermore it recognizes both individual as well as family and communal ownership of customary land.

In line with the aim of increasing security of tenure on customary land, Section 4 provides that any person, family or community holding customary land on former public land may acquire a certificate of customary ownership as documentary evidence of their ownership rights. Sections 6-8, as amended in 2004, hold that the necessary adjudication and demarcation of boundaries are to be carried out by the Area Land Committee which in turn is to forward its recommendations on applications for certificates to the District Land Board that can either confirm, reject or vary the application. In case of a confirmed application, the final certificate is then issued by a recorder located at sub-county level. It is important to note, however, that adjudication

of customary rights is entirely voluntary as the Land Act contains no provision for mandatory titling (cf. McAuslan 2003: 6).

In order to avoid the confusion caused by the Land Adjudication Act in Kenya where titling focused on individuals and hence little effort was made to protect secondary and derived customary rights, the Land Act makes provision for third-party rights to be recorded in the adjudication process. In fact, Section 5 (1) (g) holds that "[o]n receipt of an application for customary ownership, the committee shall safeguard the interests and rights in the land which is the subject of the application of women, absent persons, minors and persons with or under disability." The certificate of customary ownership will then carry note of the recorded encumbrances (cf. Coldham 2000: 68f.). However, a certificate of customary ownership does not only function as documentary evidence of a person's rights to a certain piece of land. Rather, it confers on the holder the right to undertake, subject to limitations and restrictions contained in the certificate, the full range of land transactions, whether it be lease, mortgage, sale, donation or disposal by will, as held under Section 8 (2) of the Land Act, as amended in 2004. Taking a look at the other provisions under Section 8 it becomes clear that the main objective of this provision is to facilitate dealings in customary land (cf. Mugambwa 2006a: 26). In fact, it is expected that the possession of a certificate of customary ownership will enhance the holder's access to credit. Accordingly, Section 8 (7) provides that "[a] certificate of customary ownership shall be recognized by financial institutions, bodies and authorities as a valid certificate for purposes of evidence of title." Moreover, Section 8 (5) makes clear that where a mortgagor of customary land defaults on his loan, the mortgagee has the rights to sell and execute a transfer of that land.

Through the legal recognition of customary tenure, customary rights have become statutory rights of customary ownership, indicating that a customary owner can dispose of his land in the same manner as a person holding land under freehold (cf. Alden Wily 2011: 5). However, there is a contradiction in the law. While the Land Act provides for the conferment of classic ownership rights, such as the right to sell, lease and mortgage, onto the holder of a customary certificate of ownership, Section 3 (1)(b) at the same time explicitly holds that customary land is subject to customary law. Now in practice this means that many of the rights granted to a certificate holder under Section 8 (2) won't be exercised as there are only few customary land tenure regimes that will actually permit their members to undertake any transactions in land without the community's prior consent. It is therefore questionable that the registration of customary

rights will actually increase the marketability of land as obviously desired by the government (cf. Okoth-Ogendo 2002: 51f.).

Section 9 (1) further provides that any person, family, community or association holding customary land may convert the tenure into freehold. To this end, customary owners can either convert their certificate of customary ownership into freehold or, alternatively, skip the whole process of acquiring such a certificate and directly apply for a freehold title (cf. Mugambwa 2006a: 26f.).

In recognition of the fact that individual land ownership, whether it be customary or freehold, may not be appropriate in certain settings, Section 15 (1) provides for the formation of communal land associations "for any purpose connected with communal ownership and management of land, whether under customary law or otherwise." Accordingly, a communal land association is a legal entity that – in accordance with its own constitution – may own land under a certificate of customary ownership, freehold or leasehold. This is intended to protect and regulate the rights of pastoral land holders such as the semi-nomadic Karamojong of North-Eastern Uganda. However, there is no provision in the Act preventing any other land users from forming such an association (cf. Mugambwa 2006a: 30f.). In line with the overall goal of gradually establishing a uniform tenure system based on freehold throughout Uganda, Section 22 (1) holds that

> the association shall, where the customary law of the area makes provision for it, recognise and verify that all or part of the land so held by it is occupied and used by individuals and families for their own purposes and benefit.

Therefore, Section 22 (3) provides that where individual community members wish to own communal land in their own capacity, they may apply for a certificate of customary ownership or a freehold title. The provision for communal land associations is in fact wholly in keeping with the World Bank's stance on communal land tenure at that time. By then, it had been recognized that under certain circumstances where the benefits of communal tenure outweigh those of freehold tenure it may be more appropriate to focus on community rather than on individual titling. However, due to the assumption that eventually community members may still wish to shift to freehold tenure, it was recommended that adequate provisions be made in the law (cf. Deininger/Migot-Adholla 1997: 6f.). Clearly, the Ugandan Government took this advice to heart.

Tenancy by Occupancy

Apart from customary land owners, the 1998 Land Act is particularly concerned with the category of landholders commonly referred to as tenants by occupancy. Just as customary land owners, tenants by occupancy are victims of the historical wrongs committed in 1900 when the Buganda Agreement conferred upon individuals private ownership rights to land estates that had already been occupied (cf. Okoth-Ogendo 2002: 48). While the Busuulu and Envujjo Law 1928 as well as the respective Toro and Ankole landlord and tenants laws 1937 aimed at granting tenants on mailo and freehold estates at least some security of tenure, the 1975 Land Reform Decree abolished the protective legislation and put thousands of ordinary people at risk of eviction (cf. Walubiri 1994: 157, 166). As one of the main aims of the land reform was to enhance tenure security and protect people's rights in land, the resolution of the impasse between registered owners on mailo, freehold or leasehold land and the lawful and bonafide occupants on that land posed a priority concern in the drafting process of the Land Act (cf. Rugadya 2002: 11). This was expected to be beneficial not only to the landholders but also to the national economy since prior to the new land law both land owners and tenants used to lack incentives for investment. Whereas owners found it difficult to evict tenants in order to develop their land and increase agricultural productivity, tenants were reluctant to invest in the land as a result of their high tenure insecurity (cf. Nsamba-Gayiiya 1999: 2). As a consequence, the 1998 Land Act contains a number of provisions aimed at resolving the contested issue of landlord/tenant relations.

In the law tenants by occupancy are known as either bonafide or lawful occupants. As laid down in Section 29 (1) of the Land Act the term “lawful occupant” has three meanings. First, it means persons occupying land by virtue of the repealed Busuulu and Envujjo Law 1928 or the Ankole and Toro landlord and tenant laws of 1937. Second, it refers to a person occupying land with the approval of the registered proprietor and third, the term “lawful occupant” further applies to a person in occupation of leasehold land in accordance with customary law. According to Section 29 (2) the term “bonafide occupant” denotes persons that before coming into force of the 1995 Constitution had occupied land unchallenged by the land owner for over twelve years or had been resettled on the land in question by the central government or a local government authority.

With respect to tenure security, there are several mechanisms laid down in the Land Act designed to protect the land rights of tenants by occupancy and secure their access to

land. To begin with, security of occupancy is guaranteed under Section 31 (1) in consideration of an annual nominal ground rent as stipulated under subsection (3), as amended in 2004 and 2010. In line with Section 31 (6), as amended in 2010, and (7) termination of tenancy can only take place where a tenant fails to pay the rent for a period exceeding one years and even in such a case the registered land owner is faced with a number of obstacles to overcome before vacant possession can be obtained (cf. Okoth-Ogendo 2002: 48).

As laid down in Section 33 tenants of private land lords may acquire a certificate of occupancy as documentary evidence of their occupancy by a process similar to that customary owners go through when applying for a certificate of customary ownership. However, in the case of tenants by occupancy such a certificate is subject to landowner's consent as provided under Section 33 (6). Where consent is withheld for a period of over six months, Section 33 (7) enables the tenant to appeal to the Land Tribunal which has the power to give the approval necessary for the grant of a certificate of occupancy. Once issued, the certificate of occupancy is to be recorded as an encumbrance on the certificate of title of the registered land owner. Similar to customary owners, tenants holding a certificate of occupancy are entitled to exercise the full range of transactions in land. However, apart from the transmission in mortis causa, commercial transactions such as sale, mortgaging and subletting are subject to the landlord's approval as held under Section 34 (3). Moreover, where tenants are planning to sell the reversionary interest in the land, Section 35, as amended in 2010, holds that they must first offer their interest to the land lord and vice versa.

In conclusion it can be noted that the Land Act is clearly aimed at strengthening the position of tenants by occupancy while at the same time protecting the affected landlords. In the words of Coldham (2000: 67), "the Act can be seen as striking a compromise between the interests of mailo owners and occupants, albeit one that tends to favour the latter group."

Land Administration

In pursuance of the overall government policy of decentralization another core objective of the Land Act is the establishment of an institutional framework determining the use, control and management of land under a decentralized system of land administration, as envisaged by the 1995 Constitution (cf. Rugadya 2002: 12). Accordingly, the main administrative bodies responsible for land management and control are the Uganda

Land Commission, the District Land Boards as well as the newly created Area Land Committees.

While under the Land Reform Decree 1975 all public land was centrally vested in the Uganda Land Commission, the Commission's powers are now limited to managing land vested in or acquired by the government in accordance with the Constitution, as laid down under Section 49 of the Land Act. This also applies to land purchased by the Ugandan Government abroad. Under Section 53 the Land Commission is granted extensive auxiliary powers including the power to purchase land, to erect, alter or demolish any buildings as well as to carry out necessary surveys.

The District Land Boards, as set up under Section 56 (1) of the Land Act, follow the Uganda Land Commission in the newly introduced land management hierarchy. In accordance with the respective constitutional provisions, Section 59 (1) determines the functions of powers of the District Land Boards. Established at district level, the Land Board is responsible for holding land within the district not owned by any person or authority and has various statutory powers including the facilitation of registration and transfer of interest in land. In the performance of its functions the District Land Board is to be assisted by the District Land Office which, according to Section 59 (6), as amended in 2004, "shall provide technical services through its own staff, or arrange for external consultants to the Board." In addition to the Land Office, Section 68 of the Land Amendment Act 2004 requires the establishment of the Office of Recorder at sub-county or, in the case of an urban area, divisional level. Answerable to the Land Board, the Recorder is responsible for keeping records relating to both, certificates of occupancy and certificates of customary ownership.

Finally, Section 64, as amended in 2004, holds that, on the advice of a sub-county or division council, land committees may be appointed at sub-county or divisional level. In line with Sections 6-8, as amended in 2004, the main function of the so-called area land committees is the determination, verification and demarcation of customary land subject to the application for a certificate of customary ownership.

Dispute Settlement Mechanisms

The 1998 Land Act did not only bring about a new system of land administration, but at the same time fundamentally altered the matter of dispute settlement. The powers originally vested in magistrate I courts are now to be exercised by Land Tribunals established at district level in accordance with Section 74 of the Land Act, as amended in 2004. In line with the constitutional requirements, Section 76 (1) grants District Land

Tribunals broad jurisdiction over land disputes relating to grants, lease, repossession, transfer and acquisition of land and to the amount of compensation payable for land compulsorily acquired. Appeal from the District Land Tribunal, as laid down in Section 87 (1), lies to the High Court.

In addition to the Land Tribunals, the 1998 Land Act provides for two alternative mechanisms of dispute resolution. First, there is customary dispute settlement and mediation. Section 88 (1) explicitly declares that the provision for Land Tribunals shall not be taken "to prevent or hinder or limit the functions of traditional authorities of determining disputes over customary tenure or acting as mediators between persons who are in dispute over any matters arising out of customary tenure." Accordingly, parties to a conflict can directly turn to a customary institution for mediation or conflict settlement, or be referred to one by the land tribunal hearing their case (cf. Mugambwa 2006a: 46). Second, in line with Section 89, as amended in 2004, one or more mediators are to be appointed in each district to assist the parties in conflict in reaching an amicable settlement.

The Land Fund

Section 41 of the Land Amendment Act 2004 provides for the establishment of a Land Fund comprising of financial resources from different sources which shall be managed by the Uganda Land Commission and utilized to resettle persons who have been rendered landless and assist people in obtaining titles.

Concluding Remarks

In conclusion it can be noted that the 1998 Land Act is trying to seek a balance between the principles set out in the Constitution, the pressure to create a land market and the increasing demands for security of tenure.

However, even though both customary tenants and tenants by occupancy are now explicitly protected under statutory law, the underlying aim of many provisions strengthening individual land rights is clearly to increase the transferability of land. Providing for the conversion of customary tenure into freehold, the Land Act reflects the free-market approach as advocated by the MISR/LTC study and is furthermore wholly in keeping with de Soto's advocacy of incorporating informal property rights into the formal legal framework (cf. Coldham 2000: 67f., Hunt 2004: 178f.).

The above analysis has clearly shown that the 1998 Land Act is merely aimed at fulfilling its constitutional mandate by affirming the judicial principles set out in the

Constitution without questioning them and their possible consequences as such. It is therefore not surprising that the new land law has been subject to broad criticism ever since its enactment. In fact, it has been argued that, apart from resolving the contested issue of landlord/tenant relations, many of the root causes underlying contemporary land-related problems are only dealt with on the surface or not addressed at all (cf. Rugadya 2002: 9). Instead of providing a comprehensive code of law regulating the rights and obligations of different parties under each form of land tenure, what parliament produced is essentially a legal framework governing land tenure, land administration and dispute settlement (Okoth-Ogendo 2002: 47). Despite its shortcomings, however, it cannot be denied that the 1998 Land Act is the most important piece of land legislation since the 1975 Land Reform Decree. In the words of Patrick McAuslan (2003: 1) "[i]t is, in many respects, a revolutionary law, overturning a century of land relations and laying the groundwork for the possible evolution of a market in land based on individual ownership."

4.2 Gender and Land Rights in National Policy and Legislation

While the high share of women in agricultural production and their significant contribution to Uganda's national economy went unnoticed for many years, their essential role in social and economic development processes has now largely been recognized (cf. Nyakoojo 2002: 14). This was also expressed in a presidential address to the nation in 1988 in which President Yoweri Museveni (qtd. in Nuwagaba 1999: 102) stressed the importance of gender equality stating that

> [i]t is now acknowledged that involvement of women in the development process is not just a matter of good ethics but good economics. The challenges of development enjoin us to pay more than lip service to the core issues of unequal relations in our society.

Keeping in mind the president's promise "to pay more than lip service to the core issues of unequal relations" this chapter now serves the purpose of assessing the extent to which women's concerns in regard to land and gender equality have actually been incorporated into recent legislation and addressed within the national policy framework.

4.2.1 National Policy Framework

The National Gender Policy

In recognition of persisting gender imbalances the Ugandan Government introduced the National Gender Policy 1997 in order to redress gender-based inequalities through the mainstreaming of gender concerns in national development processes. Aimed at integrating the gender perspective into all levels of planning, resource allocation and implementation of development programs, the policy, as revised in 2007, explicitly addresses the issue of unequal access to and control over economically significant resources such as land (cf. Nsamba-Gayiiya 2002: 122). It is explicitly recognized that "women's inadequate control over livelihood assets such as land, labour, skills and information, networks, technology, and financial capital remains one of the root causes of poverty." (MGLSD 2007: 7) According to the policy this is due to the fact that "[g]ender inequality in access to and control over productive assets and resources acts as a hindrance to women's economic participation and limits economic growth with significant consequences for agricultural productivity." (ibid.: 13). Consequently, the promotion of gender equality in access, control and ownership of assets, resources, income and power constitutes a priority concern within this policy framework (ibid.: 18). As emphasized in the policy this is to be achieved through affirmative action as well as adequate mechanisms for monitoring and evaluation (cf. Marsh/Kego Laker 1999: 103).

The policy direction of the National Gender Policy is reinforced in the Land Sector Strategic Plan 2001-2011 which lists "Women and Vulnerable Groups" as one of its "Priority Action Areas" stating that it "will work to mainstream gender in its activities as well as making targeted interventions to improve women's land rights." (MLHUD 2001: 35) Planned interventions include the development of guidelines for land sector activities to ensure that the needs of both, men and women, are sufficiently catered for, the provision of legal aid to women in land conflicts and the identification of barriers to the implementation of legislative provisions aimed at protecting women's interests in land (cf. ibid.: 35f.).

The National Action Plan on Women

Building on the Beijing Platform for Action which reinforces the obligations stipulated in the CEDAW, the National Action Plan on Women, as adopted by the Ugandan Government in 1999, is aimed at empowering women to participate in and benefit from

social, economic and political development (cf. FAO 2010). This is to be achieved through the reversion of national policies and programs that have affected women negatively, the establishment of principles of shared power and responsibilities of men and women at household and national level, and the promotion of women's economic rights (cf. Nzioki 2002: 44). Under the heading "The Social and Economic Empowerment of Women" the revised National Action Plan on Women explicitly addresses the issue of women's rights to land and advocates "women's access to, control over and ownership of resources" as well as "reforms in land management systems that secure women's land rights." (MGLSD 2007a: 17)

The Poverty Eradication Action Plan and the Plan for Modernisation of Agriculture

The Poverty Eradication Action Plan (PEAP) as adopted by the Ugandan Government in 1997 is the overarching policy framework for Uganda's development planning. Its overall aim is to guide public action to eradicate mass poverty and turn Uganda into a middle-income country by the year 2017 through the improvement of incomes and living standards of the poor. (cf. MGSLD 2007: 13f.). As the vast majority of Ugandans derive their daily livelihood from land and agriculture, agricultural development is viewed as crucial in the process of poverty eradication (cf. Nsamba-Gayiiya 2002: 123). Therefore, in accordance with the overall aim of commercializing agriculture and liberalizing the market, the PEAP's main focus is to enhance agricultural production and incomes, especially in rural areas, and thereby increase the individual household's competitiveness (cf. UWONET 2006: 8). With respect to women, the revised PEAP of 2004 explicitly recognizes gender as a cross-cutting issue in development and poverty eradication and repeatedly highlights the importance of strengthening women's land rights through legal reform (cf. MoFPED 2004: 6, 75).

Women's role in agriculture and their special category among the poor are also emphasized in the Plan for Modernisation of Agriculture (PMA) which is part of the government's broader strategy for poverty eradication and aimed at transforming subsistence agriculture into commercial agriculture (cf. Nyakoojo 2002: 15). The main target beneficiaries of the PMA are poor subsistence farmers whose incomes are to be increased through enhanced productivity and active participation in the market. In the pursuance of its goals the PMA promises to ensure that all interventions and programs are gender-focused and responsive. However, it needs to be pointed out that the PMA does not lay down a definite strategy in order to see to it that this is actually achieved in practice (cf. UWONET 2006: 9f.). Also, it "does not touch the issue of how production

will be increased when women are working alone in the agricultural sector." (Nyakoojo 2002: 15)

The National Land Policy

Almost 13 years after the enactment of the 1998 Land Act, the Ugandan Government finally adopted a National Land Policy in March 2011. Addressing a number of uncertainties surrounding the issue of land in Uganda, the National Land Policy pays particular attention to the land rights of women and children stating that government shall "by legislation, protect the rights to inheritance and ownership of land for women and children" and "ensure that both men and women enjoy equal rights to land before marriage, in marriage, after marriage, and at succession, without discrimination." (MLHUD 2011: 27)

In order for this to be achieved customary practices regarding access to and ownership of land shall be reviewed and regulated to avoid discrimination against women and children. Moreover, the power of traditional authorities in matters of land administration shall be restored and abuse of family land shall be prevented. However, it is not only customary law that needs revision. In order to redress gender inequalities in succession and land ownership under statutory law, government is to design a matrimonial property law protecting the interests of both spouses and provide for adequate legislation safeguarding the inheritance rights of women and children. Apart from that, it is further demanded that women be fully integrated in all relevant decision-making processes. It is therefore crucial that all the ratified international conventions aimed at putting an end to discrimination against women and children finally be domesticated and enshrined within the national legal framework (cf ibid.: 27).

Concluding Remarks

In conclusion it can be noted that Uganda has made a conscious effort to include gender as a main cross-cutting issue in its national policy framework. With respect to land issues the reasoning for women's land rights in the current policy discourse is predominantly justified in terms of agricultural productivity and economic development, two key components of the government's strategy for poverty eradication (cf..MoFPED 2004: 29, MGLSD 2007: 13, MSGLD 2007a: 13). However, as the World Bank was heavily involved in the formulation of Uganda's planning framework for poverty alleviation, this is not surprising given the Bank's stance on women's land rights (cf. MoFPED 2004). Though the issue of human rights is alluded to in most cases, the

National Land Policy 2011 is the only policy document that explicitly links women's land rights with human rights concerns (cf. MLHUD 2011: 5). As far as policy implementation is concerned most policy documents do not provide a definite guide on how their principles relating to women's land rights are to be turned into practice (cf. UWONET 2006: 8, 10). While the need to strengthen women's rights to land is highlighted in all the policies discussed, it is only the National Land Policy 2011 that lays down a concrete and comprehensive strategy as to how this is to be achieved. It therefore remains to be seen in how far rhetoric will actually translate into action.

4.2.2 Relevant Constitutional Provisions

With the ratification of numerous international conventions protecting women's rights including the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights as well as the African Charter on Human and Peoples' Rights, Uganda made a commitment to ensure that the provisions contained in these international human rights instruments are upheld in all relevant sectors of society (cf. FAO 2010). As this required legal domestication, the introduction of women's rights into the national legal framework posed a priority concern in the drafting process of the 1995 Constitution so as to ensure that the root causes of gender inequalities in Ugandan society would be adequately addressed. (cf. Obaikol 2009: 5f.).

Since much was at stake for women at that time, they were unwilling to leave it up to male policy makers to safeguard their interests and therefore actively participated in all stages of constitutional reform. In fact, a number of women lawyers served on the constitutional commission and 18 percent of the elected members to the constitutional assembly were female. Moreover, as the drafting process of the new constitution was followed with great public interest, women's organizations formed throughout the country and submitted several statements of opinions on women's rights to the constitutional commission (cf. Tripp 2004: 5). The result of the dedicated participation of women was a constitution that has often been referred to as one of the most progressive ones in regard to women's rights (cf. Joireman 2007: 469). The relevant provisions and principles derived from the ratified international covenants are expressed in Chapter 4 of the 1995 Constitution.

Article 21 (1) of the Constitution holds that all persons are equal under the law and shall enjoy equal protection of the law. Clause (2) of the same article prohibits discrimination

on a number of grounds, including sex. Article 33 explicitly deals with women's rights stating in clause (1) that "women shall be accorded full and equal dignity of person with men" and in clause (4) that "women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities." Adding to that, Article 33 (6) prohibits any "[l]aws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status." Furthermore Article 33 (3) provides that the state shall protect women and their rights in appreciation of their "unique status and natural maternal functions in society."

Articles 26 and 31 provide for equality between men and women in regard to the acquisition and holding of land. Article 26 (1) lays down the fundamental right of every person to own property, whether individually or in association with others, whereas clause (2) of the same article protects the right not to be deprived of personal property without compensation. Under Article 31 (1) of the Constitution both men and women are entitled to "equal rights in marriage, during marriage and at its dissolution." Article 31 (2) directs parliament to enact appropriate legislation protecting the rights of widows and widowers to inherit the property of the deceased spouse. These provisions on equality are further strengthened by the principle of affirmative action "in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom" as enshrined in Article 32 (1).

In light of these provisions any discrimination against women in regard to land ownership and property rights constitutes a clear violation of the Constitution and is therefore invalid. The importance of the provisions on equal rights in marriage derives from the fact that the rights in question here are basic rights of shelter and food that, in the Ugandan context, often arise automatically upon marriage, divorce or widowhood (cf. Rugadya/Obaikol/Kamusiime 2004: 6).

From the above it can be concluded that from the outset, the legislative provisions contained within the Constitution are both gender-focused and inclusive. Aimed at protecting vulnerable and marginalized groups of society while paying particular attention to the rights of women, the 1995 Constitution is clearly in fulfillment of the international obligations undertaken in various treaties (cf. Obaikol 2009: 8).

4.2.3 Relevant Provisions under the Land Act

While the Constitution lays down the fundamental rights of women in all sectors of society and sets standards for future legislation, the Land Act provides the actual legal framework governing and protecting women's rights to land under statutory law. Within the Act, there is a deliberate effort to address both, the relevant constitutional provisions and the National Gender Policy as far as gender equality in access to and control over land are concerned (cf. Marsh/Kego Laker 1999: 103).

The Lost Amendment

Despite the fact that the integration of women's interests into the national legal framework posed a priority concern in the drafting of the 1995 Constitution, the issue of women's land rights as such only gained considerable importance during the public consultations on the Land Bill (cf. McAuslan 2003: 9). As it was felt that gender imbalances in regard to land were not adequately addressed in that women were still not guaranteed the same levels of tenure security as men, women's groups started lobbying for increased protection of women's land rights and advocated the incorporation of spousal co-ownership of land into the final draft of the Land Bill (cf. MISR 2002: 75). In fact, on 25th June 1998, Member of Parliament Miria Matembe proposed an amendment to the bill to ensure that land acquired by either spouse before or during marriage on their own behalf remained the property of that spouse, whereas land acquired after marriage by either spouse for joint occupation and use would be jointly owned by both spouses (cf. Obaikol 2009: 12). However, although the proposed amendment was approved by parliament, it did not appear in the published version of the Land Act. Up to today, there is still no agreement on how the amendment was actually "lost" in the final hours of passing the bill (cf. McAuslan 2003: 9f.).

Despite this drawback women's groups continued to lobby for the reinstatement of the lost amendment and finally, as a result of increased political pressure, the government agreed to incorporate the lost amendment in the Land Act during the next phase of amendments. In 1999, however, the Ugandan President, who initially had been very supportive of the co-ownership provision, announced that such an amendment would threaten Uganda's economic and social stability and therefore should not be included in the Land Act for now (cf. McAuslan 2010: 124, Mugambwa 2006: 92).

However, even though the Land Act does not provide for spousal co-ownership, it does include a number of other provisions aimed at safeguarding women's land rights that shall now be discussed in more detail.

Land under Customary Tenure

Section 27 provides that any decision taken in respect of customary tenure be based on customary law unless that decision "denies women or children or persons with disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land." In that case, such a decision shall be null and void. This provision is of particular importance in the safeguarding of women's land rights given that over 75 percent of Ugandan land is held under customary tenure and consequently governed by customary law that is often said to put women at a disadvantage (cf. FAO 2010).

Section 15 providing for the establishment of communal land associations also bears great potential for the protection of women's rights to land as their rights can be explicitly laid down in the mandatory constitution of the association regulating the different rights and obligations of the joint land users (cf. Adoko/Levine 2008: 103). Furthermore Section 16 (4) (b) requires that at least one third of the members of the association's managing committee be female.

Restrictions on Transfer of Family Land

Section 39 of the Land Act, as amended in 2004, prohibits a person from selling, mortgaging, leasing or entering into any other transaction in respect of family land without the prior consent of the resident spouse. At the same time, however, Section 39 (5) also holds that consent "shall not be unreasonably withheld." Where this is the case it is possible to appeal to the Land Tribunal which has the power to dispense with the consent, as provided for under subsection (6). With the aim of ensuring that consent is freely given without coercion subsection (3) stipulates that the landowner's spouse has to personally communicate their consent to the responsible Parish Land Committee (cf. Mugambwa 2006a: 37).

In order to enforce Section 39 – commonly referred to as the consent clause – clause (7) provides that the spouse not being the owner of the land in question "may lodge a caveat on the certificate of title, certificate of occupancy, or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent." In fact, the Registrar of Titles and the Recorder

are both explicitly prohibited by law to register any transaction for which spousal consent is required, but has not been obtained. The only exception to this rule is if the person wishing to enter into a transaction of family land has been given the necessary consent from the Land Tribunal (cf. Obaikol 2009: 16). Furthermore, Section 39 (4) holds that transactions in family land without spousal consent shall be void in all cases, even where the purchaser entered into the transaction in good faith. This provision is in violation of one of the fundamental rules of common law that a purchaser of lands in good faith gets a good title even if the seller had no legal authority to sell (cf. McAuslan 2010: 124).

Before the amendment to the Land Act in 2004, Section 39 had also required the mandatory consent of dependent children and orphans residing on family land. This condition was, however, removed for economic reasons as it was argued that children withholding their consent to parents' land transaction would hinder the emergence of functioning land markets (cf. UWONET 2006: 21).

In essence, the consent clause is far from the idea of co-ownership as it does not accord any proprietary rights to the spouse who is not the rightful owner of the land. Still, providing the power to approve or disapprove a land transaction, Section 39 is one of the most important achievements for women in the land reform process (cf. Rugadya/Obaikol/Kamusiime 2004: 12).

Family Land and Security of Occupancy

Security of occupancy in regard to family land, as asserted in Section 38A of the 2004 Land Amendment Act, explicitly protects the right of a spouse to have access to and live on family land during the subsistence of marriage. As provided for under subsection 38A (3), security of occupancy also entails the right of a spouse to give or withhold their consent to any transaction referred to in Section 39. Hence the rights accorded to a person under this section are only occupancy rights that do not amount to ownership (cf. Rugadya/Obaikol/Kamusiime 2004: 13). In line with the definition of family land as contained in subsection 38A (4) the scope of land covered includes the ordinary residence of a family, land on which the family resides and derives its sustenance from, land the family freely decides to treat as such and land treated as family land based on norms, customs and traditions of the family. Consequently, Section 38A only grants protection in relation to the land defined, while any other land acquired during marriage is not protected (cf. Rugadya/Obaikol/Kamusiime 2004: 14).

Women in Land Administration

In compliance with the principle of affirmative action in favor of vulnerable groups as embedded within Articles 32 (1) and 33 (5) of the Ugandan Constitution, the Land Act introduces minimum quotas for women's representation in land administration. Accordingly, Section 48 (4) holds that at least one out of the five members of the Uganda Land Commission shall be female, while Section 59 (3) requires that at least one third of the members of a District Land Board shall be women. Similar requirements apply to the Land Committees, as stipulated in Section 66 (2).

Concluding Remarks

From the above it can be concluded that despite the fact that the lost amendment has not been integrated into the Land Act, the new land law does include a number of provisions aimed at securing women's interests in land and enhancing their tenure security. However, it is one thing to put into place a gender-responsive legal system; implementing the provisions for the benefit of women is quite another matter. The extent to which the protective legislation is actually felt on the ground and the impact it has had on women's security of tenure will be discussed later on.

5 Customary Land Law in Uganda

In spite of the various efforts and policy interventions aimed at replacing customary land tenure systems with statutory forms of landholding by both colonial and post-colonial regimes, customary law continues to govern the land relations of more than 90 percent of the rural population in Sub-Saharan Africa (cf. Alden Wily 2006: 15). In fact, only between 2 and 10 percent of land in Sub-Saharan Africa is actually held under freehold tenure (cf. Chimwohu/Woodhouse 2006: 346). Customary land tenure remains the most widespread and dominant form of land holding also in Uganda where over 75 percent of land are still held in accordance with customary law and only 12 to 15 percent of land are subject to formal title (cf. Alden Wily 2011: 2; FAO 2010). However, before exploring the principles of customary land tenure in Uganda in more detail, this chapter first outlines the general characteristics of different customary land tenure regimes and addresses the various drivers of change contributing to the evolution of customary law.

5.1 Customary Law and Land Tenure – An Introduction

The norms and rules governing social relations established around land in much of contemporary Africa are commonly referred to as "customary law" (cf. Alden Wily 2011: 1). However, it is important to note from the outset that customary law does not only find its expression in local land tenure arrangements, but determines social relations also in other spheres of social interaction (Nakanyike-Musisi 2002: 35). But what exactly is customary law, how can it be defined and what are its characteristics?

It is generally agreed upon that customary law derives its legitimacy from "tradition" or – in other words – the "claim to have been applied for time immemorial." (Cotula 2007: 10) It is usually unwritten and handed down across generations primarily by word of mouth (cf. Bennett/Vermeulen 1980: 212). As opposed to state law, customary law does not emanate from a centralized state authority, but from the community it governs and is therefore generally determined by "the values of the community, prevailing power relations and unspoken assumptions about how people ought to act" (Nakanyike-Musisi 2002: 35). Accordingly, it has been argued that customary law and land tenure are "as much a social system as a legal code." (Alden Wily 2011: 1) It is from this social embeddedness that customary rules derive their great flexibility and negotiability. In fact, customary claims and obligations are seldom clearly defined, but constantly re-

negotiated as customary law is evolving and adapting to changing circumstances (cf. Cotula/Toulmin 2007: 110; Whitehead/Tsikata 2003: 76). As Berry (1997: 4) has observed, this is due to the fact that relations among people are "constituted less through the uniform application of written or unwritten rules, as through multiple processes of negotiation and contest which may occur simultaneously, or in close succession, but need not be synchronized or mutually consistent." As a consequence the content of customary law is extremely diverse, and likely to vary from village to village. Vast generalization in regard to customary arrangements is therefore often out of place (cf. Cotula 2007: 10). In fact,

> [w]hat is said about custom is often a partial truth, whose completeness can only be observed or experienced in actual social interaction. Local practices are varied, as are people's opinions of what is 'customary' in specific situations. Therefore, what people actually do in day-to-day interactions with each other is more revealing for 'living' cultural norms. (Nyamu-Musembi 2003, qtd. in Ssewakiryanga 2011: 12)

While customary law governs a wide range of different aspects of life, the focus of this chapter is on customary land tenure – the body of laws and institutions determining the form of land holding within a community as well as the way land is used, managed and transferred. The different claims and entitlements regulated by customary tenure include so-called "operational" rights such as the right to access and cultivate land, as well as management rights such as the right to allocate land or transfer land (cf. Cotula 2007: 10f.).

Contrary to common belief, customary land tenure is not confined to African states, but operates on a global scale determining land relations also in parts of Asia, Latin America, Europe and North America. It is most dominant in agrarian societies where agriculture is the main source of income and employment. The great majority of customary land, however, is to be found on the African continent with over half a billion people holding land in accordance with customary law (cf. Alden Wily 2011: 2). Especially in the African context, customary tenure often operates alongside the formal land tenure systems imported by the colonial forces (cf. Adams/Turner 2006: 6).

In spite of the fact that the great diversity in customary laws referred to above is also reflected in different customary land tenure arrangements, a few commonalities applying within and between different countries can be identified (cf. Alden Wily 2011: 7). According to the dominant view of customary land tenure regimes, land is usually vested in the community and held by clans or families with individuals gaining access to land by virtue of group membership (cf. Cotula 2007: 11). In contrast to other forms

of pre-state landholding such as feudal land tenure, customary right holders usually voluntarily participate in the land tenure regime. As a result of this community adherence, “[c]ustomary land relations both depend upon the continuance of 'community' and are generally the main fabric for continuance of 'community'.” (cf. Alden Wily 2006: 16)

However, it is important to note that customary tenure regimes differ significantly depending on the context they are operating in. Pastoral communities tend to emphasize the collective character of the rights held to community land, whereas agricultural societies often allocate farming rights over specific parcels of land to smaller family units. While such farming rights are generally inheritable, they usually do not include the right to alienate land without the consent of the community. Adding to that, customary tenure regimes may also provide for multiple uses of a certain piece of land implying that different users are entitled to use the land during different seasons for different purposes, such as farming, fishing or pastoralism (cf. Cotula 2007: 11).
Substantial differences also exist between patrilineal and matrilineal societies. In patrilineal tenure systems both lineage and property are traced through the male line. Once allocated by community authorities to male heads of household, land is usually passed on from father to son. Since marriage practice is exogamous, meaning that women are expected to marry outside their birth community, daughters are generally not entitled to inherit any land as they will leave their natal home to live with the husband's community. In matrilineal societies, on the other hand, lineage and property are traced through the mother's line. As in this case marriage practice is mostly matrilocal, it is the husband that leaves his natal home to live with his wife's family. Land, however, is still passed on from men to men, only in this case not from father to son, but from maternal uncle to nephew. Daughters are often granted cultivation rights to a plot of family land, even after getting married. However, upon marriage a woman also has to work on the land her husband has been allocated by his matrilineage. Common to both systems is that land is transferred between men while women's access to land is mediated through their relationship with a male. In the case of patrilineal communities women gain access to land through their husband, whereas in matrilineal societies they access land through their fathers or husbands (cf. Lastarria-Cornhiel 1997: 1322). These examples make clear that customary land tenure arrangements cannot entirely be dealt with in isolation as they “are interwoven and related to other societal structures and institutions, including family structure and its marriage and inheritance systems.” (ibid.: 1317)

In order to avoid a stereotyped view of customary land tenure it needs to be pointed out that the common characteristics outlined here are extremely abstract and merely aimed at providing a non-exhaustive overview of the general principles on which certain forms of customary tenure are based. In practice, however, due to the fact that customary laws are distinctive to the people they govern, land tenure arrangements vary from place to place and may deviate significantly from the picture drawn above.

Customary tenure is often wrongly referred to as a "system", implying that its structures are static and incapable of change (cf. Englert/Daley 2008: 4). This, however, does not reflect the reality on the ground and undermines the fact that so-called "customary tenure systems" have substantially changed over time and are continually adapted and re-interpreted in response to changing circumstances resulting from different factors such as population pressure, cultural interaction, political processes and socio-economic change (cf. Cotula 2007: 5). Therefore, "customary rules or laws are inherently flexible and dynamic and are better described as indigenous (or local) tenure practices that are subject to change" (Englert/Daley 2008: 4). Regardless of this fact, however, in international discourse customary land tenure was for a long time regarded as being static and an impediment to development. This negative view was also reflected in numerous policies promoted throughout the nineteenth and twentieth centuries which "failed to accord indigenous and customary occupancy their deserved status as private property rights" (Alden Wily 2006: 2) and resulted in the "relegation of customary law to second-class status." (Adams/Turner 2006: 6)

This has also become obvious in the analysis of the World Bank's policies on land carried out in Chapter 2. For a long time, the Bank considered customary land tenure as "economically inferior" (Deininger/Binswanger 1999: 258) due to its allegedly static structures and inability to adapt to changing circumstances (Yngstrom 2002: 23). It was only in the 1990s that the great flexibility of customary tenure became increasingly recognized which even led the World Bank to the conclusion that "customary systems" are in fact "far from static and evolve in response to exogenous changes." (World Bank 2001, qtd. in Englert 2005: 5)

5.2 "Change is the Only Constant" – Different Factors in the Evolution of Customary Law

This inherent flexibility of customary land tenure implies that customary laws and tenure arrangements encountered today are themselves the results of past processes and changes. In fact, there is a wide range of evidence pointing to the fact that customary laws have undergone a number of significant changes during the past centuries (cf. Cotula/Toulmin 2007). One of the major factors contributing to change in customary land tenure practices in recent history was the reception of European land law as a result of colonialism. The interaction between native customary laws and imported European law will be addressed in the following section.

5.2.1 Colonialism and Customary Tenure in Africa – The Interaction of Received European Law and Customary Law

Given the inseparability of administration and law, effective colonial rule in Africa relied on the establishment of a functioning legal system to both maintain control over the dependency and provide for adequate conflict resolution. Given that the pre-existing native mechanisms of dispute settlement were considered appropriate for Africans only, the colonial forces preferred to introduce their own legal systems as they were operating in Europe (cf. Joireman 2001: 571, 579).

The focus of this chapter will be on the impact of English Common law as opposed to Roman-Dutch law on African societies since land policies in Uganda as a former British colony have been significantly influenced by the former rather than the latter. As was the case throughout Commonwealth Africa, English law was imposed upon Uganda via the so-called "reception clause" contained within the 1902 Uganda Order in Council which provided for the applicability of the common law, doctrines of equity and statues of general application in force in England at that time (cf. McAuslan 2000: 76, Ntambirweki 1996: 30).

In order to understand the changes introduced by the British colonial forces, it is important to first consider the basic ideas English land law is based on. Generally, English land law builds on two fundamental principles: First, there is the principle of divided rights of ownership that allows several persons to hold different degrees of ownership rights in the same piece of land. Second, there is a separation of what is actually owned and the physical substance of the land itself. This separation is due to the assumption that the English Crown is the ultimate owner of all land, while

individuals can only own certain bundles of rights in a given piece of land as tenants of the Crown. Therefore "what is owned is not land in itself but an *estate* or *interest* in the land." (McAuslan 2000: 78) The notion of the Crown being the ultimate owner of land goes back to William the Conqueror who, upon his conquest of England in 1066, declared all land forfeited to him. In fact, to him the conquest of a country was tantamount to the acquisition of its land. As a result of this assumed inseparability of conquest and land ownership, which has survived up till today, anyone holding a piece of land cannot claim ownership of that land due to the fact that what is owned is not the land in itself, but merely an interest in that land (cf. ibid.: 78).

The question now arises as to how the clash between English land law and the customary rules and practices prevailing in the African colonies played out in practice and how this was reflected in colonial land policies. In order to capture the shifts in the colonial attitudes towards customary law the interaction between the two legal codes will be broadly discussed in three interlocking phases:

Acquisition of Land and Justification of British Colonial Rule

One of the first steps in the consolidation of British colonial rule in Africa was the acquisition of all land through the assumption of full rights of jurisdiction over the entire territory of the respective colonies (cf. McAuslan 2000: 80). However, in order to satisfy the public back in Europe, colonialists needed to make their actions lawful and therefore employed a number of strategies undermining customary ownership in land to justify the dispossession of Africans (cf. Alden Wily 2011a: 13).

One of the stratagems applied in this context, especially in the early days of colonialism, was the "doctrine of discovery", a concept of public international law, which has been practiced by most colonial powers over the past 500 years. In short, the "doctrine of discovery" was based on the idea that a Christian monarch "discovering" non-Christian lands had the right to claim paramount title to those territories. What this meant in practice can best be illustrated by the following quote of the United States Supreme Court Justice Marshall in the case *Johnson v. M'Intosh* 1823: "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right." Consequently, indigenous lands were considered to be *terra nullius* – land without ownership and therefore available to the nation claiming it (cf. Kersey 1994: 442; ECOSOC 2010). While the case referred to here dealt with the land rights of the Indian population in the United States, a similar logic was applied in the colonization of

Africa, especially in areas were customary land ownership was vested in kings as it was claimed that there could not be two sovereigns (cf. Alden Wily 2011a: 2f.).
Another common strategy employed to justify colonial policies particularly during the nineteenth and twentieth centuries was the denial of customary ownership rights in land based on the fact that Africans did not own their lands "in a manner which European law could accept." (Alden Wily 2011a: 3) This argument built on the common observation that customary land was held communally and therefore could not be freely traded among individuals. Consequently, given that under European law a landholding is not considered real property unless it is fully fungible, it was argued that Africans merely possessed their land rather than owning it (cf. Alden Wily 2011a: 3; Alden Wily 2011b: 1). These views were also reflected in various court rulings dating from the first three decades of the twentieth century including the 1926 decision on the Swazi case *Sobhuza II vs. Miller and others* which includes the following statement:

> The true character of native title to land throughout the Empire including South and West Africa with local variations the principle is a uniform one…The notion of individual ownership is foreign to native ideas. Land belongs to the community not to the individual...The title of the native community generally takes the form of a usufructuary right … Obviously such a usufructuary right, however difficult to get rid of by ordinary means of conveyancing *may be extinguished by the action of a paramount power which assumes possession of the entire control of the land.* (Sobhuza II vs. Miller and others 1926, qtd. in McAuslan 2000: 81, italics added)

Customary claims to land were thus reduced to usufructuary rights, merely existing at the mercy of the "paramount power". The fact that most land under customary tenure was actually owned by individual families with the notion of common property applying only to forest and grazing lands, swamps and other natural resources was simply ignored (cf. Nsamba-Gayiiya ?, LEMU 2008: 2).

From the above it has become clear that whatever strategies colonialists chose to pursue, they all added up to the denial of customary land ownership by Africans. Whether it was religious or supposedly legal reasons that were brought forward, the core argument remained the same, namely that land rights held by Africans did not amount to ownership. It was exactly this strategic subordination of customary norms and practices to the allegedly superior European law that provided a legally valid justification for both, the Crown's unrestricted acquisition of radical title to all customary land and the subsequent introduction of European forms of land tenure. In many cases customary rules were not recognized as a form of law at all which made it even easier for the British colonial power to displace them. This is particularly true in

the case of Uganda, where all land, except for the mailo land in Buganda, was declared Crown land despite the fact that most of it was held under customary tenure (cf. McAuslan 2000: 81).

The "Reinvention" of Customary Tradition?

In spite of the negative perceptions of customary law, customary land tenure arrangements were largely retained during the colonial era. Especially in dependencies where a system of indirect rule was installed the maintenance of peace and order essentially depended on the recognition of certain African laws, customs and institutions. This was due to the fact that indirect rule generally built on a strong connection between land law and political stability. Accordingly, in areas set aside for the African population, traditional authorities were granted considerable powers over the allocation of land (cf. McAuslan 2000: 84). Another reason for the maintenance of customary laws and tenure was the fact that the British did not want the majority of the native population to benefit from the received English land law. Given that private property rights empower the legal owner to exclude any other person from the use of his or her property, it was feared that private land ownership by Africans would significantly undermine colonial rule (cf. Firmin-Sellers 1995: 869; McAuslan 2000: 84f.).

As a consequence, customary laws and institutions were largely kept in place. This was also the case in Uganda, where the colonial administration gave recognition to existing social norms, structures and institutions, particularly where they resembled those found in England. In legal terms this was expressed in the 1902 Uganda Order in Council which explicitly recognized the applicability of African customary law, provided that its provisions were "not repugnant to natural justice, morality and good conscience." (Ntambirweki 1996: 27)

In many cases, the recognition of customary law went hand in hand with the establishment of customary courts responsible for the administration of such law (cf. White 1965: 87). In Uganda, this resulted in a dual system of customary and civil courts which mostly operated in isolation – while the jurisdiction over family and community concerns such as land was generally left with the customary courts, criminal law was adjudicated by colonial civil courts (cf. Carswell 2007: 88; Tripp 2004: 8). This development marked an important stage in the evolution of customary law. Given that from that moment on customary rules and land tenure practices were subject to the interpretation of customary courts that often based their decisions on long-established

stereotypes of African custom, the actual contents of customary norms were often distorted (cf. Carswell 2007: 89). Other than that, customary arrangements were further affected by the commonly practiced codification of customary law that usually relied on information provided by male intermediaries of the local elite. This opened the way for biased reinterpretations of customary practices that in many cases worked to the detriment of weaker community members including women (cf. Cotula/Neves 2007: 31f., Sebina-Zziwa 1998: 31).

These observations have led some scholars to the conclusion that the allegedly "customary" laws and practices often cited in contemporary land disputes do not actually reflect long-established African "tradition", but have been invented and significantly redefined to serve the needs of the colonial administration (cf. Berry 1997: 4). As Chanock (1991: 80) writes, "[w]hat was ultimately allowed to develop as 'custom' and what was not depended on what the State would accommodate." In fact, there is a wide range of evidence supporting Chanock's argument that customary law was selectively adapted by colonial officials to suit their own ends and to fit their own world views. The assertion of male control over female property, for instance, was generally allowed to develop "strength as a recognized part of 'customary law'" (ibid.: 80) given its compliance with the Western ideal of gender roles also reflected in English law at that time. The customary practice of "widow inheritance", on the other hand, was largely deemed inappropriate (cf. ibid.: 80f.).

This "restructuring" of customary law, which was generally practiced from the 1920s on, also brought about significant alterations in customary land relations. In fact, norms governing the meanings and boundaries of customary tenure were constantly redefined to serve the needs of the colonial state and subsequently handed down for local authorities to apply in the name of "local custom" (cf. Alden Wily 2011a: 8; McAuslan 2000: 85). The evolution of customary laws was thus pushed into a certain direction approved of by the colonial regime. This was particularly evident in the case of customary land markets which gradually started to emerge during the colonial period. As a matter of fact, the colonial authority did not only deny Africans the benefits of received law, but was also determined to inhibit any infiltration of ideas from European land law into customary tenure. Accordingly, when colonialists noted a surge in the sale of customary lands which "was not customary behaviour and therefore not legitimate for Africans to engage in" (Chanock 1991, qtd. in Mc Auslan 2000: 85), customary land

sales were quickly declared as "illegal" based on the stereotyped principle that customary law did not provide for a land market (cf. McAuslan 85f.).

One of the most powerful tools in the gradual adaptation and "reconstruction" of customary law was the above mentioned codification of customary rules which essentially changed the character of customary law through the imposition of rigid rules upon communities formerly governed by fluid and negotiable social practices (cf. Carswell 2007: 89). Some have even gone so far as to argue that the codification of customary norms and practices represented "a stage in the evolution of customary law in which customary law virtually cease[d] to be customary law." (cf. White 1965: 88). This is due to the fact that once written down customary law becomes fixed and loses its inherent flexibility as "the previous genitors of the law, the people, no longer have a direct role to play in the change and adaptation of the law." (Bennett/Vermeulen 1980: 217). Others, however, have argued that despite their codification, in practice, "land tenure rules have remained ambiguous, and rights in land are [still] subject to ongoing reinterpretation." (Berry 1993, qtd. in Carswell 2007: 89).

Generally, it can be noted that regardless of whether or not contemporary customary law is actually a colonial invention, it cannot be denied that the changes introduced by colonialism have had a significant impact on customary arrangements. Having established that customary laws are continually adapting to changing circumstances, it would be rather naive to assume that colonialism has not left its mark on them.

Towards the Substitution of Customary Land Tenure

In the aftermath of the Second World War the respect previously shown for customary land tenure and the native right to occupancy dwindled considerably. Farmers engaged in cash crop production were increasingly left landless where they had failed to meet production targets. Landlessness among Africans was further exacerbated by colonial governments granting vast amounts of land to multinational companies for mining and agribusiness purposes. In order to legally justify the resulting evictions of thousands of families courts simply reduced customary land rights to mere lawful possession, denying the people concerned any rights in the land occupied by them whatsoever. However, this demise of customary rights, so it was argued, was actually in the interest of the African population itself. In fact, the customary way of communal landholding was increasingly regarded as posing a considerable hindrance to agricultural development and was therefore to be replaced by formal land tenure systems (cf. Alden Wily 2011a: 9f.).

The decisive document paving the way for the replacement of customary land tenure was the East African Royal Commission report 1955 that included a number of recommendations aimed at enhancing agricultural development and economic growth in the region. Particular attention was thereby paid to the modification of customary land tenure through the individualization of land ownership. In keeping with the views shared by colonial governments the report portrayed customary tenure as incompatible with economic progress due to its allegedly communal character and the high levels of tenure insecurity associated with it. Ironically enough, customary tenure was further discredited for its lack of a functioning land marked whose emergence, as we have seen, had been strategically inhibited earlier on. Apart from that, it was argued that customary tenure would result in poor pasture and farm management as it did not provide individuals with the investment incentives necessary for agricultural development (cf. Obol-Ochola 1971: 71f.). This view was also reflected in the report of an economic survey mission to Uganda in 1962 that decidedly discredited customary tenure:

> Apart from mailo land in Buganda and limited areas in Western Province, land is held under customary forms of tenure by Africans. Their forms vary, but their major characteristics are that there is no private ownership of land […] and the allocation of rights to land depend [sic!] on clan relationship and in some instances on tribal or district Councils. There is no security of tenure, no title and no market for the land, consequently there is no incentive to invest in land, to increase its productivity or its capitalised value. (Survey Commission Report 1962, qtd. in Obol-Ochola 1971: 72)

Based on these observations it was concluded that customary land tenure could not be left to evolve on its own but had to be removed altogether through large scale land privatization (cf. ibid: 72). This, it was argued, would enable richer African farmers to purchase lands for commercial production from poorer peasants who could from then on provide their labor to the emerging industries. Local elites needed no convincing – already benefiting from registration regimes originally set up for settlers, they were very much in favor of the legislative changes undertaken by the colonial government aimed at the replacement of customary tenure with introduced forms of private landholding (cf. Alden Wily 2011a: 10f.).

Kenya was the first country to take up the challenge of bringing customarily held land into freehold through a large-scale registration regime designed to record customary rights while simultaneously translating them into equivalent interests recognized under common law (cf. McAuslan 2000: 86). The registration of customary land was also put on the colonial agenda in Uganda, as already alluded to earlier on in Chapter 3.

However, the pilot schemes of systematic adjudication carried out in parts of Ankole, Kigezi and Bugisu in the late 1950s were ultimately abandoned due to administrative complications caused by the onset of independence (cf. Lastarria-Cornhiel 2003: 3; Walubiri 1994: 159). Calling to mind the Uganda Land Act 1998 it becomes clear that the principles set out in the report of the East African Royal Commission 1955 have survived up until today and are still reflected in present-day legislation. While the overall attitude towards customary land tenure may have changed, the adjudicatory mechanisms for the acquisition of customary land titles provided for under the Land Act clearly indicate that the underlying aim to gradually bring customary land under individual freehold tenure has remained the same (cf. McAuslan 2000: 87).

Concluding Remarks

In conclusion, it can be noted that there is little doubt that the changes introduced during the colonial period had a significant impact on customary law and land tenure given the constantly practiced oppression of customary rights and their general relegation to secondary status.

One of the most powerful tools in the subordination of customary laws under colonial rule was the introduction of European land law. Throughout the colonial era Western legal terminology was selectively employed to undermine customary land ownership and facilitate the dispossession of the African population – first at the onset of colonialism and later after the Second World War when vast amounts of land were made available to foreign companies. Where deemed appropriate, customary laws and institutions were largely retained, but constantly redefined and adapted to serve the needs of the colonial administration. While tolerated for most of the colonial period, customary land tenure came increasingly under attack in the 1950s, allegedly posing a significant obstacle to agricultural growth. This shift in attitude towards customary land tenure found its expression in the land policies following the East African Royal Commission report which were clearly aimed at the replacement of customary tenure arrangements with formal forms of land tenure recognized by English land law – an approach that has influenced policy makers up to the present and is still reflected in contemporary legislation.

However, in spite of the various attempts to oppress customary land law as a means of legal ownership, it has survived until today and continues to govern the land relations of the vast majority of Africans. According to Besteman (1995, qtd. in Sebina-Zziwa 1998: 23) a great part of this resilience of customary land tenure derives from its social and

cultural embeddedness as it is “interwoven into the fabric of family, kinship and gender relations.”

5.2.2 Contemporary Drivers of Change in the Evolution of Customary Land Tenure

Colonialism certainly posed one of the most influential factors in the evolution of customary land tenure. However, changes in customary practices continue to occur also in the present as a result of different external and internal influences such as population pressure, socio-economic change and various political processes (cf. Cotula 2007: 5).

One of the most important factors presently contributing to change in customary practices is the strong demographic growth many parts of Africa have witnessed over the past decades. Population pressure on land is particularly severe in Uganda where demographic growth rates are already above average and expected to increase even further. In fact, between 1960 and 2005 Uganda's population increased by 22.2 million, rising from roughly 7 million to almost 29 million. The demographic changes described here have had a profound impact on customary land tenure arrangements given that land has become scarcer and scarcer as a result of high population density (cf. Cotula/Neves 2007: 16f.). According to the evolutionary theory of land rights this context of rising land scarcity and high population pressure leads to an increasing individualization of land rights while at the same time paving the way for the emergence of a land market (cf. Platteau 1996: 31ff.). However, as evidence has shown, the processes taking place on the ground are much more complex than portrayed by the evolutionary theory. While population pressure on land may have indeed led to increased individualization of land tenure in some instances, it has simultaneously provoked customary claims reasserting collective rights over land in other cases (cf. Yngstrom 2002: 24). Yet, it cannot be denied that the growth in population has brought about noticeable “shifts in the centre of gravity of communal domains from tribal territory to clan areas to village domain”. (Alden Wily 2011: 7).

Customary land tenure arrangements are furthermore affected by the increasing integration of African agriculture into the world economy. Subsistence crops are increasingly replaced by export crops bringing about a rise in the value of land and further increasing competition for scarce land resources (cf. Cotula/Neves 2007: 23). Other than that, flows of remittances resulting from international migration have also had a noticeable impact on customary practices enabling recipients to purchase lands,

acquire land titles and to make land more productive through hired labor. In fact, it has been observed that "remittances – by increasing demand for valuable land – may fuel competition, chaotic land markets, increased land tenure individualization and land disputes." (ibid.: 24)

Urbanization is another factor that has brought about considerable changes in customary practices. As a consequence of rural-urban migration many rural households are crucially dependent on urban income for their livelihoods. This is partly due to the fact that there has been a shift in production patterns. In many cases subsistence production has given way to market-oriented production meaning that food is no longer produced for domestic consumption only but also for the urban markets. This has also led to the conversion of communally held land into farm land to meet new production targets (cf. Alden Wily 2011: 7; Cotula/Neves 2007: 20). Urbanization has also had a significant impact on customary land markets as in a context of rising land values farmers have been increasingly forced or tempted to sell their land to urban elites, thereby further disrupting customary communities (cf. Cotula/Neves 2007: 20). Moreover, since rural income is increasingly derived from off-farm opportunities the clear division of herding and farming communities has gradually disappeared. While herders used to depend on farmers for access to land, farmers used to rely on incoming cattle herders for access to milk and manure. However, given that many farmers can now afford to buy their own livestock, this mutual dependency has increasingly vanished, raising potential for natural resource conflict (cf. ibid.: 25).

Apart from urbanization, factors such as HIV/AIDS and conflict are additional drivers of change in customary practices. HIV/AIDS has major impacts on economic productivity and land use as a result of the related loss of labor force. While some affected families are able to develop adequate coping mechanisms such as hiring labor, entering into sharecropping arrangements or renting out land, other households are often forced into distress sales of land in order to cover the medical expenses arising from the disease (cf. Cotula/Neves 2007: 28). The negative social stigma attached to AIDS/HIV has further given rise to the problem of land being grabbed from widows and orphans by male relatives upon the supposedly AIDS-related death of a husband or father (cf. Akwanalo Mate 2005: 9). In the case of conflict, customary relations are often completely disrupted, especially where whole communities are displaced and resettled. The consequent weakening of customary institutions oftentimes results in high levels of tenure insecurity, land disputes and increased incidents of land grabbing by both

relatives and elites, as has become obvious in the conflict-ridden area of Northern Uganda (cf. Adoko/Levine 2004).

All the factors outlined above, combined with contemporary land policies and legislation pushing towards land tenure privatization, have created an environment of increased competition over land encouraging the individualization and monetarization of customary land tenure relations (cf. Cotula/Toulmin 2007: 107). However, at the same time it needs to be pointed out that the people affected by these changes are not merely passive observers of what is happening around them, but play a crucial role in the shaping of the processes described. In fact,

> [c]hange in the rules of the game is not only a function of profound social transformation, but also the outcome of struggles between groups trying to reinterpret the rules to make the most of that transformation. This has important implications for differences along status, income, gender and other lines, as the more powerful are usually able to bend the rules to their advantage. (ibid.: 108)

How this situation plays out in practice and what impact these changes in customary arrangements have had on women's access to land in Uganda will be discussed later on.

5.3 Principles of Customary Land Tenure in Uganda[5]

Having explored the general characteristics of customary land tenure regimes as well as the different drivers of change in the evolution of customary laws, the purpose of this section is to outline the principles underlying different forms of customary tenure prevailing in Uganda today.

Customary land tenure is one of the four tenure systems legally recognized under Article 237 (3) of Uganda's 1995 Constitution. Accordingly, land held customarily is governed by the specific customary laws applying in a particular region, provided that they do not violate any rights granted by the Constitution (cf. LEMU?). This is of great significance given the fact that most of the land in Uganda is held under customary tenure, especially outside Buganda and the urban areas. As indicated earlier on, there is an enormous diversity in customary laws and practices as they vary according to region

[5] Customary land tenure practices in Uganda are very diverse, differing from place to place. Given that the existing literature on customary land tenure does not cover all regions of Uganda, the account of customary land tenure presented in this chapter mostly draws on information provided by the Land and Equity Movement in Uganda (LEMU) that has done a lot of research into the customary laws and land tenure practices in Northern and Eastern Uganda. Consequently, most of the principles discussed here apply to these regions in particular.

and ethnic group, Uganda being no exception. However, due to a number of different factors such as government intervention, migration, population pressure, and cultural interaction, many customary tenure regimes encountered today have similar characteristics (cf. Mugambwa 2006: 66). While contemporary customary land tenure in Uganda broadly falls under two systems, namely village and clan tenure, the focus of this chapter will be on the latter.

5.3.1 Clan Tenure

The clan is by far the most important landholding unit in customary land law in contemporary Uganda (cf. Obol-Ochola 1971: 67). Although relatively stronger in the northern parts of the country such as Lira, Apac, Gulu, Arua and Kitgum, clan-based tenure still continues to play a significant role also in other regions of Uganda (cf. Tripp 2004: 13). This is also expressed in the following statement of a former Saza Chief of the Kingdom of Bunyoro:

> From the time people first settled in Bunyoro, the clan system has been the force which has united them; for although rulers rose and fell, the clans have remained. The basis of the clan system is the land. The greater the clan, the more land it would possess. Each clan held sufficient land for the permanent food crops such as plantains, for the annual crops, for its grazing and for the needs of the future generation. (Labwoni ?, qtd. in Obol-Ochola 1971: 67)

In social anthropology clans are defined as "corporate descent groups of people with a common ancestor but who do not necessarily know the precise links to that ancestor." (Sebina-Zziwa 1998: 42). In many cases clans are subdivided into lineages which form another level of descent groupings. In Buganda, for instance, where descent is traced through the paternal side of the family, clans are subdivided into several *masiga* [sing.:*siga*] indicating the number of male agnates of the clan founder. One *siga* is further broken down into sub-lineages referred to as *nyiriri*. Clan matters of any given lineage used to be handled along this hierarchy, from sub-lineage level upwards to the clan chiefs and finally the Kabaka (cf. ibid.: 42).

Conceptualizing Customary Land Ownership

The common misinterpretation of the frequently encountered phrase that customarily held land "belongs to the clan" has led to the widespread assumption that customary land ownership is tantamount to communal land ownership. This, however, is not the case as Adoko and Levine (cf. 2004: 6f.; 2008: 107) have indicated. Rather, the idea

that land belongs to the clan simply implies that the clan has the power to set the rules by which clan members can own land and to regulate the social context within which customary rights to land are claimed. Accordingly, clan authorities have the right to intervene if customary law is violated and to limit the rights of the individuals under their jurisdiction where deemed necessary. "To belong" in this context is therefore much closer to the Western concept of sovereignty than to that of ownership.

Much of the confusion about who actually "owns" land under customary tenure results from the fact that the Western concept of land ownership differs significantly from the way rights and responsibilities around land are organized under customary law. European law generally grants individual rights *of* ownership meaning that land owners have absolute and well-defined rights over their land and can dispose of their property as they desire. Customary law, on the other hand, grants individual rights *to* ownership implying that every family member has an innate right to land. The nature and scope of that right, however, vary according to several factors such as the individual's position within the family and the availability of land. Customary claims to land are therefore situational dependent and often subject to negotiation and compromise (cf. LEMU 2011: 3).

The main reason for why customary law does not provide for absolute land ownership by individuals is that under customary tenure "[l]and 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." (Adoko/Akin/Knight 2011: 2). Accordingly, customary land ownership is generally by families, not individuals. Given that the predominantly male head of household is usually entrusted with the over-all management of family land, he is commonly referred to as the "land owner". It would be fallacious, however, to conclude that all the rights in land are actually vested in him. Rather, land ownership in the customary sense constitutes a form of stewardship that is associated with the responsibility to protect the land rights of all those with a claim in a given piece of land. The management role of the head of household is therefore closely tied to social obligations that extend also to future generations as family land represents the heritage of both living family members and those yet to be born (cf. Adoko/Levine 2004: 5; LEMU 2008: 2).

Rights and Responsibilities

The clan generally exercises its rights and obligations over land through the clan elders who are responsible for overseeing the administration of all clan land. Accordingly, clan elders have the right to allocate unused land, to allow individuals from within and without the clan to occupy and use unused clan land and to declare void any land transaction undertaken without their consent. Clan elders are furthermore responsible for ensuring the proper use of the lands communally used for grazing or hunting purposes which are generally vested in the clan as a whole (cf. Bibaako/Ssenkumba 2003: 234; LEMU ?). Adding to that, clan authorities also exercise broad jurisdiction over land-related disputes within their areas of control. In fact, according to a study on land conflicts in Uganda conducted by John Kigula (1996, qtd. in Okumu Wengi 1996: 51) "almost all intra familial land disputes were said to be solved by elders of the family lineage or the clan." In short, it can be concluded that the overall responsibility of the clan elders is to protect all clan land while at the same time safeguarding the interests of all clan members (cf. Obol-Ochola 1971: 68).

Within the boundaries of the clan land each family has its own recognized area of land which remains theirs unless they choose to abandon it. While family land is generally owned by the family as a whole, it is usually the head of household that is responsible for the overall management of that land. A son becomes head of household upon marriage when he is allocated a piece of land by his father which he is to hold in trust for his wives, children and other family members with a claim to that land. His wives are furthermore entitled to their own piece of land which he is to allocate to them upon marriage (cf. LEMU ?). In general, a son can only be allocated family land from the part cultivated by his mother, not from the land worked by her co-wives (cf. Carswell 2007: 93). In cases where the father does not have enough land at his disposal, the son usually has to turn to the clan elders to be allocated a parcel of unoccupied clan land (cf. Obol-Ochola 1971: 68).

In Lango and Teso tradition – and supposedly also in other communities – a woman can assume the position of head of household in the event of widowhood when she takes on the responsibility to manage both the land allocated to her upon marriage as well as the land of her minor children which she is to allocate to her sons when they show intention to marry and start their own family. An unmarried woman with children born out of wedlock can also become head of household on her father's clan land, provided that the

biological father of the children has not claimed their heritage by paying compensation to the mother's clan (cf. LEMU 2008a: 2, LEMU 2009: 38f.).

Contrary to the common assumption that under customary land tenure all rights are enjoyed communally, individual clan members are usually granted a wide range of individual rights over their own plot of clan land. Generally, once an individual has established a valid claim over a piece of land by means of either inheritance, purchase, donation or gift their rights over the land include the right to cultivate, to enjoy the benefits of their agricultural produce, to build, to delegate cultivation rights through renting or sharecropping arrangements as well as to bequeath and subdivide the land. Land sales, however, are subject to prior approval by the clan elders. Rights that are in fact enjoyed by the community as a whole include the right to graze cattle on clan lands set aside for this particular purpose, to collect firewood, clay deposits as well as grass for thatching and to use water from wells and rivers (cf. Nsamba-Gayiiya ?; Obol-Ochola 1971: 68).

In view of the clan tenure arrangements discussed above, it becomes obvious that the assumption propagated by adherents of the evolutionary theory of land rights that there is a linear progression from communal to individual land ownership clearly does not hold in this case. Rather, the example of clan tenure in Uganda has shown that existing tenure arrangements are "genuine multi-tenure systems with different land uses calling for different tenures" in which "individual tenure can exist under a general system of corporate ownership." (Platteau 1996: 33)

Inheritance of Land

Considering that most societies in Uganda are patrilineal, both lineage and property are traced through the male line meaning that land is usually passed on from father to son (cf. Lastarria-Cornhiel 1997: 1322).

In most communities customary succession to land is governed by the will of the deceased which can be either oral or written. However, given that customary inheritance practices are deeply rooted within the culture and social relations of a given community, written wills are infrequent as community members are generally familiar with the customary requirements in the event of death (cf. Obol-Ochola 1971: 69).

In the case of an oral will the aging family head usually divides up his property among his successors in the physical presence of the clan elders who are supposed to ultimately implement his wishes upon his death. In most cases this means that the deceased's land

is to be distributed between the customary heir and those sons who have not yet been allocated any family land. Where a family head dies intestate, the clan elders have the right to distribute the deceased's land in accordance with their customs (cf. HSRC/ICRW/AfD 2008: 107).

In most cases it is the eldest son that is installed as customary heir, provided that he has proven responsible and trustworthy (LEMU ?). In case the family head dies leaving minor sons, the widow as head of household is to hold her children's land in trust for them until they come of age in addition to managing the land allocated to her upon marriage. Should the widow decide to leave her late husband's family or should the death of a family head leave minor children orphaned, one of the deceased's brothers takes on the trusteeship of the children's land (cf. LEMU 2008a: 2; LEMU 2009: 38, 40). Only in the absence of a son, does another male relative of the deceased, generally one of his brothers or nephews, take the position of customary heir. Regarding the rights and responsibilities associated with customary succession, it needs to be pointed out that customary heirs assume authority only over unallocated family land. Land that has already been distributed to other family members does not fall under their jurisdiction (cf. Bibaako/Ssenkumba 2003: 248, LEMU ?, Okumu Wengi 1996: 52). Moreover, it is important to point out that all inherited land remains family land and does not turn into the individual property of the heir upon the death of a family head. Rather, the heir takes over the responsibility to manage the family land for the good of all family members (cf. LEMU 2008a: 2; LEMU 2009a: 1).

In most parts of Eastern and Northern Uganda it used to be common practice for a father to pass on unallocated family land to his eldest son only. However, nowadays in an environment of increasing land scarcity family heads tend to divide up their land between all their sons rather than passing on the land to one son as a single family holding (cf. Adoko/Levine 2008: 109).

Generally it can be concluded that where land cannot be handed down vertically to sons it is usually passed on horizontally to brothers (cf. Okumu Wengi 1996: 51).

5.3.2 Village Tenure

Village-based land tenure is another important form of customary landholding in Uganda, mostly to be encountered in villages formed around trading centers, schools, churches, water pump stations, dams and local government headquarters. In its nature village tenure does not significantly differ from clan-based tenure. As a matter of fact, village leaders and chiefs usually exert the same institutional control over land as clan elders do and also the nature and scope of rights enjoyed by individuals are similar to those of individuals holding land under clan tenure. The fundamental difference between clan and village tenure is to be found in the basis of membership. While clan tenure is built upon the principle of kindredship with individuals gaining access to land by virtue of clan membership, village tenure does not require landholders to belong to a certain clan. This is because a village constitutes a social unit in itself regardless of the fact that its members may not share the same ancestor (cf. Obol-Ochola 1971: 69).

5.4 Women's Land Rights under Customary Law in Uganda

In light of the fact that the customary rules governing women's access to land have evolved significantly over time adapting to changing circumstances, this chapter first outlines the principles underpinning women's access to land in pre-colonial and colonial Uganda before turning to the basic rights in land granted to Ugandan women under contemporary customary law.

5.4.1 Gender Relations and Women's Land Rights in Pre-Colonial Uganda

In most pre-colonial societies in Uganda individuals gained access to land through their clan and family structures which ensured that no community member was left landless (cf. Walubiri 1994: 155). The most significant factor guaranteeing both men and women's access to land back then was certainly the marriage contract. In fact, men were granted land through their lineage only once they showed intention to marry, thus it was “the subject 'woman' that accorded the man access to land.” (MISR 2002: 74) Women, on the other hand, gained access to land through their husband's clan. Upon marriage they were allocated a piece of land which would generally remain under their control until death unless they chose to leave their husband's family. They usually enjoyed exclusive rights of cultivation to that land in addition to owning the agricultural produce

derived from it (cf. Nuwagaba 1999: 22; Sebina-Zziwa 1995: 7). The degree of control exerted by women over their plot of land can be illustrated by the example of Kigezi District where a woman could not be deprived of any land allocated to her upon marriage without her consent, even in cases where her husband was in need of land himself (cf. Carswell 2007: 102).

Thus, during marriage both husband and wife usually had their own portions of land to cultivate, although it was common for both spouses to help in the planting and weeding of each others' gardens. While the produce of the wife's garden was exclusively to provide for her and her children, that of the husband's was retained for clan festivities and, where kingdoms had emerged, to pay tribute to the monarch (cf. Sebina-Zziwa 1995: 3). In Iganga a married woman also retained usufructuary rights to land in her natal home and sometimes even to the family land of her mother's provided that she was cultivating the given plot permanently (cf. Mukwana 1998: 56).

Due to the assumption that once married, women would be provided for by their husband's clan, they generally did not inherit any land or property from their natal family. In Buganda, for instance, upon the death of a family head the clan would appoint an heir to the deceased, in most cases one of the deceased's brothers, who was to act as a guardian for the deceased's children. While for some time girls were able to inherit from their paternal aunts, this custom was later abolished when Kabaka Mutesa I introduced the practice of land being passed on directly from father to son under Arab influence (cf. Nuwagaba 1999: 24; Sebina-Zziwa 1995: 8). Despite the fact that Baganda women, with the exception of females belonging to the royal family, were largely denied any inheritance rights to land, widows could generally live undisturbed on their plantation until death when the land would revert to the customary heir (cf. Nuwagaba 1999: 26). In most cases, the main reason for the widespread exclusion of women from inheritance practice was to ensure that land would remain within the clan. Given that upon marriage a daughter entered her husband's family, any land bequeathed to her by her father would have eventually devolved to her husband's kin (cf. Mukwana 1998: 59; Sebina-Zziwa 1998: 48).

However, there is a wide range of evidence that in other societies of pre-colonial Uganda women's inheritance rights where considerably stronger than in Buganda. This was the case in Acholi, Alur, Kigezi and Lango, for instance, where matrilineal inheritance of land through mothers was practiced (cf. Bibaako/Ssenkumba 2003: 235). Yet, inheritance by daughters also occurred under patrilineal succession systems.

Among the Basoga, for instance, daughters of chiefs could inherit land from their fathers which they could own and freely dispose of. In nineteenth-century Toro, to list another example, women were known to inherit property including land and livestock from their fathers regardless of whether there were sons in the family or not. Where there were no sons, daughters could even assume the position of head of household. They could freely dispose of inherited land which would generally remain in their sole control also during marriage. Given that matrilocal marriage practice was common in Toro, it was usually the husband who left his natal community to live with his wife's family. As a result, many social roles usually reserved for men were largely filled by women at that point in time (cf. ibid.: 235). In fact, between 1830-90 the position of Toro women independent of their marital status "was somewhat higher than it was in some other societies in Africa." (Perlman 1966; qtd. in Sebina-Zziwa 1995: 9).

In conclusion it can be noted that men and women were both accorded similar rights in land during the pre-colonial era. In many areas, women exercised considerable control over the land cultivated by them and the produce derived from it, also upon widowhood. While women's access to land was primarily through the husband's clan, some married women retained usufructuary rights to land also in their natal home. Furthermore, there is a wide range of evidence of daughters inheriting land in some areas despite the fact that, in general, land was passed on to male descendants.

5.4.2 Gender Relations and Women's Land Rights under Colonial Rule

Upon the acquisition of control over what is now known as Uganda, colonialists introduced a number of significant political, social as well as economic changes that have had far-reaching consequences for women up to the present. (cf. Mukwana 1998: 61).

One of the most fundamental changes, aimed at tightening British colonial rule in the dependency right from the beginning, was brought about by the 1902 Uganda Order in Council which provided for the applicability of the common law and other legal provisions in force in England (cf. Nuwagaba 1999: 30). This had severe implications for Ugandan women and their position within the colonial society as many aspects of the Western ideal of gender roles at that time were simply conferred upon the colonized population with the introduction of the British legal system (cf. MISR 2002: 73). Given the male-dominated property regime prevailing in England at that time, colonialists

generally did not accommodate the idea of Ugandan women as land owners which is why women, with the ironical exception of the Queen of England and a few females belonging to the Baganda royalty, were not considered in the 1900 Buganda Agreement (cf. Mukwana 1998: 62; Okumu Wengi 1996: 47).

Even in cases where the British law was favorable to women, Ugandan females were largely excluded from the possible benefits. Of particular importance in this context is the Married Women Property Act which had been passed in England in 1882 and accorded married women the right to own property in their own name (cf. Mukwana 1998: 61). While in theory the provisions under this act were also applicable in Uganda, Ugandan women hardly ever benefited from it. This was partly due to the fact that even back in England male control over female property was still widespread and commonly accepted in practice (cf. Chanock 1991: 80f.). A more important factor at play, however, was the fact that the British judge Hamilton simply denied the validity of customary marriage due to the existence of a bride price. Rather, he referred to African marriage as some kind of "wife purchase" (*Rex v. Amkeyo* 1917; qtd. in Ntambirweki 1996: 30). This inevitably implies that customarily married women were not considered to be legally married and were therefore denied any protection provided under the Married Women Property Act. If a couple was to enjoy the benefits of the protective provisions contained within the common law they had no choice but to enter into a civil marriage under the Marriage Act 1904 (cf. UWONET 2006: 25). In the African context, however, this did not benefit all women equally. Due to the fact that civil marriages are monogamous, a husband who had married multiple wives under custom could enter into a civil marriage with only one of his wives, leaving the other ones without legal protection (cf. Kameri-Mbote 2002: 8).

It was not only the formal law that put women at a disadvantage, but also the jurisdiction of the newly established customary courts that were to adjudicate over matters involving Ugandans applying native customary law. Given that most of these native courts were dominated by males, men's interests were generally favored over those of women in the name of "custom". This becomes obvious when looking at a few decided cases. In *Batinda for Kiteyirwano v. Byalugaba* [Civil Case No. 54/44 at 25], for instance, the court held that the plaintiff trying to assert her interests after her husband's death "being a mere woman who gave birth in a clan cannot interfere with probate matters." (qtd. in Nuwagaba 1999: 32) In *Bernado Kanyike v. Eria Wembuganye* [Civil Case No.104/1944], to list another example, the court did not object

to a father chasing his daughter off his land because he had found her unhelpful and did not need her any longer to fend for his other children (cf. ibid.: 32).
Yet, it needs to be pointed out that the picture drawn above does not reflect the situation in all of Uganda at that particular time. In fact, according to Lynn Khadiagala (cf. 2002: 1), customary courts in Kabale District, routinely upheld women's land and property rights, even where this was to the disadvantage of the husband. Apparently, in the case of Kabale it was not until the 1960s that the courts adopted an increasingly patriarchal vision of gender roles within the African household.

Colonialism brought about a number of significant changes not only at the political level, but also within the economic sphere. One of the first steps taken during the consolidation of British colonial rule was the introduction of a market economy geared towards realizing economic prosperity back in Britain. As a consequence, increasing portions of land were alienated for cash crop production and large numbers of males were recruited for forced labor in order to ensure that production targets were met (cf. Mukwana 1998: 61, 65). Given that the newly introduced hut tax was required of males only, men were generally forced to market their labor outside the domestic circles in order to earn money in cash (cf. Englert 2005a: 40). This development fundamentally changed the nature of the Ugandan household given that as a result women's labor was largely domesticated, while men were benefiting from monetary employment and education (cf. MISR 2002: 74; Nuwagaba 1999: 4). Despite the fact that most of the labor for cash crop production was provided by females the agricultural produce was generally controlled and owned by men, which further contributed to the gradual subjugation of women in Ugandan society (cf. Sebina-Zziwa 1995: 8).
The introduction of land titling in some parts of Uganda also proved to be detrimental to women as land was almost exclusively titled in the name of the male head of household. In fact, land ownership by women was viewed as an impediment to development given the assumption that a man would have no incentive to invest in land "over which he had no tenuous transitory tenure" (Kettlewell?, qtd. in Mukwana 1998: 63). As a result, rights in land were increasingly concentrated in the hands of males who could freely dispose of the land as they desired. The increasing individualization of land tenure was particularly problematic in light of the fact that with the introduction of a cash economy land had acquired cash value and was increasingly perceived as a marketable commodity rather than a source of food (cf. Lastarria-Cornhiel 1997: 1324f.). As a result, land transfers became more frequent as men began to sell off pieces of their land

for other gains. For women, more often than not, such sales were tantamount to a loss of rights and access to land previously cultivated by them. Their already precarious situation was further exacerbated in that they were not able to benefit from the emerging land market since their domestic labor was largely unremunerated (cf. Mukwana 1998: 66; Nuwagaba 1999: 3f.).

Other than that, women's ability to become economically independent was further impaired by the onset of urbanization which was often associated with a withdrawal of male labor from the rural household. Given that it was mostly men that migrated to towns in search of better employment opportunities, the responsibility for domestic food production generally remained with the woman depriving her of the possibility to assume work outside the own household (cf. Mukwana 1998: 67).

In view of the above it cannot be denied that gender constituted a key determinant of women's access to and control over land during the colonial period. Under the patriarchal structure of colonial society, male control over land and property and was gradually reinforced while women's role was largely reduced to domestic food production (cf. Lastarria-Cornhiel 1997: 1320). To make matters worse, the change in social structures brought about by colonialism resulted in the gradual erosion of customary institutions safeguarding the strong usufructuary rights to land held by women in pre-colonial times. This reduction in customary protection, however, did not bring about a reduction in women's responsibilities (cf. Bibaako/Ssenkumba 2003: 239f.; Kameri-Mbote 2002: 4). On the contrary, with men taking up monetary employment and migrating to urban areas, many rural women were faced with an even greater labor burden, especially with regard to agricultural production (cf. Englert 2005a: 40). At the same time women's access became increasingly dependent on the good will of male family members as the introduction of individual land titling further entrenched male domination in land matters (cf. Kameri-Mbote 2002: 7). Considering the many changes introduced by the colonial regime and their severe impact on women's access to and control over land it has been argued that the colonial period marked “the beginning of the disappearance of women's rights in land.” (Sebina-Zziwa 1995: 8)

5.4.3 Principles Governing Women's Land Rights in Contemporary Uganda

As has become clear, women have long had access to land in Uganda and even though women's rights in land have been significantly weakened as a result of colonialism their access to land is still safeguarded under contemporary customary law. Considering the great diversity in customary practices this section merely seeks to provide a general overview of the different customary land rights enjoyed by different categories of women in Uganda today. While the basic principles underlying women's customary claims to land are quite similar across the country, actual practice on the ground may vary from community to community.

As in most patrilineal societies customary land in Uganda – once allocated by the clan or community authorities to the male head of household – is passed on through the male line, from father to son (cf. LEMU ?). This inevitably implies that "[t]he nature of women's rights in patrilineal societies is dependent on [their] relationship with a male, usually a father, husband, brother or son." (Rugadya 2007: 1) Given that the nature and scope of customary land rights are derived from the individual's position within the family, women' claims to land vary according to different stages in their life cycle and changing family circumstances. In practice, the most important determinant of women's land rights under customary law has been their marital status (cf. LEMU 2011: 3).

Marriage practice in most Ugandan communities is exogamous and virilocal, meaning that a woman marries outside her father's clan, which is also her own, and goes to live in the community of her husband's father. Among the Baganda, for instance, the fact that women marry into their husband's lineage makes them "wives" to that lineage implying that a woman's senior male and female in-laws exert a similar authority over her as her husband (cf. Lastarria-Cornhiel 1997: 1322, Sebina-Zziwa 1998: 48). Due to the fact that on marriage a woman gains rights to the land of her husband's clan, a daughter usually is not allocated any land in her natal home given that it is the responsibility of the husband to provide her with an adequate piece of land for cultivation. In cases where the husband chooses to take another wife, he has to ensure that the married woman will remain with enough land to provide for her and her children (cf. Adoko/Levine 2008: 108, LEMU ?).

Upon widowhood, customary law provides for women through the customary institution of "levirate marriage" – also referred to as "widow inheritance" – a practice ensuring the widow's continued use rights over the land she has been cultivating during the

marriage (cf. Bibaako/Ssenkumba 2003: 243). Traditionally, the clan elders would appoint an inheritor, in most cases one of the late husband's brothers, to assist the widow in terms of work and protection. However, due to the spread of HIV/AIDS the practice of widow inheritance has been increasingly abandoned (cf. Adoko/Levine 2008: 108f.; LEMU ?). Nowadays, after her husband's death a widow normally gets to choose whether she wants to stay in her matrimonial home without remarrying or pick an inheritor from within or without her husband's family. If the widow decides to remain in her marital home, she becomes head of household taking over the responsibility to manage the land allocated to her upon marriage and to hold family land in trust for minor children. In fact, even in cases where the widow chooses an inheritor to support her, the management rights over family land pass on directly from the deceased husband to the widow. Alternatively, the widow can also choose to return to her natal home or remarry within an entirely different family. In reality, however, widows tend to remain in their matrimonial home as in a context of rising land scarcity and fierce competition over land there is most likely not going to be enough land left for them at their maiden home (cf. Adoko/Akin/Knight 2011: 3f., LEMU ?). Moreover, a widow will generally lose her use rights to the land allocated to her by her husband if she chooses to leave her husband's family (cf. Bibaako/Ssenkumba 2003: 22). It is important to point out at this stage that while widows are usually free to enter into a relationship with a person of their choice, men from outside the clan cannot lay a claim to any land of the widow's family (cf. LEMU 2009: 2).

Whereas a widow has the possibility to remain at her matrimonial home, a divorced or separated woman has no other choice but to move back to her natal family where she is supposed to be given land by her parents or – in some communities – by the brother who used her dowry to marry. Her children usually remain with their father given that they would put their inheritance rights to their father's land at risk if they weren't physically present (cf. Adoko/Akin/Knight 2011: 4f.). This practice is also common in Buganda, where women receiving land from their natal family in the event of divorce are referred to as *Nakyeyombekedde* - "the woman who built her house alone" (cf. Obbo 1976: 378; Ssewakiryanga 2011: 21).

Where a woman remains unmarried she has the right to be allocated a piece of land for her personal use by her father. However, in her case there is no "trigger" event such as marriage for the son or death of the husband for the widow to ensure that she is actually allocated land, as there always remains the possibility that she might still get married

despite her increasing age (cf. ibid.: 4). In Lango tradition, where an unmarried woman is mother to children born out of wedlock she assumes the role of head of household and has the right to allocate land to her children once they come of age, provided that their biological father has not claimed their heritage by paying compensation to their mother's clan (cf. LEMU 2009: 39).

The assumption that women are eventually going to get married and enter their husband's clan also has a great impact on women's inheritance rights. As mentioned before, fathers usually do not allocate any land to their daughters because if they did, the land allocated to them would devolve to their husband's clan upon marriage. Husbands are generally reluctant to bequeath land to their wives for the same reason – they want to make sure their land does not leave the clan in case the widow decides to remarry outside her husband's kingroup (cf. Rugadya 2007: 9). Yet there are a few exceptions to this rule, especially where customary land ownership has become increasingly individualized. Among the Bakiga and the Baganda, for instance, girls have been able to inherit land from their fathers for a long time. However, the inheritance rights of daughters in such cases have generally been confined to lands and property of uneconomic categories meaning that the lands bequeathed or donated to daughters by way of gift usually do not have any economic or exchange value (cf. Okumu Wengi 1996: 54). Some parents, however, have begun to show a shift in attitude and are increasingly handing down land to their daughters partly as a result of the increasing incidence of marriage instability. Moreover, girls are often perceived to be more responsible and less prone to opportunistic behavior than their brothers who tend to be more likely to sell off family land in order to meet immediate financial needs (cf. Bibaako/Ssenkumba 2003: 249f.).

The primary source of customary protection of women's land rights is the family head who is responsible for safeguarding the land rights of all those with a claim to family land. However, in cases where family heads do not meet their responsibilities, the clan is supposed to step in as the final guarantor of a woman's rights to land (cf. Adoko/Levine 2008: 110f.; LEMU 2008: 3).

5.4.4 Are Women's Customary Land Rights of Secondary Character?

The attempt to capture the nature of customary claims in Western legal terms has led to the widespread assumption that multiple claims under customary law constitute a bundle of rights, in which some are primary while others are of secondary character. Given that in most customary societies women's land rights are mediated through their relationship with a male, their land rights – as wives, sisters, daughters or mothers – have generally been characterized as secondary and subordinate to those of men (cf. Yngstrom 2002: 25).

However, as some authors have pointed out, this hierarchical ordering of customary claims is inappropriate in the African context given that the realities of land relations experienced by both men and women are much more complex as they "depend on negotiations within the conjugal unit as well as on the ties with the natal kin and extended family, and are mediated by broader institutional and social change." (HSRC/ICRW/AfD 2008: 6) As has been outlined earlier on, customary claims to land vary according to the individual's position within the family. The fact that under customary law men and women have inherently different rights and responsibilities in their role as family members, also with regard to land, does not necessarily imply that women's land rights are weaker or of secondary character just because they are not identical in content to those of men (cf. LEMU 2008: 2).

In fact, it has been argued, that women's land rights are usually very secure in light of their husband's social obligation to provide for them and their children. It needs to be kept in mind that, strictly speaking, a woman does not gain access to land only through her husband but also by joining his kingroup that is obliged to intervene in her favor if the husband is unwilling to provide her with land (cf. Quan 2007: 56; Yngstrom 2002: 35). At the same time, as has become clear in the case of Uganda, women often retain residual rights in their natal home also after marriage to secure them against the risks associated with separation and divorce (cf. Adoko/Akin/Knight 2011: 4f.). However, the actual strength of women's land rights is often overlooked by "focusing exclusively on the allocative power of male household and family heads, to the neglect of the social context in which these rights are exercised." (Quan 2007: 56).

This does not mean that the high levels of tenure insecurity presently experienced by many women across Sub-Saharan Africa are not real. Rather, the argument is that their vulnerability does not result from the allegedly secondary character of their customary

land rights but from the various socio-economic processes that have significantly altered the terrain in which customary land rights are currently negotiated. Only if the issue of women's land rights is situated within the wider context of economic and social transformation it can be explained why "married women do experience tenure insecurity as wives in certain historical contexts and not in others." (Yngstrom 2002: 32)

Hence it can be concluded that, contrary to common belief, women's customary land rights are not of secondary character but are, just as those of men, derived from their position and responsibilities within the larger family unit. As has become clear in the Ugandan case, customary law as such does not discriminate against women, but recognizes their vulnerability and includes clear provisions to protect their access to land in different stages of their life cycles. The tragedy of today, however, is that for a number of reasons customary systems have been weakened "releasing the family and the community from its customary obligation to some of its members, such as women." (Lastarria-Cornhiel 1997: 1324) Part of the next chapter will be to assess how this situation actually plays out in the Ugandan context.

6 Women's Land Rights and Tenure Security in a Context of Legal Pluralism and Land Tenure Privatization

Having discussed both the statutory legal framework and the customary environment governing women's land rights in Uganda as well as the relevant historical aspects that have influenced women's claims to land throughout the 19th and 20th centuries, it is now about time to look at the reality on the ground in order to assess the extent to which women have actually been able to benefit from the protection provided to them under the different legal systems. Accordingly, this chapter serves the purpose of shedding light on the various aspects determining women's access to and control over land in practice while at the same time exploring the existing and potential threats to women's tenure security. In doing so, the chapter draws on both, relevant information contained within the literature and, more importantly, the data collected during my fieldwork in Mbale, Apac and Ntungamo districts of Uganda. However, before turning to the discussion of the research data I will first give a background to my fieldwork and outline the methodological approach underlying this chapter.

6.1 Methodological Background

6.1.1 Background to the Field Research

The field research in Uganda was carried out from July to September 2011 in the course of a research internship on women's land rights and tenure security with the Uganda Land Alliance (ULA). Right from the beginning of my stay in Uganda I found myself within a setting that could not have been better for the purpose of my research. With the Women's Land Rights Movement Uganda – a loose coalition of different NGOs under the auspices of ULA – officially launched just the year before I was surrounded by vivid debates on how to best secure women's rights to land in a context of legal pluarlism and increasing commercialization of land that spanned well beyond the institutional borders of the movement.

As outlined earlier on in Chapter 2, the discourse on women's land rights in Uganda is very much dominated by two almost conflicting perspectives, the rights-based approach on the one hand and the pro-customary approach on the other. During my internship I was able to gain valuable insights into both approaches given that my association with the ULA provided me with a gateway not only to the field but also to other NGOSs and research institutions active in the area of land rights. This was particularly helpful in the

preparation of my fieldwork as it allowed me to discuss my research concept with representatives not only of the ULA but also of other institutions such as the Land and Equity Movement in Uganda (LEMU) and the Makerere Institute of Social Research (MISR). As a consequence, I was able to consider the different voices and perspectives on women's land rights already at an early stage of my research which further encouraged me to also reflect on my own positions and assumptions on the topic right from the beginning. Adding to that, the valuable inputs and suggestions made by the land rights experts consulted allowed me to develop an adequate structure for my research project and were of great help in the selection of the methodological approach and the design of my interview questions.

6.1.2 Areas Covered

In consultation with ULA executive director, Esther Obaikol, Mbale, Apac and Ntungamo districts where chosen for the fieldwork. Given the great diversity of land tenure systems across Uganda, the three districts where selected due to their contrasting geographical locations within the country. This allowed me to capture regional differences in land tenure practices and helped me to deepen my understanding of the various land-related issues many women in Uganda are currently faced with. Moreover, as all those three selected districts are areas of ULA operation I was able to work with the local ULA member organizations which greatly facilitated my access to the field.

Characterized by its highly mountainous landscape and volcanic soils, **Mbale** District is located in the Eastern part of Uganda covering a total area of approximately 1373 square kilometers (UBOS 2011: 85). The predominant ethnic group in the district is the Bagisu which is why Mbale is often referred to as Bugisu, the land of the Bagisu. In 2011 the Uganda Bureau of Statistics (UBOS 2011: 112) estimated Mbale's population at 441,300. Due to the high population density of 534 persons per square kilometer (UBOS 2006: 13) and the geographical features of the district there is a substantial land shortage in the region. This has led to the clearing of hill tops for cultivation which has been one of the major causes of the land slides in the area (cf. Ovonji-Odida et al. 2000: 82). Most land in Mbale is held under customary clan tenure with only a few leaseholds and freeholds to be found mainly in the (peri-)urban areas of Mbale town (cf. Sebina-Zziwa 1995: 19). However, the incidence of freehold tenure in the district is expected to increase given that the two parishes of Bumbobi and Bumasikye have been subject to

the government's systematic demarcation program launched after the enactment of the 1998 Land Act (cf. MLHUD 2010: 35)

Apac is located in Central Northern Uganda and covers a total area of approximately 6541 square kilometers (UBOS 2011: 86). Part of the Lango sub-region, the district is predominantly inhabited by the Langi ethnic group. Following the rise of Yoweri Museveni's National Resistance Movement, Apac's local economy was almost completely destroyed by the violence and has never fully recovered. Today, Apac is hardly industrialized with only a few small urban centers and a predominantly rural population that is almost entirely dependent on agriculture (cf. Adoko/Levine 2005: 1). In line with the most recent census 2002 Apac's current population is projected at 349,000 (UBOS 2011: 11) with a density of 116 persons per square kilometer (UBOS 2006: 13). With an annual population growth rate of 3,5% (UBOS 2006: 18), however, population density is expected to increase substantially in the near future. Most land in Apac district is held under clan-based customary tenure with only a few freehold and leasehold plots located in the (peri-)urban areas.

Ntungamo District is located in the South-western part of Uganda and covers a total area of approximately 2055 square kilometers (UBOS 2011: 86). The ethnic groups predominant in the district include the Banyankole, the Bahima, the Bakiga, and the Ugandan Banyarwanda who started settling in Ntungamo when the Hutu majority came to power in Rwanda in 1959 (cf. Tukahirwa 2002: 16). Ntungamo's current population is estimated at 480,100 (UBOS 2011: 109) with a population density of 192 persons per square kilometer (UBOS 2006: 18). The dominant form of landholding in Ntungamo differs signficantly from the clan-based customary tenure in Mbale and Apac. While most of the land is held in accordance with customary rules, access to land is highly individualized meaning that land is controlled by family units rather than the clan (cf. Carswell 2007: 90f.). Freehold and leasehold tenure are still uncommon in the district and most likely to be found in the (peri-)urban areas. Freehold tenure, however, is on the increase, especially in Rukangaro parish which was one of the first areas surveyed and plotted in the government's systematic demarcation programme (MLHUD 2010: 35)

6.1.3 Methodological Approach

The overall aim of my fieldwork in Uganda was to explore the different factors affecting women's land tenure security under customary tenure while paying particular attention to the various reasons for land loss experienced by women. Given that in my text I wanted to capture as much as possible the voices of women on the ground, I decided to take up a qualitative approach to the topic rather than a quantitative one.

Considering my strict time limit of four weeks the focus group methodology, as discussed by Flick (2004: 180ff.) and Bohnsack/Schäffer (2001: 324ff.), was chosen as the main mode of data collection during the fieldwork given that focus groups allow the researcher to collect in-depth information about social systems also within a relatively short timeframe. All of the discussions were guided by a set of open-ended questions that were designed to encourage the participants to express their views, share their personal experiences and comment on each other's anecdotes. As literary analysis conducted prior to the field work had indicated that marital status is a key determinant of women's land rights under customary law, it was ensured that married and cohabiting as well as widowed, divorced and unmarried women were included in the focus groups.

In addition to the focus groups discussions, key informant interviews were conducted in each district. Respondents included representatives of the local government administration and local NGOs active in the area of land rights. Given that in most cases the key informants were interviewed at their workplace there was a strict time limit to the interviews which is why the questions posed had to be very precise and on point. Key informants were mainly targeted to collect data on the implementation of the new land law, the institutional capacities for handling land disputes in the district and the role of their institutions in the protection of women's land rights.

6.1.4 Structure of the Field Research

The fieldwork was first carried out in Mbale from where I travelled straight to Apac and then on to Ntungamo. In each region, I was accompanied by a representative of the respective local ULA member organization in the district. All three of them were so kind as to assist me during the research in the respective districts selecting the communities to be consulted and scheduling both the focus group discussions and key informant interviews. They were present during all the focus group discussions held in the respective districts and sometimes also functioned as translators given that in some

rural areas knowledge of English was only minimal. Their support and company during the fieldwork did not only enrich my stay in the respective study area but also provided me with an opportunity to exchange personal views and thoughts on the issues raised during the different interviews.

In total, 9 key informant interviews and thirteen focus groups discussions were held in twelve different communities. Out of the 165 focus group participants 158 were female and 7 were male. Initially it was planned to conduct focus group discussions for women only, however in a few discussions one or two male community members were participating. While it is often considered problematic to interview women in the presence of males, I did not make this experience. In my case, women were just as talkative and straight forward as those participating in all-women focus groups. The number of participants per focus group varied from eight to twenty persons. At first, it was planned to confine the number of interview partners to ten persons per group, however, due to the fact that the discussions were generally held in an informal setting within the communities (mostly in someone's homestead in the shade of a tree) we often attracted the attention of other community members who asked to take part in the discussions. Against all prior reservations, the sometimes relatively large size of the focus groups did not negatively affect the dynamics of the discussions. Quite the contrary, the discussions often received fresh impetus as new ideas and personal experiences were shared.

In Mbale, where I was working with David Mabonga, a member of the Mbale paralegals, four focus group discussions were conducted in the communities of Bumbobi, Lukhonge and Nakaloke with a total of forty two women and three men interviewed. Adding to that, four key informant interviews were held with the Land Officer, the Probation and Social Welfare Officer and NGO representatives of the "Women Concern Ministry" and the "Mbale Paralegals".

In Apac, ULA Land Rights Desk Officer Humphrey Okilla kindly assisted me in my research arranging six focus group discussions in the communities of Upper Center, Angayiki, Abany Iping, Abotaber Village, Aduku Senior and Amilo. In total, sixty two women and four men took part in the discussions. Key informant interviews were held with the Probation and Social Welfare Officer and a representative of LEMU Apac. Initially the Land Officer should have been interviewed as well, however, upon my arrival it turned out that the land office in Apac has not yet been established.

In Ntungamo, I was accompanied by Priscah Tumusiime who has been part of various community sensitization activities on women's land rights across the district. With her support three focus group discussions were conducted in Bwongyera, Nyanga and Rubaare Town with a total of fifty four women interviewed. Moreover, key informant interviews were held with the Land Officer as well as the Probation and Social Welfare Officer.

All the interviews were recorded on tape and transcribed on the same day. However, for the purpose of this thesis literal transcription was considered unnecessary. In most cases it was the main statements and core information given during the interviews that were written down, although some parts of the interviews were transcribed rather precisely.

6.1.5 Writing

In my text I have tried to incorporate as much as possible, the different voices captured during the field research and let the material speak for itself. Given that the issue of women's land rights is a topic of great sensitivity, not only at national but also at local level, I have decided not to indicate the full names of my interview partners as I do not want my work to get anyone into any kind of trouble. Instead, I have referred to them by their first name only.

Due to the relatively strict time limit during my fieldwork certain issues raised during the interviews could not be investigated in depth while still in the field. Most of them regarded the implementation of the 1998 Land Act and the actual functionality of the newly established institutions. Further research into these issues has therefore been carried out consulting the existing literature.

MBALE

Figure 1 - Focus Group Discussion in Lukhonge Community

Figure 2 - Focus Group Discussion in Lukhonge Community

Figure 3 - Focus Group Discussion in Nakaloke Community

Figure 4 - View on Lukhonge Community

Figure 5 - Homestead in Abany Iping

Figure 6 - Focus Group Discussion in Abany Iping

Figure 7 - Focus Group Discussion in Amilo

Figure 8 - Swamps and grassland on the way to Apac Town

NTUNGAMO

Figure 9 - Focus Group Discussion in Nyanga

Figure 10 - View on Nyanga

Figure 11 - Matooke plantation

Figure 12 - Focus Group Discussion in Rubaare Town

6.2 Women and Land in Uganda: The Reality

"Land is life – without land you are no person." (Enin, A/FGD2)

In all the communities consulted both men and women listed land as their most important source of livelihood providing them with both, shelter and food. Without land they would have nowhere to grow crops, plant trees, build a home or graze their animals and hence nothing to derive an income from. In fact, with agriculture being the primary – and in most cases the only – source of revenue, many families are crucially dependent on the sale of the agricultural produce derived from their land to generate a regular cash income. Apart from being a source of wealth, land also provides a security against the risk of divorce or in case one drops out of school. Land was furthermore referred to as an asset given that it can be sold or hired out to raise money for various purposes, most importantly to pay for school fees and cover medical expenses. In other words, "without land, there is no life." (A/FGD6)

Needless to say that in such an environment secure rights to land are crucial for the livelihoods of both men and women, particularly in the rural areas. In order to gain a comprehensive understanding of the different factors determining and influencing women's tenure security on the ground, the following section seeks to provide an analysis of the land rights granted to women in practice, most notably their breadth and duration. Drawing on the evidence collected in the field, it first addresses women's access and control rights to land before discussing the different threats and vulnerabilities experienced by women throughout their life cycles.

6.2.1 Access to Land

In all the districts visited four major ways for women to access land could be identified – namely access by virtue of family membership, inheritance or donation, purchase and borrowing.

Family Access

As has been outlined earlier on, customary law grants each family member automatic rights to land, the content of which varies according to one's position within the family and, in the case of women, their marital status (cf. LEMU 2011: 3). This also becomes evident when looking at the data collected in the field. In fact, women in all the communities consulted confirmed that customarily their access to land is mediated through their relationship with a male, usually a father, husband, brother or son.

As daughters, unmarried women access land in their maiden homes which they are entitled to use for cultivation. However, in most cases the piece of land used while still unmarried is family land meaning that it does not belong to the unmarried girl, but to the family as a whole. Girls are not given their own personal shares of land due to the fact that they are considered to be in transit – once married, they will leave the natal home to go and stay with the husband's family. The land cultivated by them in the maiden home will then be used by someone else or, in some cases, sold off.

Upon marriage, a son is given a piece of land by his father part of which is to allocate to his wife to provide for her and her children. While it was generally stated that the land women access in their matrimonial homes belongs to their husbands, women in Apac emphasized that the land received from the father-in-law upon marriage had been allocated to both of them, husband and wife (cf. A/FGD4). In Mbale, some married women also retained usufructuary rights to land in their maiden home despite them having left their natal family to live with the husband (cf. M/FGD2, M/FGD3, M/FGD4). In all the three districts visited, customary marriage requires the husband to pay dowry – also referred to as bride price – to his wife's family. Dowry can be defined as “a token of appreciation to the bride's parents from the bridegroom's parents for having raised a girl good enough for their son.” (Nyakoojo 2002: 18) Depending on the agreement between the spouses' families it is mostly paid in cash and livestock. Strictly speaking, a woman whose husband has not yet fully paid dowry for her is not yet actually married but merely cohabiting with her husband provided that she is already living with him and his family (cf. M/FGD4, A/FGD3). Cohabitation is on the rise as bride price is often paid over a long period of time due to increasing poverty (cf. M/KI2). In general, however, couples tend to consider themselves as husband and wife whether dowry has been completed or not. During the fieldwork it could be observed

that the size and composition of the dowry paid gives a woman a certain kind of "status" in her society, especially in cases in which the husband paid an exceptionally high bride price for his wife (cf. A/FGD5).[6] Similar observations were also made by Jaqueline Asiimwe and Evelyn Nyakoojo (cf. 2001: 24) during their field study in Pallisa and Kapchorwa districts in Uganda where women whose dowry has not been paid are often ridiculed by other women.

In the event of widowhood, women are free to choose whether they want to stay with the late husband's family or return to their natal homes. In practice, however, women tend to prefer to remain in the matrimonial home to continue the cultivation of their field and to safeguard their children's hereditary claims to their father's land.[7] Only where a widow decides to remarry does she have to leave the late husband's family as from that point on she will be able to access land in her new husband's home with the land cultivated by her during the first marriage being left for her children (cf. M/FGD2, A/FGD6, N/FGD1). Whereas in Mbale and Apac widow inheritance is still practiced, it is unheard of in Ntungamo.[8] Making a widow one of her late husband's brother's wife, the underlying purpose of this customary institution is to ensure continuing use rights for women to the land they have been cultivating throughout their marriage (cf. Adoko/Levine 2008: 108f.). In Apac and Mbale the prevalence of the practice varies from one village to another. While generally on the decline mostly due to the spread of HIV/AIDS (cf. M/FGD2, A/FGD4, A/FGD5), widow inheritance is still commonly practiced in some communities (cf. M/FGD4, A/FGD3, A/FGD6). Where the practice is still common, it was generally emphasized that nowadays widows are free to decide whether they want to be inherited and by whom meaning that the clan no longer has the power to impose an inheritor upon a widow without her approval.

In case of divorce or separation a woman usually returns to her maiden home where she is given a piece of land by her parents or brothers so that she can provide for herself.

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[6] During the focus group discussion held in Abotaber Village, Apac, one woman proudly explained that nine herds of cattle, nine goats, two chicken, nine hoses, one spear, one suit for the father-in-law, one dress for the mother-in-law, one jerrycan of parafine, one box of soap and 300,000UGX were paid for her.

[7] Due to the increasing land scarcity within families minor sons are likely to lose their inheritance rights to their father's land if they follow their mother to her maiden home and are not physically present on their father's land.

[8] In Ntungamo the terms "levirate marriage" and "widow inheritance" were unknown to most respondents and often confused with a woman's ability to inherit land or property from her husband. Once the terms and their implications had been explained in more detail, all the women stated that they knew of no community in Ntungamo where widow inheritance was practiced.

Her children remain on their father's land, unless they are still too small to be separated from their mother. In some communities, however, a woman may be allowed to remain on the matrimonial land depending on the circumstances of the divorce or separation. In Lukhonge, Mbale, it was noted that if the woman is the one insisting on a divorce, she has no choice but to return to her natal family, whereas in cases where the husband wants to separate she might have a chance to stay on the matrimonial land (cf. M/FGD3). A similar view was also expressed in Abany Iping, Apac, where, apart from who wants to separate, the length of a marriage constitutes another decisive factor in the event of divorce. If a couple was married for long the woman can remain in the matrimonial home living in a separate house. However, the men participating in the discussion were quick to point out that this was only possible in cases where the woman had given birth. A childless woman has to return to her maiden home in any case (cf. A/FGD3). In Apac, women cited a case where the husband had been the one to leave the marital home upon divorce given that he had been residing with his wife's family during marriage and not the other way round (cf. A/FGD1) This is quite surprising as matrilocal marriage practice is very uncommon in contemporary Uganda. However, in light of the fact that prior to 1900 Langi society was organized along matrilineal lines such cases could be a relict of pre-colonial times (cf. Bibaako/Ssenkumba 2003: 235). In all the districts visited dowry has to be paid back upon divorce and, in fact, the great majority of separated and divorced women stated that their dowry had at least partly been returned to the husband's family. In Upper Center, Apac, however, it was pointed out that in cases where the dowry has not been completed at the time of divorce or separation, it does not have to be refunded. Rather, what has already been paid to the wife's family is regarded as compensation for the food and labor provided by the wife while the relationship still subsisted (cf. A/FGD1). Moreover, women in Bwongyera, Ntungamo, stated that the reason for the divorce is central in the decision on whether or not bride price needs to be paid back. Where a marriage failed on grounds of the wife's adultery or her practicing witchcraft, a refund of the dowry paid to her family is necessary (cf. N/FGD1).

It has become clear that under customary law a woman's access rights to land are greatly dependent on her marital status and family membership. Unmarried, separated and divorced women are guaranteed access to land through their natal families, whereas married women, cohabitees and widows usually access land in their matrimonial homes as upon marriage a woman joins her husband's family.

Donation and Inheritance

Customarily, land in Uganda is traced through the male line and usually passed on from father to son with the aim of expanding the clan or family lineage (cf. Rugadya 2007: 4). This was also confirmed by all the men and women consulted in the communities visited during the fieldwork. While the most common practice upon a father's death is to divide the family land among all the sons, there are some families in which the land is still passed on as a single holding to the customary heir, in most cases the most responsible son. Where a family head dies intestate, the heir is usually chosen by the clan or, in some cases, also by the widow (cf. M/FGD4, A/FGD2, A/FGD6). In Ntungamo, where the clan plays a less influential role, the extended family decides together with the local leaders on the distribution of family land in case the deceased has not left a will (cf. N/FGD1). Sometimes a father may also choose to distribute his land while still alive in order to avoid family disputes upon his death (cf. M/FGD4). Where there are no sons, the land generally reverts to the brothers or nephews of the deceased (cf. M/KI2, A/FGD1).

While donation and inheritance remain a major means for men to acquire land in Uganda, daughters only rarely inherit from their parents given that upon marriage a woman leaves her natal home and enters her husband's family. In fact, in Mbale a daughter is sometimes referred to as a visitor or “someone across the river” due to the assumption that she will eventually get married and be given her share of land at the matrimonial home (cf. Rugadya 2007: 4f., Ovonji-Odida et al. 2000: 20).

However, evidence on the ground suggests that customary inheritance practices are slowly changing. In fact, daughters are increasingly considered in the distribution of family land due to the rise in marriage instability and the perception that girls are more reliable in the maintenance of property than boys (cf. Bibaako/Ssenkumba 2003: 249f.). As a result, in all the districts visited girls are increasingly given land by their parents and in some rare cases in Mbale and Apac daughters are even installed as customary heirs (cf. M/FGD4, A/FGD2).

If land is actually allocated to girls in their natal home depends on the individual family. In some cases parents distribute land to unmarried daughters only, while others keep land also for those who have already left the family to provide for them in the event of

divorce or separation (cf. M/FGD4, A/FGD3, A/FGD5, A/FGD6).[9] The amount of land given to girls usually varies according to the number of boys in the family and the overall availability of land. In Ntungamo, where inheritance by daughters is still very rare, girls are more likely to be given land where there are no sons in the family (cf. M/KI1, A/FGD5, N/FGD1). Generally it was noted that the shares allocated to daughters are in most cases considerably smaller than those distributed to their brothers (M/FGD1, M/FGD2, A/FGD2, N/KI1). In fact, sometimes one plot of land has to be shared among all the girls of the family, while each of the sons receives his own separate share (cf. N/FGD1). In Agatha's case, however, the girls in the family were given more land than the boys due to the fact that exceptionally large dowries had been paid for them upon marriage (cf. M/FGD2).

While land is increasingly passed on to daughters as well, it is still uncommon for a husband to bequeath land to his wife. As revealed by other studies men tend to show more concern for their daughters than for their wives and daughters-in-law when it comes to women's security of tenure (cf. Nyakoojo 2002: 35; Ovonji-Odida et al. 2000: 22). In Apac, however, three female respondents reported that they had been considered in their husbands' wills and inherited a piece of matrimonial land (cf. A/FGD2, A/FGD4, A/FGD5).

It has become clear that in patrilineal societies a child is expected to inherit from the father's family (cf. Lastarria-Cornhiel 1997: 1322). In Apac, however, children born out of wedlock can also inherit from the mother, provided that the father has not claimed their heritage by paying compensation to the mother's clan for impregnating her. Under local custom, where a father fails to pay compensation and claim his child he does not show responsibility, "so eventually, much as he is the biological father, the children will traditionally belong to the mother and to the maiden home of the mother." (A/FGD3) Allowing a child born out of wedlock to take on the lineage of their mother, this custom protects the land rights of children who are unlikely to inherit land from their father's family, especially in cases where the father is not around. Similar customary arrangements can also be found among the Iteso (cf. LEMU 2008a: 1f.).

[9] In families where land is bequeathed to unmarried daughters only, parents generally expect their sons to share their land with a sister returning to her natal home upon divorce or separation (cf. A/FGD5, A/FGD6).

Where a cohabiting woman dies leaving behind a child, the father does not only have to pay compensation to claim their heritage but is furthermore required to complete the payment of dowry to her parents depending on the length of the relationship (A/FGD5). At this stage, however, it is important to point out that the customary practice of paying compensation to the mother's clan does not apply to the children of divorced or separated women. In all the districts visited children born in wedlock always inherit from their father's family regardless of whether they are staying with their father or mother. Consequently, upon the death of a divorced or separated woman the land used by her in the maiden home is not passed on to her children, but usually reverts to her brothers (cf. M/FGD2, M/KI4, A/FGD5, A/FGD6, N/FGD2).

As has become clear, women are increasingly acquiring land also by means of inheritance. Regardless of the fact that customary inheritance practices still tend to favor men over women, the attitudes of parents towards bequeathing land to their daughters are clearly changing. Crucial in this development seems to have been the increasing incidence of divorce and separation. In one community, however, it was pointed out that it was not until the enactment of the new law that daughters have increasingly been given land (cf. A/FGD3).

Purchase

With land becoming scarce and local economies being monetarized access to land has increasingly been achieved also by means of purchase (M/FGD4, M/KI2, A/KI1, A/KI2, N/KI1, N/KI2). The progressive commercialization of land has often been said to be particularly beneficial to women given that, ideally, land markets allocate according to purchasing power and not along gender lines. Hence, the option to purchase land, so the argument goes, provides an avenue through which women can circumvent the customary mechanisms of land acquisition that tend to favor men and own land in their own right (cf. Chimwohu/Woodhouse 2006: 361; Lastarria-Cornhiel 2003: 6).

However, the reality on the ground is somewhat different. Despite the fact the Ugandan Constitution provides for gender equality in respect to the acquisition and holding of land, the majority of women in Uganda have not been able to benefit from the emerging land markets (cf. Bomuhangi/Doss/Meinzen-Dick 2011: 6). This is due to the fact that "often women enter the market system with no property, little cash income, minimum political power, and a family to maintain." (Lastarria-Cornhiel 1997: 1326)

In fact, women in most communities confirmed that with agriculture being their main source of income they often lack the financial means to actually purchase land from the market. Adding to that, in the case of married women it is usually the husband who controls the sale of the agricultural produce and the money derived from it. As a result, the majority of land purchases have been made by male family heads (cf. M/FGD4, A/FGD1). Looking beneath the surface, however, it quickly turns out that in most cases this is only half the story. Women in the family often contribute considerably to the land purchases undertaken by male household heads, providing both cash and labor. Nevertheless, their contribution is hardly ever formally acknowledged as the sales agreement is usually in the husband's name with the wife's name appearing only as a witness, if at all (cf. A/FGD3, A/FGD6, N/FGD1, N/FGD2). In Apac, however, it was noted that where the family is seeking additional land to expand the matrimonial home, couples are increasingly purchasing land jointly with both their names on the sales agreement (cf. A/FGD1, A/FGD2, A/FGD3, A/FGD6).

Although it is still uncommon for women to purchase land independently, it is not completely unheard of. In fact, in all the districts visited a few women had managed to muster the resources necessary to buy their own piece of land. While some of them had benefitted from monetary employment, the majority had raised money digging in other people's gardens, selling livestock, food and the agricultural produce derived from family land (cf. M/FGD2, A/FGD2, A/FGD3, A/FGD4, A/FGD6, N/FGD1, N/FGD2).

Whereas single women are relatively free to transact in land, married women often cannot enter the land market without their husbands' approval. This can be illustrated by the example of Jane, a school teacher in Lukhonge, Mbale, who was able to purchase her own piece of land only once she had obtained her husband's consent even though she had earned the money required herself (M/FGD2). According to Tamale (2004: 58) this is due to the fact that in most patriarchal societies, even where women have managed to leave the domestic sphere and enter into monetary employment, “men still take control of [their] finances and have the final say on how they are to be used.”

Social judgment is another constraint limiting many married women in their attempts to enter the land market given that a wife seeking to purchase her own land is often viewed as having the intention of escaping her marriage and entertaining other men (cf. UWONET 2003, qtd. in Tripp 2004: 11f.). This social pressure has led many women to the conclusion that, as wives, they have “no right to purchase land in their own benefit.” (N/FGD1) In an attempt to avoid victimization by the husband and his family, some

women have even chosen to buy land in the names of their husbands instead of their own (cf. A/FGD3, A/FGD6).

In light of the reservations against married women acquiring their own land by means of purchase, it is not surprising that mostly single women are the ones that have been able to take advantage of the land market. As a matter of fact, the majority of women in the communities consulted who had managed to purchase land independently were widowed, divorced or separated (cf. M/FGD2, A/FGD2, A/FGD4, A/FGD6, N/FGD1, N/FGD2).[10] However, regardless of the fact that there is less social pressure on single women, many of them are nevertheless faced with enormous difficulties when trying to access the land market. Especially where they have a family to maintain women noted that they often find it difficult to withdraw their labor from subsistence production in order to accumulate the money necessary to buy additional land (cf. M/FGD2, N/FGD1). This situation is particularly alarming in consideration of the fact that in the case of separated and divorced women, land purchase is often the only option to ensure their continuing access to land, especially if there is no land left for them at the maiden home (cf. A/FGD2, A/FGD6, N/FGD1). Lack of access to land was also the main motivation behind the land purchases undertaken by the widows consulted. All of them had bought land after the husband's death, either because their in-laws had been claiming most of the matrimonial land, or due to the fact that there was too little land left to allocate to adult sons (cf. A/FGD4, N/FGD2).

In conclusion it can be noted that as far as land markets are concerned as a mode of accessing land, the majority of women, particularly in the rural areas, have not been able to seize the opportunity to acquire land by means of purchase due to a number of different constraints, including shortage of funds and social pressure. In fact, it is only a small proportion of women, usually educated, relatively wealthy and urban-based, who have so far been able to benefit from the emerging land markets (cf. Ovonji-Odida et al. 2000: 20).

[10] Out of the 158 women interviewed during the fieldwork only eight women had purchased land independently and in their own name. While three of them were separated or divorced, three of them were widowed and only two of them were married.

Borrowing

Borrowing is another means by which women have been accessing land, given that in an environment of high population pressure and land scarcity the prospect of gaining access to family land is increasingly fading. Especially in cases where women lack the financial means to purchase land for themselves, borrowing is often the only option they have left to access land (cf. A/FGD2, N/FGD1).

> When after her separation Enin returned to her maiden home taking her three children with her, her parents only had a small piece of land left on which Enin could build her house. However, given that the land allocated to her was too small to be cultivated, Enin had no other choice but to hire a piece of land from one of her neighbors. To cover the rent she is forced to sell most of her agricultural produce with only little left to provide for her and her children (cf. A/FGD2).

Some women without access to family land also choose to enter into sharecropping arrangements, instead of paying rent in cash, the agricultural produce is shared between the woman hiring and the land owner (cf. N/FGD1, N/KI1).

However, it needs to be pointed out that borrowing land is a very tenuous form of access that bears a number of challenges, particularly for women. Since the majority of people in a position to lend land are male, women are often disadvantaged and find it hard to effectively negotiate the conditions of the contract (cf. Rugadya 2007: 6). Moreover, people borrowing land are often exploited in that they are given virgin land to clear which is immediately taken back by the owner once cleared and ready for cultivation (cf. Nyakoojo 2002: 20). In other instances, people are reluctant to lend land in the first place given that there have been cases of borrowers claiming ownership upon the death of a lender. Considering the risks associated with borrowing land, women entering into such informal arrangements are often faced with high levels of tenure insecurity as the land owners usually have the power to terminate the contract at any time (cf. Bibaako/Ssenkumba 2003: 255).

6.2.2 Control over Land

Access to land does not necessarily guarantee a person's control over the land used as, in practice, access, use and decision-making rights to family land are often held by different family members (cf. Bomuhangi/Doss/Meinzen-Dick 2011: 3). In fact – contrary to the longstanding assumption in policy discourse that households are units of congruent interests in which all rights and resources are shared equally, irrespective of gender – there are significant power inequalities between male and female family members affecting both property relations and decision-making processes at household level, also in relation to land (cf. Razavi 2007: 1480, Rugadya 2007: 3). Analyzing women's decision-making power over the use, management and alienation of land as well as the benefits derived from it, this section seeks to assess the extent to which these power inequalities actually manifest themselves in women's control of the land cultivated by them.

Use of Land and Agricultural Produce

In all the three districts visited the degree of control over land exercised by different family members varies considerably from one household to another. Generally, a woman's decision-making power over land and the production process depends on her marital status and whether the land is accessed in the natal or matrimonial home.

In regard to what gets grown on matrimonial land, married women in Apac and Mbale usually decide jointly with their husbands while some are free to also decide by themselves. Only in rare cases is the decision solely the husband's (cf. M/FGD1, M/FGD2, A/FGD6). In Abany Iping, Apac, some couples also follow the recommendations of the National Agricultural Advisory Services extension staff that has been assisting them in the choice of what crops to plant (cf. A/FGD3). In many households the upward trend towards mutual consultation and joint responsibility between spouses in the production process is also reflected in the dynamics of decision-making concerning the agricultural produce. In some communities women even stated that they would go so far as to separate from their husband if they were no longer included in decisions concerning family land and the produce derived from it (cf. A/FGD3, A/FGD5). However, regardless of the fact that it is becoming increasingly common for spouses to decide jointly over the agricultural produce by mutual consent, there are families in which the harvest is still controlled by the husband alone (cf.

M/FGD1, A/FGD3, A/FGD5, A/FGD6). Mary's case serves as an example for the power-inequalities still prevalent in numerous households.

> While Mary is relatively free in her decision on which crops to plant on the land cultivated by her in the matrimonial home, she only has little control over the agricultural produce. Right at the beginning of her marriage, her husband decided that the produce derived from her part of the land would be for family consumption only, whereas the crops cultivated on his part of the land would be for sale. As a consequence, Mary is hardly ever included in the decisions regarding her husband's produce and does not have a say in the use of the sales proceeds – the family's only cash income (cf. A/FGD3).

Cases like Mary's suggest that in many households the ultimate decision-making power still lies with the husbands despite the increasing incidence of mutual consultation among spouses. This is also reflected in the statements of some women who noted that even in families where decisions are usually taken jointly by husband and wife, husbands may still go ahead and sell the agricultural produce without their wives' consent while women feel they have no right to do the same (cf. M/FGD1, A/FGD2, A/FGD6).

In Ntungamo gender roles are still strictly defined by custom with a rigid division of men's and women's tasks. While men generally engage in livestock rearing and the production of cash crops such as matooke and coffee, women are responsible for the cultivation of food crops including millet, beans, groundnuts, peas and cassava (cf. N/FGD1, N/FGD2, N/FGD3). Interestingly enough, the cultivation of matooke has not always been the men's domain. In fact, it was not until the value of matooke increased and the crop became more marketable that men took over its production – prior to the increasing commercialization of the staple food crop, however, "the wife had the right of matooke." (Sorensen 1996: 619) This example of men's ability to take advantage of changing market conditions turning valuable female food crops into male cash crops clearly indicates the high degree of male control over land and the produce derived from it.

In light of the above it is not surprising that in Ntungamo mutual consultation and joint decision-making of both spouses concerning their land and agricultural produce are still uncommon and in some cases totally unheard of. In fact, the majority of married women consulted are denied any right to take part in decision-making processes at household

level and have no choice but to follow their husbands' instructions. Even in families where women are included in land-related decisions it was emphasized that the husband still gets the final say (cf. N/FGD1, N/FGD2, N/FGD3).

Women's lack of control over land and the produce derived from it has sometimes also been linked to their experience of violence, especially in situations where they have tried to challenge their husbands' decisions (cf. N/KI1). In fact, in many regions in Uganda, domestic violence tends to increase during the time of harvest when couples have to decide on the use of the agricultural produce (cf. Eilor/Giovarelli 2002: 22).

As opposed to married women, widows, divorcees and separated women in all the communities consulted are relatively free to decide what crops to plant on their land and how to go about the marketing of their agricultural produce. In fact, only a few widows in Ntungamo stated that their decisions are subject to the approval of the deceased husband's brothers (cf. N/FGD1, N/FGD3). While it is quite common for single women to let their adult children take part in land-related decision-making processes, some widows in Apac also consult with the customary heir appointed by the clan, provided that he is considered responsible and trustworthy (cf. A/FGD2, A/FGD3, A/FGD5, A/FGD6). Divorced and separated women staying in their maiden home are furthermore likely to also include their parents in their decisions, especially if they are expected to share their sales proceeds with them (cf. A/ FGD6, N/FGD2).

In the case of young girls that have not yet married it is predominantly the parents that decide what gets grown on the land cultivated by their daughters with only a few girls able to plant crops without their family's approval. Likewise, the control over the agricultural produce and the proceeds derived from it also lies with the parents, although in some families the profit made is shared with the daughters working the land (cf. M/FGD1, A/FGD3, A/FGD5, N/FGD1).

Apart from their marital status, the mode by which the cultivated land was acquired is another relevant factor affecting women's decision-making power. In fact, women who have purchased land in their own name are generally free to decide over the use of the land and the agricultural produce derived from it, although some choose to include their children in their decisions (cf. M/FGD2, A/FGD2, A/FGD4, A/FGD6, N/FGD1, N/FGD2). However, where land has been purchased jointly by both spouses, the husband is again in the more powerful position as becomes evident when considering Jane's case.

> A couple of years ago Jane and her husband bought a small piece of land in order to expand their matrimonial home. Given that Jane made a significant financial contribution to the land purchase her name was also listed on the sales agreement as one of the contracting parties with their son as a witness. The family used the newly acquired land for cultivation and in the beginning Jane was free in her decision on which crops to plant. After a misunderstanding between the spouses, however, the husband took over the land and gave it to their son. Jane has not been allowed to cultivate the land ever since (cf. M/FGD2).

Similar cases can also be found in Ntungamo.

> When Sulaina and her husband wanted to buy more land to add to the matrimonial home, Sulaina's father sold a piece of his land to raise money for his daughter and her husband. Shortly after the land purchase, however, Sulaina's husband decided to take another wife and allocated the newly purchased piece of land to her. Due to the fact that Sulaina's name does not appear on the sales agreement, she feels that there is nothing she can do as the new wife is already staying on the land (cf. N/FGD1).

Allocation of Land

As has already been outlined earlier on, customary land is generally handed down from father to son by either donation or inheritance (cf. Rugadya 2007: 4). While customary practice is slowly changing with land increasingly being given to daughters as well, the allocative power over land is still vested in the same person. In fact, in all the three districts visited, the allocation of land to children has remained the sole responsibility of the male family head – the husband in the matrimonial home and the father in the maiden home – who is usually free to choose whether or not to include his wife or other family members in his decisions. However, where a family head who has not yet distributed the family land among his children dies intestate, the responsibility for the allocation of land usually devolves upon the widow, provided that she remains on the matrimonial land after her husband's death (cf. A/FGD4, N/FGD2). Even so, in Ntungamo some widows are still required to seek the approval of their deceased husbands' families before any land can be allocated to their children (cf. N/FGD2).

While still married, however, women usually have no allocative power over family land including the piece of land allocated to them upon marriage. In fact, there is an unvoiced assumption that the land used by them will automatically revert to their husbands or children upon their death. Only in cases where women have purchased land

or acquired a land title in their own name, are they free to dispose of their land as desired (cf. M/FGD4, A/FGD4, N/FGD3).

In Mbale, however, it was noted that some women – mostly widows who have spent most of their lives in the matrimonial home – are granted the right to make a will and bequeath the land used by them to a person of their choice on the condition that the land will not leave the clan. Where the land is not passed on to a clan member, a woman's will is very unlikely to be respected and followed upon her death (cf. M/KI4).

Alienation of Land

Despite the general assumption that customary land cannot be sold, land sales are a reality also in the customary sphere. While in Ntungamo informal land markets have been in place for a long time, in Mbale and Apac it was emphasized that land sales are a recent development closely linked to increasing poverty (cf. M/KI3, A/KI1, N/KI).[11] In fact, as arable land is becoming scarce and population is growing, the income derived from agriculture is often too meager to cover basic household expenses. With the spread of HIV/AIDS further adding to the burdens of poverty, the sale of land is often the only option left to quickly raise the money needed (cf. M/FGD2, M/FGD3, A/FGD1, A/FGD3, A/FGD5, A/FGD6).

Considering the circumstances, the majority of land sales can be classified as distress sales that "take place under pressure of poverty, usually with a likely long-term negative impact on the household's economy." (Adoko/Levine 2008: 109) In fact, most land is sold to meet urgent financial needs such as payment of dowry, school fees, medical bills and burial expenses, or to raise money to buy more land elsewhere where it is cheaper (cf. M/FGD3, A/FGD5, A/FGD6, A/KI1, N/FGD2, N/FGD3). The latter is particularly common among cattle herders in Ntungamo who are increasingly moving into more rural areas where land is still plentiful and less expensive (cf. N/KI).

In all the communities visited land sales are predominantly carried out by male family heads as there is a general understanding that customarily land belongs to men. While in Mbale and Ntungamo husbands are relatively free to engage in land transactions and often do so also without prior consultation of their wives or families, customary law in Apac imposes certain restrictions on the sale of land. Given that among the Langi

[11] Women in Lukhonge noted that in earlier days "husbands did not use to *sell* land, they only ever *added* [bought] land when they wanted to take a second or third wife." (M/FGD2)

people the clan still exercises a considerable amount of control over land, there is a strong perception that "land is for the clan." (A/FGD4) As a consequence, any transactions taking place on clan land need to be sanctioned by the clan authorities before they can be effected. Even so, in cases where a land sale is based on a genuine reason, the clan is generally unlikely to withhold its consent (cf. A/FGD1, A/FGD2, A/FGD3, A/FGD4, A/FGD5, A/FGD6). It needs to be pointed out, however, that the clan's authority is generally confined to clan land as can be illustrated by Netty's case.

> When two of Netty's sons wanted to get married her husband decided to sell off a small piece of land in order to raise money for the dowries. Due to the fact that the land sold had previously been acquired by means of purchase and therefore did not constitute clan land in the narrow sense, Netty's husband was free to dispose of it even without the clan's permission (cf. A/FGD3).

In all the three districts visited there is a common understanding that women cannot sell family land without the permission of a male family member – a husband or son in the matrimonial home, a father or brother in the maiden home. Moreover, in the case of widows whose sons have not yet come of age the in-laws are to be consulted prior to any land sale in the matrimonial home (cf. M/FGD2, M/FGD4, N/FGD1, N/FGD2). In practice, however, women are seldom granted the right to engage in land transactions. Only a few women in Mbale were confident that in case of an emergency their parents would allow them to sell part of the land used by them in the maiden home (cf. M/FGD2, M/FGD4).

During the focus group discussions women's inability to sell land was often regarded as one of the most severe problems resulting from their lack of control over land. The situation is particularly severe for widows and other female heads of household who often find it hard to withdraw their labor from domestic food production to take up another income opportunity, especially if they have children to look after. As a consequence, where urgent financial needs are to be met, they often run a high risk of falling even further into poverty (cf. M/FGD2, N/FGD1). Rovene's case serves as an example of the helplessness often experienced by women when denied the right to sell off part of their land in emergency situations.

> After her husband's death, Rovene remained in her matrimonial home in Bwongyera together with her children who are still in school. When last year part of her house collapsed under the rain, she asked her husband's family if she could sell a small part

> of the matrimonial land so that she could raise money and rebuild her home, but her request was denied. In her maiden home the family land had already been divided among her brothers, so there was no land left for her to sell. Up to today Rovene has not been able to muster the resources necessary to fix her house given that there would be no one to look after her land and provide for her children, if she took up work somewhere else (cf. N/FGD1).

Concluding Remarks

In conclusion it can be noted that while the actual degree of control over land exerted by women varies from one family to another, in most cases male family members are in the more powerful position when land-related decisions are to be taken at household level. In fact, in many cases the ultimate decision-making power is still with the husband who is generally free to choose whether or not to let his wife take part in relevant decision-making processes. Although in Mbale and Apac decisions relating to the use of land and the agricultural produce derived from it are increasingly made jointly by both spouses, the allocation and sale of land have clearly remained the husband's domain in all the three districts visited. This is also true for single women on family land. Regardless of the fact that widowed, divorced and separated women tend to be relatively free in their decisions on what crops to grow and how to use their agricultural produce, their right to sell and allocate land is still subject to male consent.

Merely in cases where women have managed to acquire land in their own name, do they exert a degree of control similar to that of men and can freely dispose of their land as desired – at least in theory. In practice, however, women's decisions are often still influenced by social pressures and society's unvoiced expectations. As Budlender/Alma (2011: 41) have observed, "[e]ven when women have formal title to land, they might not claim the rights this affords them due to communal norms and power relations within the family." In fact, in the case of married women, for instance, there is a general assumption that upon their death any land and property in their possession will pass into their husband's ownership (cf. N/FGD3). Therefore, it needs to be kept in mind that the distribution of different rights among family members "does not imply that they exercise those interests primarily as individuals. Rather, they are embedded in social relations and identity." (Meinzen-Dick/Mwangi 2008: 37)

6.2.3 How Land is Lost – Threats to Women's Land Rights and Tenure Security

Having discussed women's land rights in terms of access to and control over land, the following section serves the purpose of exploring the different factors currently threatening women's tenure security. In doing so, particular attention is paid to women's vulnerabilities under customary tenure arrangements.

As has been outlined earlier on, land ownership in the customary sense constitutes a form of stewardship that "comes with the responsibility to protect the land itself, and to protect the land rights of all those with a claim in that land – all family members, including future generations." (LEMU 2008: 2) With increasing individualization of land rights, however, customary ownership has become confused with the Western notion of individual land ownership (cf. Adoko 2000: 2). As a consequence, the people supposed to hold the land in trust for the whole family have turned themselves into individual land owners leaving weaker family members without protection and vulnerable to land rights abuse. This development has worked to the detriment of women in particular as they often lack both the social and physical strength to defend their claims in a given piece of land. Women's vulnerability is further exacerbated by the fact that in patrilineal societies a woman is a "variable" in family relations rather than a constant since she is considered to be "in transit" moving from her maiden home to her husband's family and sometimes back again to their natal home (cf. Adoko/Akin/Knight 2011: 2f.) To make matters worse, the protection originally granted to women under customary law has been significantly weakened as in the face of increasing land scarcity, rising land values and fierce competition for land social norms are often abandoned in favor of personal profit (cf. Adoko/Levine 2008: 106). In this context the very people responsible for safeguarding a woman's interests in land are often the ones depriving her of her land rights (cf. LEMU 2009b: 3). How this situation plays out in practice and what this means for different categories of women will now be discussed in more detail.

Widows

Under custom there is an inherent assumption that once married a woman will stay on the matrimonial land for the rest of her life as, ideally, her interests in the husband's land are safeguarded also upon widowhood through the customary institution of widow inheritance (cf. Adoko/Akin/Knight 2011: 3). Looking at the situation on the ground,

however, it quickly turns out that the reality is somewhat different. Considering that in many communities in Mbale and Apac widow inheritance is no longer practiced in fear of HIV/AIDS[12] while in Ntungamo the practice is generally unheard of, the protection once granted to widows under customary law has largely been eroded (cf. M/FGD2, A/FGD4, A/FGD5). To make matters worse, no alternative practice has yet taken its place, leaving numerous widows in a position which "customary law did not previously encounter – unmarried, and within the clan, although not of it." (Adoko/Levine 2005a: 41) A widow's vulnerability is further exacerbated if her husband never completed the payment of dowry to her family. Considering that in such a case, the woman was, strictly speaking, never actually married under customary law, but merely cohabiting, she may not be automatically "absorbed into the patrilineal tenure system." (Okuro 2008: 135) As a result, a widow's possibility to actually remain on the matrimonial land has come to depend a great deal upon whether or not she has children and her personal relationship with her in-laws (cf. M/FGD2, A/FGD1, N/FGD3).

In an environment of increasing land scarcity and rising land values, this has led to a situation in which widows are increasingly falling victim to land grabbing as self-interested family members are trying to gain from their vulnerability. Affecting women disproportionately, land or property grabbing represents a form of gender-based violence "whereby an individual is forcibly evicted from her home by other family members, traditional leaders or neighbors, and is often unable to take her possessions with her." (Izumi 2007: 12)

In all three districts visited property grabbing poses a serious threat to widows' tenure security, especially where a widow does not have any sons given that in such cases the matrimonial land is usually inherited by one of the late husband's brothers (cf. M/FGD2, A/FGD1, A/FGD4, N/FGD3, N/KI2). In Rose's case, however, her brothers-in-law could not be stopped from taking her land regardless of the fact that she is mother of two minor sons who both have hereditary claims to their father's land.

> Immediately after her husband's death, Rose's brothers-in-law turned against her and took over her matrimonial land, leaving Rose and her children confined to the

[12] In a few communities in Apac, however, where the matter was discussed quite openly, it was noted that HIV/AIDS should not stand in the way of a widow remarrying. Quite the contrary, it was generally suggested that the widow get tested and, if positive, find herself an inheritor or husband that it also living with the virus (cf. A/FGD3, A/FGD4).

> matrimonial house. When she tried to challenge them, they threatened to hurt her and her children if they ever dared to set foot on their land again. Subjecting Rose to constant harassment and verbal abuse, her brothers-in-law eventually managed to drive her out of the matrimonial home. Scared and intimidated, Rose remained silent and left without taking any further action. She is now staying on a small piece of land that her husband had previously purchased outside their village. The land is, however, too small to properly provide for her and her children (cf. A/FGD3).

Repeated intimidation of the victim is in fact one of the most powerful tools employed by land grabbers. As could be seen in Rose's case, the psychological damage caused by constant harassment and abuse "erodes a woman's self-esteem, inhibiting her ability to defend herself or take action against her abuser." (Izumi 2007: 11) In many cases, this situation is further exacerbated by the lack of social support from the victim's personal environment. In fact, in light of the high prevalence of violence in land disputes witnesses to land and property grabbing are often too intimidated to actually testify against the perpetrator before a judge or any other local authority. (cf. M/FGD1, M/FGD3, A/FGD1, A/FGD3, N/FGD3).[13]

Some land grabbers, however, abstain from using threats of violence and resort to more subtle strategies to force their victim off her land. Sometimes, for instance, in-laws may pretend to assist the widow in the cultivation of her field and then, at the time of harvest, simply refuse to return the part of the land cultivated by them (cf. N/FGD3). Christine's brother-in-law, on the other hand, slowly took over her land by gradual encroachment.

> While still alive, Christine's husband lent a small piece of land to one of his brothers for cultivation. After her husband's death, however, the brother started taking more and more land, slowly moving the boundary and encroaching upon the field Christine had been allocated upon marriage. When confronting him, she was told that she had no right in his family land given that "she never brought any land into her matrimonial home." Thereupon, Christine took the case to the clan leaders who have not yet reached a decision on the matter. However, in view of the fact that it is clan land that she is claiming she is not optimistic that the clan will decide in her favor (cf. A/FGD4).

[13] The high probability of falling victim to violence in land conflicts is reflected in a Bugisu proverb according to which a Bagisu man will kill for three things – women, land and meat (cf. M/KI2).

The use of excuses to justify a widow's dispossession of her land is quite common, especially if the family members involved feel that they have to provide an explanation for their actions (cf. M/FGD1, M/FGD3, A/FGD1, A/FGD4, N/FGD3). However, for the most part, the excuses put forward to drive a widow out of her matrimonial home have absolutely no basis in customary law. This is also true in Christine's case as under custom widows have the right to remain in their marital home and continue the cultivation and management of the land allocated to them upon marriage regardless of whether or not they have ever "brought land into their matrimonial home."

In communities where widow inheritance is still practiced, widows may also be thrown off their land if they pick an inheritor from outside the clan or refuse to be inherited altogether (cf. M/FGD2, A/FGD4). Such cases again constitute a clear violation of customary law as both men and women in Mbale and Apac emphasized that a widow is free in her decision on whether or not she wants to be inherited or remarry (cf. M/FGD4, A/FGD3, A/FGD4, A/FGD6).

In all the districts visited it was generally argued that widows enjoy higher levels of tenure security where they have been considered in their husbands' wills – provided that the will is actually respected and followed (M/KI4, M/FGD2, A/FGD2, A/FGD4, N/FGD1, N/KI1).

> When Peace's husband died of HIV/AIDS her in-laws refused to show her the will her husband had left and quickly took over the entire marital property including the land Peace had been cultivating during her marriage. After all her attempts to reach an agreement with her late husband's family had failed she wanted a judge to decide over the matter, but unfortunately she could not afford the court fees. Meanwhile her in-laws have pledged the matrimonial land to secure a bank loan. Should they default on the loan, Peace has no hope to ever get her land back (cf. N/FGD3).

While it has become clear that the main perpetrators of land grabbing from a widow are usually her in-laws, first and foremost her brothers-in-law, some widows fall victim even to their own children or those of their co-wives, especially where family land is scarce (cf. M/FGD4, A/FGD3, A/FGD6, N/FGD3).

> Soon after Specioza gave birth to her two children, her mother-in-law took over their upbringing and even took them with her as she moved to another district. However, when Specioza's husband died, her 25-year-old son returned to Ntungamo and claimed all of his father's land telling his mother to go back to her maiden home. According to him the land was now his alone. When Specioza realized that her son's mind could not

> be changed she turned to the local representatives of the Women's Land Rights Movement who were able to intervene in her favor. Although she has managed to stay on her matrimonial land up to today, Specioza is still scared that her son might eventually evict her (cf. N/FGD3).

Once driven out of their matrimonial homes, widows often find themselves in a precarious situation given that most of them are unlikely to find enough land for them in their maiden homes, especially where the family land has already been divided among the sons. To make matters worse, in a context of increasing land scarcity brothers are generally reluctant to share their land with their widowed sisters as they are often already struggling to provide for their own families (cf. M/FGD1, A/FGD1, A/FGD3, A/FGD4, N/FGD3). The resulting landlessness puts the women concerned at a high risk of falling even further into poverty, as can be illustrated by Merabu's case.

> Upon the death of her husband, Merabu was chased away from the matrimonial home together with her five children. When she tried to go back to her natal family, she was told by her brothers to go somewhere else because "five children are too many." Merabu is now staying in Rubaare Town where she is renting a small room for her and her children. Considering that she does not have any access to land at the moment, she is crucially dependent on casual wage labor as her only source of income. To further add to her misery, two of her children have already dropped out of school because she has not been able to pay for their school fees ever since she lost her land (cf. N/FGD3).

In light of the above it has become clear that respect for widow's land rights is considerably dwindling in all the three districts visited. At the same time widows find it hard to defend their claims in a given piece of land, considering that the main perpetrators are usually the very people responsible for protecting their interests in family land – in both their marital and maiden homes. Interestingly enough, the driving motivation behind land and property grabbing seems to have less to do with poverty and land scarcity than with greed. In fact, with land increasingly being perceived as an asset with cash value, "those who have want more." (M/KI4). It is therefore not surprising that a study on land grabbing in the Lango sub-region revealed that land is mostly grabbed by brothers-in-law, uncles, politically influential people and wealthy business owners (cf. Adoko/Akin/Knight 2011: 2).

For widows the increasing landlessness associated with this development is often particularly devastating. Given that the probability of remarriage is declining with age

and the spread of HIV/AIDS, widows often have no choice but to assume sole responsibility for the maintenance of their family (cf. A/FGD4, N/FGD1, N/FGD3). Consequently, depriving a widow of her land is in most cases tantamount to pushing her and her children even further into poverty, as could be seen in Merabu's case. In the words of Karen, a young widow living in Apac, "upon your husband's death, land becomes your husband. It provides you with food and shelter and when you die, that is where you will be buried. But without land you cannot survive, you have nowhere to go." (A/FGD2)

Married Women

As has already become evident when discussing women's control over land, a married woman's vulnerability to land rights abuse stems primarily from power imbalances in decision-making processes at household level. In an attempt to strengthen women's bargaining power within the marital home, Section 39 (1) of the Land Act, as amended in 2004, prohibits a person from selling, mortgaging, leasing or entering into any other transaction in respect of family land without the prior written consent of the resident spouse.

In practice, however, only few women have benefitted from the so-called consent clause. In point of fact, women in all the three districts visited reported that husbands frequently rent out or sell off parts of the family land without their wives' consent and sometimes even without their knowledge. The latter is particularly common when the money gained is spent on alcohol and other women (cf. M/FGD1, M/FGD3, A/FGD2, N/FGD2, N/FGD3, N/KI1). In the rare cases where consent is sought, it is not always given voluntarily – quite the contrary, where initially withheld consent is oftentimes coerced (M/KI, A/KI, N/KI). Especially in Ntungamo it was noted that women trying to get in the way of their husbands' plans are likely to fall victim to domestic violence or might even be divorced as a punishment (N/FGD2, N/FGD3, N/KI1). The threat of violence and possible separation is also one of the major reasons for why women are generally reluctant to report their husbands to the local authorities (cf. M/KI1, N/FGD1, N/FGD2, N/FGD3).

Women's lack of bargaining power at the household level is particularly alarming in view of the fact that it is mostly them who are suffering the consequences of the land sale as the land sold is hardly ever the husband's.

> Teddy and Edith's husband is frequently engaging in land transactions and has already sold off a considerable part of the family land without prior consultation of his wives. According to him most of the land was sold in order to pay for the children's school fees. As a result of the growing land scarcity within the family, Teddy and Edith are now forced to share one piece of land, although they once used to cultivate separate fields. They are worried that, if any more of their land is sold, they might not be able to properly provide for them and their children any longer. At the same time, however, they feel that they lack the authority to actually challenge their husband in his decisions. Given that the payment of Teddy's dowry has not yet been completed, she is furthermore scared that her husband might chase her away if she started complaining to him (cf. M/FGD1).

While land sales certainly constitute a major factor contributing to women's land loss in the marital homes, they are not the only threat to women's tenure security during marriage. Married and cohabiting women also become vulnerable to land rights violations when their husbands decides to take another wife given that in most cases the husband will take land from the first wife in order to provide land for his new wife.

In fact, in all the three districts visited co-wives are commonly forced to share one piece of land as husbands tend to lack the resources to provide each of them with separate fields. Only in two communities in Mbale and Apac both men and women stated that, nowadays, husbands are required to acquire additional plots of land considering that in a context of rapid population growth and increasing land scarcity the first wife can no longer be expected to share her land with another woman (cf. M/FGD3, A/FGD5). Even in communities where it is still common for husbands to take land from the first wife, some women stated that under no circumstances would they tolerate their husbands allocating part of their land to a second wife (cf. M/FGD2, A/FGD3). As Netty expressed rather emotionally, "this land is mine, for me and my children. So if he [the husband] wants to bring another person, fine! But he has to get extra land for that!" (A/FGD3) These were also the words she directed at her husband when he tried to take part of her land to marry another woman a couple of years ago – and they proved effective. Shortly after Netty's husband had realized that his wife was serious about not giving up any of her land, he decided to abandon his plans given that he did not have enough funds at his disposal to purchase an additional piece of land for another wife (cf. A/FGD3).

It needs to be pointed out, however, that a woman's possibility to actually stand up against her husband and defend her land like Netty did is crucially dependent upon her

bargaining power within the household. Women with little authority in the marriage are generally more likely to go along with their husbands' decisions considering that it is not uncommon for a husband to divorce a wife trying to oppose his wishes, especially if another wife is involved (cf. M/FGD1, A/FGD2, A/FGD3, A/FGD6, N/FGD1, N/FGD2, N/FGD3).[14]

It is, however, not solely the first wife that is likely to suffer land rights abuse in a polygynous marriage. Once on the matrimonial land, the wives following the first one are often faced with even higher levels of tenure insecurity, especially when the first wife's children come of age and start claiming land in their father's home. In fact, where family land is scarce, second and third wives frequently find themselves threatened by the first wife's adult sons trying to take their land. The likelihood of a married woman actually having her land grabbed is particularly high in cases where the land used by her now was initially the first wife's (cf. A/FGD3, A/FGD6, N/FGD1, N/FGD2).

> At the time when Esther's husband took her as his second wife, she was allocated part of his first wife's land for cultivation. Shortly after Esther gave birth to her only child, the first wife died leaving behind five children that Esther has been taking care of ever since. Recently, however, the two eldest sons of the deceased wife have started to disturb Esther, threatening to throw her out of the house and denying her access to the land she has been cultivating during the marriage. Arguing that the land initially belonged to their mother, they are now claiming it for themselves (cf. N/FGD2).

Molly is suffering similar harassment and abuse from the first wife's children, although so far no land has actually been taken from her.

> Ever since Molly became part of the family as her husband's second wife, the first wife's sons have been harassing her trying to drive her out of the matrimonial home. Now they have also threatened her with eviction, repeatedly telling her that upon the husband's death "you will be the first person to run as fast as your legs can carry you." So far, Molly has kept quiet, but she is living in constant fear worrying about what will happen to her in the event of widowhood (cf. A/FGD6).

[14] In fact, in Angayiki and Amilo communities the husband taking a second wife was listed as one of the main reasons for marriage failure among all the divorced and separated women consulted in the community (cf. A/FGD2).

Contrary to what one might think, not all the potential threats to a married woman's tenure security originate from within her matrimonial home. In fact, married women having acquired rights to their fathers' land by virtue of donation or inheritance may become vulnerable to land grabbing also in the maiden homes, especially if they are staying far away from their natal families (cf. M/FGD4, M/KI3, A/FGD1, A/FGD3, A/FGD6, N/FGD2)

> Before Ophelia got married, her father allocated her a piece of his land. Upon the father's death, however, Ophelia's elder brother quickly took over her field claiming that she had no right to any land in her maiden home because she had left the family long before to stay with her husband. By the time she managed to confront her brother in person, he had already sold off the land her father had given to her. Ophelia did not hesitate to take the matter before a judge. In court, however, she could not be helped given that the buyer had already titled the land in his name and Ophelia did not have any papers to prove her ownership. Lacking the financial means to appeal to a higher court, she only has little hope to ever get back the land (cf. M/KI3).

In view of the above it has become clear that a married woman's insecurity of tenure can originate from a number of different factors. Land rights abuse in the marital home is often connected to women's lack of bargaining power within the household as wives with only little authority in their marriage are unlikely to successfully influence their husband's decisions on whether or not to sell a piece of land or take another wife. Polygyny further adds to their vulnerability, especially if there are a lot of boys in the family competing for their father's land. Where women retain land also in their natal families, brothers often take advantage of their married sister's physical absence from the maiden home, grabbing her land instead of protecting it for her.

Divorced and Separated Women

Under customary law a divorced or separated woman usually has little choice but to leave the matrimonial home and return to her natal family. Only in a few exceptional cases may it be possible for her to remain on the marital land, as has already been outlined earlier on (cf. M/FGD3, A/FGD3)

Regardless of the fact that custom requires a woman's parents and brothers to provide their daughter or sister with land upon her return to the maiden home, the increasing land scarcity within families has left many divorced and separated women vulnerable to land rights violations. In fact, research carried out by LEMU in the Lango sub-region

has revealed that up to 90% of divorced women have been subject to land loss in the maiden home – a result that suggests that divorcees and separated women fully enjoying their customary land rights are the exception rather than the rule (cf. Adoko/Akin/Knight 2011: 2, LEMU 2009b: 1).

This is also confirmed by the evidence collected in the field. In fact, only a few women in all the three districts visited were confident that they would be given land in their maiden homes upon divorce or separation (cf. M/FGD4, A/FGD3, A/FGD5, A/FGD6, N/FGD2).

Generally, a woman's possibility to return to her natal home depends on a number of factors – whether or not her parents are still alive, the number of children following her to the maiden home, the reason for the divorce and whether or not dowry was paid for her. Where the woman's parents are still alive, her likelihood of being accepted back into her natal family is much higher as parents are more likely to sympathize with their daughter than the rest of the family. In cases where the parents have died and all of the family land has already been divided among the (male) children, there is only little hope for women to actually be allocated their own piece of land. Especially if brothers have already started their own families, land is unlikely to be shared with a returning sister and her children (cf. M/FGD2, A/FGD3, N/FGD1, N/FGD2). In Apac, it was emphasized that a cohabiting woman may be faced with particularly great difficulties when trying to return back home based on the fact that her family never received full dowry for her. Considering that the bride price paid for a woman is usually used by her brothers to pay for their own marriages, brothers who never “benefitted” from their sister's union with a man tend to be even more unwilling to give part of their land to her (cf. A/FGD6).

The number of children following the mother to her maiden home is another critical determinant of a woman's ability to access land in her natal family, especially where family land is scarce. In view of the fact that sons leaving their father's home are likely to lose their hereditary claims to his land, the divorcee's family is often concerned that in the end they will be the ones responsible for securing the children's access to land if they cannot go back to their father's place. Therefore, the more children a divorced or separated woman is taking with her, the smaller her chance of getting land in the natal

home (cf. M/FGD2, A/FGD1, A/FGD2, A/FGD4, N/FGD1).[15] In Bwongyera, Ntungamo, it was furthermore noted that some parents will first consider the reason for the divorce before deciding whether or not to allow their separated or divorced daughter to access land in their home again (cf. N/FGD1).

Similar to widows, divorcees and separated women denied access to land in their maiden homes are often forced to find an alternative source of income in order to rent or purchase a piece of land for themselves.

> When Betty returned to her maiden home after separating from her husband, most of the family land had already been divided among her brothers who made it clear right from the beginning that they would not share any land with their sister as they already had their own families to look after. She was, however, allowed to remain with them as long as she did not have any other place to stay. Taking up casual work opportunities, Betty eventually managed to muster the resources necessary to buy herself a piece of land for settlement. The land purchased is, however, too small to be used for agricultural purposes. Lacking the financial means to buy an additional plot of land, Betty is for now crucially dependent on her friends in the village for access to arable fields (cf. A/FGD6).

However, even in cases where divorced or separated women have been accepted back into their natal families, their chances of actually living undisturbed on the land allocated to them are often slim. Their vulnerability to land rights abuse is particularly high once their parents have died (cf. M/FGD4, A/FGD1, A/FGD2, A/FGD3, A/FGD4, A/FGD5, AFGD/6, N/FGD1, N/FGD2).

> Upon separation Lilian was allocated a small piece of land by her father. However, ever since the father's death her brothers have been trying to force her off the land constantly harassing her, stealing her harvest and encroaching upon her field. They have been telling her to return to her husband's home regardless of the fact that the separation was over ten years ago. At one point, her brothers even went so far as to make up a lie claiming that Lilian had been adopted and therefore did not have any rights in their father's land. Fortunately, however, owing to the support received from the rest of the family, Lilian has so far managed to remain on her land (cf. A/FGD2).

[15] The number of daughters following their mother to the maiden home is less problematic than the number of sons, as there is the implicit assumption that daughters will get married and eventually leave the family – so they are less likely to lay claim to the mother's family land (cf. A/FGD1).

While the main perpetrators of land grabbing from separated and divorced women are usually their brothers, potential threat to a woman's tenure security in her maiden home emanates also from other male relatives including her father's brothers and her (half-)brother's sons (cf. A/FGD2).

> As her father had bequeathed her a piece of his land, Gloria faced no difficulties when moving back to her natal home after her divorce. However, upon her return she had to find out that one of her half-brother's sons had taken part of her land and was unwilling to give it back. When all of Gloria's attempts to reach an agreement with her nephew had failed, she reported the matter to the clan. After the clan's intervention, however, the nephew started to get even more aggressive and threatened Gloria to kill her if she took any further action. In order to demonstrate his power and determination to drive Gloria out of her home he even started to graze his animals on her land to destroy her harvest. To make matters worse, the nephew stabbed one of Gloria's brothers when he wanted to hire out a part of the family land. Although the case was taken to the police, it was not followed up based on the fact that it was a "family issue". Meanwhile the nephew has started to plant mango trees on Gloria's land. However, too intimidated by the recent events, she has not yet dared to confront him about it (cf. A/FGD2).[16]

Gloria's case clearly demonstrates just how violent land disputes can get sometimes and offers a valid explanation for why so many women are oftentimes reluctant to report their cases to local authorities and stand up to the people grabbing their land.

In light of the above it has become clear that divorced and separated women are particularly vulnerable to landlessness given that unlike widows they usually cannot lay any customary claims to their husbands' or partners' land once their relationship has ended. As a consequence, upon divorce or separation a woman is crucially dependent on the goodwill of her natal family for access to land. In a context of increasing land shortage within families and fierce competition for land this has left a growing number of separated and divorced women in a precarious situation as family members are often unwilling to share their land. Aware of the risks associated with divorce and separation many of the married women consulted feet they have no choice but to stay married, no matter what. As one woman in Bumbobi, Mbale put it, "[w]hen you go back [to the

[16] After the focus group discussion Gloria could be encouraged to report her case to the ULA Land Rights Center in Apac to seek legal aid. The case is, however, still pending.

natal family] they say, you got married, there is no land here for you. So you stay married. If you don't, where to go? This where no land, this where no land, you will end up in slums! So you stay married." (M/FGD1)

Unmarried Women

Under custom, a woman who remains unmarried has the right to be allocated a piece of her father's land for her personal use. However, as already indicated earlier on, in her case there is no "trigger event", such as marriage for sons, to ensure that she will actually be allocated land. Given that "not marrying" does not constitute a definite event, unmarried daughters are often not taken into account when family land is allocated due the expectation that they will eventually get married and be given land by their husbands (cf. Adoko/Akin/Knight 2011: 4).

Yet, while their parents are still alive unmarried women generally enjoy relatively secure access and use rights to their fathers' clan land. Once their parents have died, however, they often experience high levels of tenure insecurity as inheritance of land by daughters is still uncommon. As a consequence, the family land is usually divided only among the sons, leaving unmarried women at the mercy of their brothers or the male relatives holding the land in trust for the minor customary heirs. The maintenance of good relations with male family members is therefore crucial if an unmarried woman is to enjoy continuing access to land in her maiden home also after her parent's death. Otherwise, her lack of control over the family land is likely to result in her undoing (cf. M/FGD1, A/FGD1, A/FGD2, A/FGD3, A/FGD6, N/FGD2, N/FGD3).

> Phiona lost both of her parents while still in school. When her only brother died shortly after their parent's death, Phiona went to stay with her uncle for a while. After completing senior four, she went back to her parent's home where she was taken in by her half-brothers[17] and given a piece of land for cultivation. Contuining with school, she managed to do her A-levels, but the family lacked the financial means to send her to university. When Phiona suggested selling or renting out part of the land she had been using in her parent's home to raise the money needed for her education, her half-brothers immediately turned down her request. She kept on begging them until one day she was thrown off the family land and chased away without any warning. Now Phionah is staying with extended family, landless and destitute (cf. N/FGD3).

[17] Sons of her deceased mother's co-wife

Contrary to what one might think, it is, however, not only daughters who were not considered in the distribution of family land that are prone to land rights abuse. In point of fact, even women who have been allocated or bequeathed a piece of land in their maiden homes are frequently falling victim to land grabbing by brothers, uncles and male cousins. Especially where there are a lot of sons competing for their father's land, the women in the family are usually the first ones to lose out, as can be illustrated by Scoviah's case (cf. M/FGD4, A/FGD1, A/FGD3, A/FGD6, A/KI2, N/FGD2).

> Aware of the acute land shortage within the family Scoviah's father allocated his daughter two small pieces of land – one to build her house on and one for cultivation. Shortly after his death, however, Scoviah's brothers called in a clan meeting during which all of the family land, including the plots Scoviah had previously been allocated, was distributed solely among the sons of the deceased. When confronting her brothers, she was told that she could continue the cultivation of her field until she got married. The other piece of land on which Scoviah had been building her house was, however, immediately taken over by one of her brothers. Unwilling to accept her situation Scoviah managed to take the case to court with the support of a few women in her community. So far, however, the judges have not yet reached a decision (cf. M/FGD4).

Scoviah's case clearly indicates that a deceased's will does not necessarily provide unmarried women with the desired protection, especially if the sons in the family feel disadvantaged. In fact, the more control over land is passed on to women, the less likely the rest of the family tends to be to respect and actually follow the will of a late family head. In Apac, for instance, one woman was even violently chased away from her maiden home after her father had made her heir and left the land management responsibility with her (cf. A/KI2).

In Mbale and Apac, it was furthermore emphasized that unmarried women are even more vulnerable to land rights violations where they did not grow up on their fathers' land – either because they were born out of wedlock or because they followed their mother to her maiden home upon divorce or separation. Given that in patrilineal societies unmarried girls are supposed to gain access to land through their fathers, their mothers' families are often reluctant to share with them, even more so if family land is scarce. At the same time their fathers are oftentimes unwilling to accept them back into their families, especially where they have lived away from them for too many years (cf.

M/FGD2, A/FGD2, A/FGD4, A/FGD5). The actual severity of the situation can be illustrated by the example of Enin's daughter.

> Shortly after her husband had taken another wife, Enin separated from him and returned to her natal family taking all of her three children with her. A couple of years later, Enin's eldest daughter tried to go back to her father's home as there was no land for her in her mother's family. However, once on her father's land, she was constantly abused by his wife and her children. At one point, they took all the clothes she had brought with her and burned them in front of their house. Scared and humiliated, the daughter eventually returned to her mother's family. In view of what has happened to her daughter Enin is worried that if she dies her children will be chased off the land and won't have anywhere to go as they belong neither here nor there (cf. A/FGD2).

In conclusion it can be noted that an unmarried woman's vulnerability to land loss stems primarily from the inherent assumption in customary law that girls will eventually get married and be provided for by their husbands. In fact, this expectation offers family members the perfect excuse to deprive a woman of her rights to her father's land – regardless of whether or not the will of a deceased tells them to do otherwise. Adding to that, women who did not grow up on their fathers' land are even more vulnerable to land rights abuse as they often find themselves caught between their fathers' and their mothers' families, neither of which feel responsible for safeguarding their access to land.

Concluding Remarks

From the above it can be concluded that abuse of women's land rights is common in all the three districts visited. In the face of increasing land scarcity and rapid population growth men are increasingly taking advantage of their superior position within the patrilineal tenure system advancing their own interests at the expense of weaker family members, first and foremost the women in the family. As a result, women are increasingly dispossessed of their land as they often lack both the power and authority to successfully defend their land rights. However, it has become clear that not all groups of women are exposed to the same threats. In fact, the different vulnerabilities experienced by women vary considerably according to marital status and changing family circumstances. While widows often run a high risk of being evicted from their matrimonial homes by their in-laws, married women's vulnerability to land loss usually results from their lack of bargaining power within the conjugal households and the

perils of polygyny. Divorced, separated and unmarried women, on the other hand, are commonly falling victim to land grabbing by their brothers and other male relatives in their maiden homes.

Considering the excuses often brought forward to justify a woman's dispossession of her land, it is easy to assume that the essential problem lies within people's culture and customs. However, regardless of the fact that many of the injustices against women are committed under the pretext of culture, it is important to point out that there is nothing cultural about the constant land rights violations suffered by women (cf. LEMU 2008, Ssewakiryanga 2011: 19). In-laws throwing a widow off the matrimonial land or brothers grabbing land from sisters are not acting in accordance with customary law and tradition – and both victim and perpetrator are aware of that.[18] As a matter of fact, custom requires male relatives to safeguard women's rights and interests in family land – regardless of how little land there is available within a family (cf. Adoko/Akin/Knight 2011). Therefore, "the abuse of women's land rights that is seen around the country is not a collapse in cultural systems around land; rather, it is a failure of male-led cultural institutions carrying out the duty to protect women's land rights." (Ssewakiryanga 2011: 19)

6.3 Competing Legal Systems and Land Rights Protection on the Ground – What is Going Wrong?

The above analysis of women's land tenure security has clearly shown that women fully enjoying their land rights in the rural areas of Uganda tend to be the exception rather than the rule. This situation is particularly surprising in view of the fact that women's vulnerabilities were explicitly recognized and catered for in the new land legislation. In fact, the legal environment has never been more favorable to women in Uganda. In addition to the protective provisions contained within Uganda's Constitution and the 1998 Land Act, the customary rules safeguarding women's interests in land now have full judicial force in national law and are to be upheld also by state courts (cf. Adoko/Levine 2008: 103). The ongoing abuse of women's land rights, however, suggests that even more than ten years after its enactment, the new land law has not yet

[18] None of the men and women consulted during the field research designated the ongoing discrimination against women as part of their culture. Rather, the constant abuse of women's land rights was blamed on increasing land scarcity, high population pressure and greed.

reached the people on the ground. In an attempt to answer the inevitable question of what is going wrong, the following part of this chapter seeks to explore the reasons for why the state has failed to provide adequate protection of women's land rights in practice.

6.3.1 Inadequacy of the Legal Framework

Even though Ugandan women have never been granted more rights under national legislation, a closer look at the legal framework governing land rights quickly reveals that there are still a number of shortcomings in the law that put women at a considerable disadvantage. While Uganda's family law has proven the most problematic, the 1998 Land Act also contains several weaknesses that are to be pointed out.

Law in Practice: The Consent Clause Reconsidered

In line with Section 39 (1) of the Land Act, as amended in 2004, a person is required to obtain the consent of their spouse prior to any transaction in family land. In spite of the fact that Section 39 is clearly aimed at strengthening women's rights in land, the intended protection has so far existed only on paper. In fact, due to the numerous constraints and limitations inherent in the consent clause, only few women have actually been able to benefit from its protective provisions.

To begin with, making the right to consent conditional upon an existing marriage, Section 39 applies to legally married women only, leaving the many cohabiting, widowed, divorced, separated and unmarried women on family land without any legal protection (cf. Budlender/Alma 2011: 53, Adoko/Levine 2005a: 40). However, even the protection granted to married women is rather unsatisfactory as the consent clause only safeguards their interests in family land on which the family resides (cf. Section 38A (4) (a), Land Amendment Act 2004) and "on which is situated the ordinary residence of the family *and* from which the family derives sustenance" (Section 38A (4) (b), Land Amendment Act 2004, italics added). Accordingly, where the family resides on a piece of land other than the one cultivated, the woman's interests in the latter are not protected (cf. Kafumbe 2010: 205).

Still, even in regard to the family land defined in Section 38A (4), the consent clause has not been beneficial to the majority of married women in Uganda. This is partly due to its failure to take into account the power inequalities existing at household level. In point of fact, there is an inherent assumption in the law that everything is equal between

couples and that a woman can freely decide whether or not to consent to an intended land transaction (cf. MISR 2002: 72, Rugadya 2008: 14f.). Unfortunately, however, this does not reflect the reality on the ground considering that many women are still subject to the husband's authority. As could be seen in the previous section, wives refusing to comply with their husbands' wishes are often faced with the threat of domestic violence and separation. It is therefore important to keep in mind that even where consent has been obtained, it may not have been given voluntarily (cf. M/FGD1, M/KI1, A/KI1, N/FGD2, N/FGD3).

Apart from its content-related shortcomings, the practical implementation of the consent clause has also proven problematic and presented law and policy makers with a number of challenges not previously anticipated. Due to the fact that in Uganda most customary marriages are not registered, it is hard to verify whether or not there is a spouse to consent or whether the woman consenting to the land transaction is the actual spouse (cf. Kafumbe 2010: 206, Rugadya/Obaikol/Kamusiime 2004: 12). Moreover, no authority has actually been put in place to record transactions on customary land whose owners have not acquired certificates of customary ownership. Considering that so far hardly any such certificates have been issued, transactions carried out on more than 80 percent of the land in Uganda still go unrecorded, making "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?" (Adoko/Levine 2008: 114)

In light of the above it is not surprising that the consent clause has failed to provide the majority of women on the ground with adequate land rights protection. Given that the right to consent has been made conditional upon an existing marriage, those women among the most vulnerable to land rights abuse have been automatically excluded from any potential benefits associated with Section 39. However, even in regard to married women the provision has proven ineffective due to a number of inherent shortcomings and technical limitations that are yet to be resolved.

Ugandan Family Law and Women's Land Rights

Providing the overall legal framework for the regulation of women's property rights, Uganda's family law contains a number of provisions that pertain also to the issue of land. Most of the regulations relevant in this context are contained within the 1906 Succession Act, as amended in 1972. Even though a woman's right to inherit from both her father and her husband is explicitly recognized, a closer look at the different legal

provisions quickly reveals that women's inheritance rights are significantly inferior to those of men (cf. FAO 2010). This inequality in succession is most obviously expressed in the definition of the legal heir under Section 2 (n) which gives priority to men over women stating that where there is equality of some degree "a paternal ancestor shall be preferred to a maternal ancestor [and] a male shall be preferred to a female."

Adding to that, in accordance with Section 27 (1) (a) of the Succession Act the widow of a male intestate is entitled to only 15 percent of the deceased's estate with the remaining 85 percent going to the lineal descendants, dependant relatives and the customary heir. In polygynous marriages the widows receive even less given that in such cases the 15 percent are to be shared equally among all of them (cf. Kafumbe 2010: 208). Clauses (1) and (2) of the Succession Act's second schedule do, however, explicitly protect a widow's rights to occupy her house and to continue the cultivation of any land adjoining the residential holding that she used to till during marriage. The rights granted to her are, however, mere rights of occupancy, automatically terminating upon remarriage (cf. Mulumba 2006: 14)

In line with Section 2 (w) the Succession Act only caters for the interests of women "validly married to the deceased under the laws of Uganda; or married to the deceased in another country by a marriage recognised as valid by any foreign law under which the marriage was celebrated." This narrow definition of a wife puts cohabiting women at a significant disadvantage considering that in *Uganda vs. John Eduku* (1975) the court held that in order for a customary marriage to be considered valid full payment of bride price is required. As a consequence, a woman whose husband dies before completing the payment of dowry to her parents is likely to be denied any inheritance rights to the deceased's estate, regardless of her contributions to the marital property and the length of the relationship (cf. Nuwagaba 1999: 41). This was also the case in *Erinesti Babumba and others vs. Nakasi Kizito* (1987) where the court denied the mother of the deceased's children grant of letters of administration on the grounds that as a cohabitee she was not necessarily a widow (cf. Okumu Wengi 1996: 56f.).

Section 3 of the Succession Act, however, explicitly protects both men's and women's property rights stating that

> [n]o person shall by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her property which he or she could have done if unmarried.

This provision is of great significance in regard to women's land rights given that it provides for any property, including land, acquired by either spouse before marriage to remain the sole property of that spouse (cf. Rugadya/Obaikol/ Kamusiime 2004: 16)

The tendency in Ugandan family law to favor males over females is also reflected in the 1904 Divorce Act. In fact, Section 26 provides that the court may deny a woman her right to property and rule in favor of the husband where "a decree of dissolution of marriage or of judicial separation is pronounced on account of adultery by the wife." This provision is in clear violation of Articles 21(1) and 31(1) of the Constitution holding that all persons are equal before the law and providing for equal rights in marriage and at its dissolution (cf. Nakanyike-Musisi 2002: 37f.). Where there is a different reason for divorce, however, a woman's right to own property and land at the time of separation is protected under Section 15 of the Divorce Act stating that

> the wife shall, from the date of this decree, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire […] and such property may be disposed of by her in all aspects as if she were an unmarried woman.

However, the provision remains silent as to how separation will affect a woman's rights to land acquired during marriage (cf. Rugadya/Obaikol/Kamusiime 2004: 16f.).

From the above it can be concluded that there are a number of contradictions within Uganda's national legal framework that need resolving if compliance with the constitutional provisions on gender equality and affirmative action in favor of women is to be achieved. As long as the 1995 Constitution and the 1998 Land Act continue to be undermined by the discriminatory provisions contained within succession and divorce laws, the rights granted to women under the new land legislation are unlikely to be turned into a practical reality. For this reason a fundamental revision of Uganda's family law is essential in order for women's land rights to be adequately protected in both law and practice.[19]

[19] In 2003 major sections of the laws governing divorce and succession were declared unconstitutional after they had been successfully challenged in court by *FIDA* (The Uganda Association of Women Lawyers) and *Law and Advocacy for Women* . However, up until now no new laws have yet been enacted (cf. Ahikire 2011: 3).

6.3.2 Chaos and Confusion: The Current State of Ugandan Land Administration

Land administration can be defined as "the way in which rules of land tenure are applied and made operational." (FAO 2002: 12) One of its main tasks is to clarify property relations established around land in order to facilitate the transfer of land rights through sale, loan, lease, gift or inheritance and to minimize the potential for land conflicts (cf. LEMU 2009c: 1) Other than that, land administration serves the purpose of administering land use as well as land valuation and taxation (cf. MISR 2004: 18). Exploring the functionality of Uganda's land management institutions, the aim of this section is to assess the extent to which Ugandan land administration is actually fulfilling the tasks referred to above.

In line with Uganda's overall policy goal of decentralization the 1998 Land Act has decentralized land administration and management to district and sub-county level providing for the establishment of District Land Boards, Districts Land Offices and Land Registries as well as Sub-County Area Land Committees. However, even more than ten years after the enactment of the land reform program the newly created system of land administration is still far from functioning. The major challenges to the successful implementation of the new land law emanate from the enormous and previously uncalculated costs associated with setting up the new administrative bodies required to make the Land Act operational. Even though the Land Amendment Act 2004 already reduced the number and size of the prescribed institutions at sub-district level the cost of implementation still far exceeds Uganda's financial and human capacities (cf. Adams/Palmer 2007: 59, Alden Wily 2011c: 7).[20]

As a result, many land management institutions have either not yet been established or are so underfunded and understaffed that they are hardly operational (cf. Joireman 2007: 472f.). In point of fact, none of the key informants interviewed during the fieldwork could confirm that all of the prescribed institutions in their districts were in place and fully functional.

[20] The 1998 Land Act was passed without a detailed budget regarding its implementation. Prior to the amendment in 2004 the enactment of the Land Act would have exceeded the preliminary budget allocations ratified by parliament by about 500 percent. In fact, the Ugandan Government would have had to recruit an extra of 20,000 of trained personnel in order to staff the prescribed administrative institutions and make the new land law operational (cf. Hunt 2004: 187, Joireman 2007: 472).

Figure 13 - Source: (OAG 2011: 53)

A large number of the newly created administrative bodies do not only lack the office facilities, but also the technical equipment necessary to adequately carry out their functions. In fact, a study on the functionality of land management institutions in Uganda revealed that in up to 90 percent of the 23 districts visited the Area Land Committees and District Land Offices did not have typewriters, computers or photocopiers. In consequence, major activities such as processing of applications, valuation, surveying as well as printing and delivery of titles are all done manually. Moreover, due to a significant lack of storage room, files are often kept loosely on floors and shelves with no references attached to them (cf. OAG 2011: 51f.). The state of chaos prevailing in many land offices can best be illustrated by the following picture.

In view of the above it does not come as a surprise that the processing of title applications can take up to more than 100 working days (cf. ibid.: 76).

Adding to the lack of equipment and office space, the absence of support institutions further impairs the functionality of the few land management bodies actually in place. In Apac, for instance, the responsibility for land administration and management in the district rests almost solely with the District Land Board given that no District Land Office has yet been established and only a few Area Land Committees have been formed so far – and yet the performance of these institutions is the crucial determinant for the District Land Board to actually function (cf. A/KI). In an attempt to make up for the acute shortage of institutions some Local Council Courts have been doubling as Area Land Committees. In practice, however, this has created a lot of uncertainty and confusion about the actual roles of these institutions, not only among the people on the

ground but also among the committee/court members themselves (cf. Ahikire 2011: 13).[21]

To make matters worse, the members of District Land Boards and Area Land Committees oftentimes also lack the knowledge and skills to adequately handle their tasks. Due to improper induction training many of them do not fully understand their roles and responsibilities under the Land Act and therefore sometimes fail to properly apply the law. As a consequence, the land rights of the people on the ground are often jeopardized rather than safeguarded (cf. Mwebaza/Sebina-Zziwa 2005: 21, OAG 2011: 32ff.). In fact, there have been cases of District Land Boards issuing leasehold titles to customary land owners in an attempt to protect them against possible land rights abuse. However, for the people affected this means that "instead of having permanent ownership over the land, they are now given a fixed term contract, and may even have to pay rent." (LEMU 2009d: 2) With their ownership rights reduced to temporary use rights, they are now renting what used to be their own property.

In other cases customary land owners have been told that without a land title they are not entitled to compensation for land taken by the government for public purposes. This also happened to Juliet's family when the Town Council[22] in Apac took a large part of their land in order to construct a new road. On the grounds that the land acquired by the local authorities was held under customary tenure, the family has never been paid compensation (cf. A/FGD1). This is of course incorrect as the right to "prompt payment of fair and adequate compensation" granted under Article 26 of the Constitution applies to any person who is compulsorily deprived of their property by the government. However, given that adequate knowledge of the law is absent not only among government officials but even more so among the population on the ground, the affected people often do not realize that they have been wronged or do not know how to effectively defend their interests (cf. COHRE/WLLA/ULA 2009: 21).

Another major problem hampering effective land administration at local level is the inadequate remuneration of land management officials. In fact, according to the Ntungamo Land Officer, board members often receive their salaries only every other month while most committee members are not remunerated at all (cf. N/KI2). This lack of payment has severely affected the quality and quantity of the work carried out by the

[21] During her fieldwork in Mukono District Ahikire (cf. 2011: 13) came across an Area Land Committee whose members identified themselves as Local Council Court whereas the sub-county officials referred to them as land committee and the formal letter head used read "Land Tribunal Court".

[22] Town Councils are responsible for land use planning in urban areas (cf. LEMU 2009d: 1).

respective institutions. Moreover, it is not uncommon for committee members to transfer the costs associated with their work to applicants who are often in no position to raise the money requested (cf. IOM/UNDP/NRC 2010: 42).[23] As one woman in Amuru (qtd. in ULA 2010: 23) put it, "[w]hen you go to apply for a certificate, the area land committee ask you for transport, and they are normally many; In many cases it is expensive and we can't afford and this fails the process." The problem of inadequate remuneration has furthermore created a fertile ground for corruption and bribery rendering the services of many institutions unavailable to the majority of people on the ground who cannot afford to bribe their way to a land title (cf. Mwebaza/Sebina-Zziwa 2005: 30).

In light of the above it is not surprising that only few people have been able to benefit from the services provided by the newly created land management institutions. In fact, due to the constraints outlined before next to no certificates of customary ownership have yet been issued and not one communal land association has so far been set up in the country – and this regardless of the fact that both of these provisions bear great potential for the protection of both men's and women's customary land rights (cf. Adoko/Levine 2008: 114, OAG 2011: 43).

The poor performance of Uganda's land management institutions is often blamed on the lack of funds at both national and local level. However, spending is a matter of priorities. A quick glance at Uganda's budgetary plans reveals that the government's main interest has not exactly been the support of the newly set up institutions. Rather, the state has been focusing its resources on the conversion of customary tenure to freehold tenure. In point of fact, the amount of money earmarked for systematic demarcation in only four districts exceeds the budget allocations to all the sub-county land management institutions in the entire country by thirteen times (cf. Adoko/Levine 2005: 9). In view of this fact it does not come as a surprise that the "institutions which could protect women's land rights are either non-existent, non-functioning, unsupported, or they do not know or accept the law." (Adoko/Levine 2008: 115)

[23] In fact, Area Land Committees in the Acholi sub-region are charging up to 800,000UGX (approx. 250€) for all the administrative steps they are involved in (cf. IOM/UNDP/NRC 2010: 42).

6.3.3 Corruption and Male Bias: The Current State of Uganda's Land Justice Delivery System

In a context where land administration has failed to protect people's land rights and land grabbing from the vulnerable seems to be the order of the day access to a functioning justice system is essential if one is to successfully defend and secure his or her rights in a given piece of land.

Judging by the legal environment prevailing in Uganda one would assume that victims of land conflicts are sufficiently catered for in terms of secure and unimpeded access to justice. Setting up an ambitious structure of land tribunals operating at district and sub-county levels, the Land Act[24] has established a system of decentralized land dispute settlement easily accessible for the majority of Ugandans – at least in theory. The practical reality looks somewhat different. Due to financial and human resource constraints most of the prescribed land tribunals were never established and the few in place were hardly operational (cf. Ahikire 2011: 11). Even after the Land Amendment Act 2004 had repealed the section providing for sub-county land tribunals, the establishment of the remaining dispute settlement institutions at district level still posed too big a challenge for the Ugandan Government.[25] Towards the end of 2006 funding to the existing District Land Tribunals was stopped altogether with the pending cases handed over to the Chief Magistrate Courts in the respective districts (cf. Adams/Palmer 2007: 59).

At sub-district level the Local Council (LC) Courts[26] that had previously been banned from hearing land-related cases were reinstated and are now the first points of reference for land disputes (cf. Ahikre 2011: 12). The LC Courts – where in place – are not only locally accessible but also ensure that court proceedings are run in the most culturally appropriate way possible. There is no obligation to be represented by a lawyer and disputes in respect of customary land are to be determined according to customary law (cf. LEMU 2009e: 1). However, judging by the field evidence presented above, the LC Court system has failed to effectively protect women against land rights violations

[24] Sections 74 and 80 of the Land Act as passed in 1998

[25] In 2006 District Land Tribunals were operational only in 18 out of almost 80 districts (cf. Adams/Palmer 2007: 59).

[26] LC II Courts are handling cases at village and parish levels while LC III Courts - also referred to as Sub-County Court Committees – are appellate tribunals operating at sub-county level. Appeal from the LC III Court lies to the Magistrate's Court. The final court of appeal in land conflicts is the High Court (IOM/UNDP/NRC 2010: 32).

regardless of the favorable rules governing the procedural aspects of its hearings. Taking a closer look at LC Court practice, the reasons for this failure quickly become evident.

To begin with, in many cases the ability of LC Court members to adequately carry out their tasks is considerably compromised by their lack of training in both state and customary law (cf. ibid.: 2). In consequence, when deciding a case LC Courts often draw on a "mixture" of customary norms, statutory provisions and sometimes bills that Parliament has not even passed yet.[27] It is therefore not uncommon for legal provisions to be applied in the wrong context or to be adapted so as to fit a specific case at hand. In other words, where adequate knowledge of the relevant legal provisions is absent "LC Courts are tasked to craft a basis for their judgment […] building up pieces provided in the statutory law as well as custom." (Ahikire 2011: 28)

This selective application of different laws tends to put women at a significant disadvantage, particularly in land-related cases where LC Courts are expected to apply local custom. Due to their inadequate knowledge of customary law, LC Court members are just as susceptible to the misconceptions about customary land ownership as anyone else (cf. LEMU 2009e: 2). Following the prevailing assumption that under customary tenure "land belongs to men", LC Courts more often than not fail to acknowledge women's customary rights in land and, consequently, rule in favor of the male party to the conflict (cf. Adoko/Levine 2005a: 37, Eilor/Giovarelli 2002: 18).

Another obstacle faced by women when pursuing their land rights in court is the problem of corruption and bribery (cf. M/KI4, A/FGD1, A/FGD5, A/KI2, N/FGD1, N/FGD2, N/KI1). Considering that, similar to the newly created land management institutions, LC Courts are only poorly funded and facilitated their members are oftentimes inclined to side with those willing to "financially reward" them for their services (cf. IOM/UNDP/NRC 2010: 34). This has proven particularly detrimental to women who usually lack the means to engage in this kind of bribery, as can be illustrated by Provice's case.

[27] During her fieldwork Ahikire (cf. 2011: 26ff.) came across judgments that had been based on the Domestic Relations Bill – a bill that has been hotly debated for decades but never actually passed by Parliament. In other cases courts even drew on non-existing laws in order provide a basis for their judgment.

> While still alive, Provice's father allocated a piece of land to his daughters. Upon the father's death, however, one of Provice's brothers sold off the sisters' land without their knowledge. They did not hesitate to take the matter before a judge, but even though they were clearly in the right the LC II Court eventually ruled in their brother's favor. It soon turned out that the brother had not only managed to bribe the court members but was furthermore friends with one of them. Lacking the money to appeal to the next court, the sisters are unlikely to ever get back their land (cf. N/FGD1).

Provice's case points to another important factor severely compromising women's ability to successfully defend their land rights. Due to the fact that LC Courts are usually staffed with local community members, court staff and conflict parties are often familiar with each other and sometimes even maintain personal relationships. In a male-dominated institutional environment women are again on the losing end as male court members are generally unlikely to rule against their fellow clan man, relative, neighbor or comrade (cf. Ahikire 2011: 31). In the worst case, the land grabber is not only on good terms with the LC staff, but part of the court panel himself (cf. A/FGD3).

The close proximity of relationship between court staff and conflict parties also accounts for the general reluctance of LC Court members to handle cases involving a man and his wife or sister as they do not want to meddle in a fellow man's family problems (cf. Ahikire 2011: 31). In fact, it is not uncommon for women trying to report their husbands or brothers to a Local Council Court to be told to go home and resolve the "family issue" themselves or to first consult with the respective customary authority (cf. M/FGD1, A/FGD4, A/FGD5). This tendency of LC Courts not to get involved in "family issues" is particularly alarming in light of the fact that the main threats to women's tenure security emanate from within their own families.

An additional problem arising from the local embeddedness of dispute settlement institutions is the LC Courts' unwillingness to challenge the powerful and to make unpopular decisions. Especially where court members fear that they might lose popular support, they often refuse to pronounce judgment advising dissatisfied conflict parties to take the matter to the next court for proper settlement. In other cases, LC Courts have decided in favor of the person who can present the most witnesses or who is voted for by the "audience" (cf. LEMU 2009e: 2). This has led the wealthy and more powerful conflict parties to bribe community members to function as witnesses during the court hearings in order to tip the scales in their direction (cf. A/KI2).

However, even where a court rules in favor of a female plaintiff, this does not necessarily imply that her struggle is over as LC Courts usually lack the authority to actually enforce their decisions (cf. Adoko/Levine 2005: 15). As a consequence, where the judgment granted is not respected, the woman affected often has little choice but to appeal to a higher court and have the original suit restarted (cf. LEMU 2009e: 3). In practice, however, most women will choose to refrain from doing so considering the high costs associated with a new court case (cf. M/KI2, A/FGD6, N/FGD, N/FGD3, N/KI1).[28]

In view of the common failure of LC Courts to uphold and protect women's interests it is not surprising that many women are hesitant to take legal action against those depriving them of their land rights. Given that the main perpetrators of land grabbing from women are family and clan members, the pursuance of land rights in court is already risky business for the majority of women as "[g]oing to State courts against a clan member is not just expensive but socially unacceptable." (LEMU 2009b: 2) In fact, women taking a family member to court are not only faced with a high risk of domestic violence but are sometimes even expelled from their communities or abandoned by their husbands (cf. Eilor/Giovarelli 2002: 18). In consequence, many women remain quiet given that in the absence of a strong and reliable justice system taking a land grabber to court might actually do more harm than good.

6.3.4 Changes in Customary Land Tenure and the Erosion of Customary Institutions: Why Customary Systems are Failing to Protect Land Rights

Background to the Erosion of Customary Authority in Uganda

Generally, customary land tenure systems are structured to ensure that all community members, including women and children, are guaranteed access rights to land and other resources essential for their wellbeing (cf. Lastarria-Cornhiel 1997: 1324). Under clan tenure the ultimate responsibility for land rights protection rests with the clan elders who are to make sure that land remains within the clan and that family heads are managing their landholdings for the benefit of the whole family including future generations (cf. Adoko/Levine 2005a: 45, Obol-Ochola 1971: 68). However, due to the

[28] Considering that state courts are not adequately funded, the costs associated with their work are oftentimes transferred to the conflict parties. In consequence, taking a case as far as to the LC III Court can cost as much as a three months' family income (LEMU 2009e: 3).

various social, economic and political factors outlined in chapter 5[29] customary systems in many African countries have significantly been weakened over the past decades, Uganda being no exception. As a result of the progressing monetarization of local economies, economic goods have increasingly been divorced from their social context and the norms that used to determine their value. The consequent erosion of the personal and social ties once inherent in the exchange of goods and services has severely affected the functionality of customary institutions whose authority to enforce customary rules of protection is essentially dependent on a high level of social cohesion in their communities (Adoko/Levine 2008: 106, Rugadya 2008: 7).

Apart from the decline of social cohesion, another key factor contributing to the erosion of customary authority in Uganda has been the significant increase in informal land sales many communities have witnessed over the past decades. With commoditization increasing the need for cash incomes in rural households, land is increasingly perceived as an asset that can be sold to meet urgent financial needs, rather than a family heritage and source of livelihood that derives its value from the right to be used (cf. Adoko/Levine 2005: 1, 10). Regardless of the fact that in most cases the land sold remains unregistered and therefore still falls under the category of "customary land", it is often treated differently than "traditional clan land" handed down from father to son. As Adoko/Levine (2005a: 45) have observed,

> [p]urchased land is considered more the sole property of the man who bought it: because it was not given to the owner through inheritance or any other social process, the land does not come with social obligations, meaning that other interests in the land are less likely to be recognised.

As a result of the gradual disappearance of the notion of customary ownership as trusteeship, individual men have started to assume the powers originally vested in the clan elders (cf. LEMU?a, Oxfam 2000). As suggested by the evidence collected in the field, this development has created a situation in which land transactions are increasingly taking place without prior consultation of the family or clan.[30] In consequence, with the power base increasingly shifting from clan elders to the male heads of household, the clan's ability to impose social rules upon its members and comply with its obligation to ensure that land does not leave the clan has been severely

[29] Contemporary Drivers of Change in the Evolution of Customary Law

[30] The fact that transactions of purchased customary land are not necessarily subject to the clan's approval could also be seen in the case of Netty, as outlined above, whose husband did not deem it necessary to first consult with the clan elders before selling a piece of land previously acquired by means of purchase (cf. A/FGD3).

weakened (cf. Rugadya 2008: 7). This development has been particularly detrimental to women who used to be among the main beneficiaries of clan protection (cf. Adoko/Levine 2005a: 45).

When Customary Law Meets State Law: The Impact of Land Reform on Customary Institutions

Giving legal recognition to the laws governing customary land tenure, both the Constitution and the Land Act bear great potential for reversing the trend of weakening customary institutions. In light of the fact that customary rules now have full judicial force in state law and customary dispute settlement mechanisms have formally been recognized[31], one would think that the erosion of customary systems would have successfully been countered by now. Unfortunately, however, this has not been the case. On the contrary, ever since the enactment of the new land law customary authorities have been weakened even more as state institutions are increasingly taking their place (LEMU 2007).

In fact, so far the Ugandan Government has completely ignored customary institutions and done next to nothing in order to support them in the performance of their functions – and this regardless of the fact that customary authorities remain responsible for the administration of more than 80 percent of the land in Uganda (cf. Adams/Palmer 2007: 57, LEMU 2009c: 2).[32] Instead, the state has focused its resources on systematic demarcation and the creation of a decentralized system of land administration that it obviously cannot afford and that concerns itself only with the small portion of titled land in the country (LEMU 2007).

The state's reluctance to support customary tenure is particularly alarming in view of the fact that in a context of rapid population growth, increasing individualization of land tenure and a growing number of land disputes the tasks associated with customary land administration and dispute settlement have become increasingly complex – and require funds that customary institutions currently lack. It is therefore not surprising that many of them have failed to meet the challenges presented by the changing environment and are no longer capable of effectively executing their work (cf. LEMU 2009c: 2, ULA 2010: 17). To make matters worse, even where customary institutions are still functioning they often lack the necessary authority to actually enforce their decisions

[31] Sections 3 (1) and 88 of the Land Act.

[32] In fact, by 2007 no budget at all had been allocated to the customary institutions in the country (cf. Adams/Palmer 2007: 57).

over land-related matters and disputes (cf. ULA 2010: 19). This also became evident in Gloria's case as described above. Even though the clan had clearly ruled in her favor, her nephew could not be stopped from grabbing her land and up to today has not faced any consequences for his actions (cf. A/FGD2).

The problem of declining clan authority has further been exacerbated by the fact that the Land Act has installed a parallel system of state courts for the adjudication of customary land disputes, instead of reinforcing the existing customary institutions it has formally recognized (cf. LEMU 2011: 3). As a result, customary authorities and local courts are oftentimes confused about their actual roles and responsibilities as they do not know how to relate to each other. Uncertain about the legal status of judgments granted by customary fora, local state courts often simply restart already adjudicated cases instead of hearing an appeal against the decision of the respective customary institution. In such an environment any person losing a case at a customary forum can simply ignore the judgment and turn to another court (cf. LEMU 2009a: 3).

In many cases, however, customary authorities are circumvented altogether. Due to the fact that state law is generally considered superior to customary law people have increasingly been turning to the Local Council (LC) I Chairman[33] or the Resident District Officer (RDC)[34] instead of addressing the responsible customary authority.[35] This development is particularly problematic in light of the fact that neither the LC I nor the RDC has the legal authority to decide over land-related matters. Nevertheless, as representatives of the state administration they are often held in higher regard than customary authorities (cf. Adoko/Levine 2005a: 46, Ahikire 2011: 13f.). As a result, people wishing to sell customary land often do no longer bother to seek permission from the clan, but take the matter straight to the LC I whose authorization is erroneously believed to confer validity on a land transaction. In practice, this situation has often worked to the detriment of women. In fact, due to their lack of legal training LCs often fail to verify if spousal consent to a land sale has actually been obtained – either because they are not aware of the consent clause or because they are under the common

[33] The representative of state administration at village level

[34] The RDC, who is directly appointed by the president, is a representative of the president responsible for the promotion of national interests in the district of operation (cf. Ahikire 2011: 14)

[35] Especially in Ntungamo the importance of the clan in conflict resolution is steadily decreasing with people preferring to take their cases straight to the LC I Chairman or LC II Court (cf. N/FGD1, N/FGD2, N/FGD3, N/KI2, N/KI1).

misapprehension that customarily "women do not own land" and therefore have no right to oppose a land transaction (cf. Adoko/Levine 2008: 113).[36]

In many communities the increasing circumvention of clan institutions has severely affected their performance and functionality. In an environment where they are no longer taken seriously and constantly undermined by allegedly superior state institutions, clan authorities have increasingly neglected their responsibilities and started to pursue their own interests (cf. LEMU 2009a: 3). This was also confirmed by the men and women consulted in Mbale and Apac where compared to Ntungamo the clan is still relatively strong and plays an active role in conflict resolution. Regardless of the fact that for many women the clan elders have remained the first point of reference for land disputes, only few of them have actually been able to benefit from clan protection (A/FGD2, A/FGD4). This is partly due to the fact that corruption and bribery have become common also within the clan, leading to a situation where customary authorities are more likely to side with the wealthier conflict party than the one in the right (A/FGD1, A/FGD5). Adding to that, there was a general sentiment among the women consulted that clan leaders are essentially biased against females and generally rule in favor of their fellow clan men, regardless of whether or not they have been violating women's rights (cf. M/FGD1, M/FGD4, A/FGD1, A/FGD2, A/FGD4, A/FGD5).

In light of the above it is not surprising that customary mechanisms of protection have failed to adequately safeguard women's customary land rights. With clan authority steadily decreasing as customary tenure is becoming increasingly individualized, the clan's ability to impose social norms upon its members has been severely compromised. Moreover, it has become clear that, despite the formal recognition of customary land law, the government's negative attitude towards customary tenure has not changed, quite the contrary. Instead of building on existing customary structures, the Ugandan Government chose to establish a parallel system of state institutions that it cannot even afford and that, in practice, has further contributed to the erosion of customary authorities which are now increasingly by-passed in favor of their formal counterparts.

[36] The phrase "women do not own land" is the result of a confusion of customary law and state law. Customarily, neither women nor men own land. However, with men increasingly confusing their land management role with individual land ownership the fact that under customary law women depend on men for access to land has led to the conclusion that under customary law it is men and not women who own land (cf. Adoko/Levine 2005: 10f.).

As a result, customary authorities have started to abandon their responsibilities, increasingly pursuing their own interests, to the detriment of the more vulnerable members of customary societies.

6.3.5 Concluding Remarks

Women's ability to successfully defend themselves against land grabbers and secure their claims in land is currently severely compromised by a number of different factors. It has become clear that the legal framework governing women's land and property rights still contains a number of discriminatory provisions that put women at a considerable disadvantage. While Uganda's divorce and succession laws have proven the most problematic, several weaknesses are contained also within the 1998 Land Act which has an overall tendency to protect legally married women only.

Apart from the legislative framework, threats to women's tenure security also emanate from the current state of Uganda's institutional environment. With the government spending most of its resources on systematic demarcation, many of the formal land management and dispute settlement institutions necessary for the protection of land rights are either not yet in place or so underfunded that they are hardly operational. At the same time, customary institutions – which remain responsible for the administration of more than 80 percent of the land in Uganda – are severely overwhelmed by the growing complexity of the tasks associated with their work and already struggling to fulfill their roles. To make matters worse, customary authorities have been severely undermined by the existence of parallel state institutions which are increasingly taking their place, sometimes even without the legal authority to do so. In consequence, this has led many traditional leaders to abandon their responsibilities altogether and pursue their own interests instead of safeguarding those of the vulnerable.

As a result, what people on the ground are now left with, is a multiplicity of uncoordinated and dysfunctional institutions whose members have fallen prey to corruption, frequently protecting perpetrators rather than victims. It is therefore not surprising that forum shopping has become the order of the day given that in an institutional vacuum, as it is prevailing in many parts of Uganda, “parties to disputes [are free to] invoke different norms to support competing claims and choose to utilize the institutional channels according to personal calculations and the social networks available to them.” (Ahikire 2011: 14) A certain degree of social strength and power have therefore become essential if a person is to successfully manipulate the multiple

institutional pathways in their favor. In a context of highly unequal gender relations, this has put women at a significant disadvantage given that, as could be seen above, they often lack both the social ties and financial capability necessary to assert their interests and obtain justice in a corrupt and male-dominated institutional environment where, clearly, might has become right (cf. Adoko/Levine 2008, LEMU 2009b, LEMU 2009e).

6.4 "Women do not own land" or How to Translate Customary Rights into State Law: The Likely Impact of Land Titling on Women's Tenure Security

Considering that the creation of a uniform land tenure system based on freehold tenure is unquestionably one of the main objectives underlying Uganda's current land policies, the aim of the following section is to assess the likely impact of land titling on women's security of tenure and its potential for actually strengthening women's land rights in the Ugandan context.

There is a general assumption among the proponents of land tenure formalization that the benefits of formal title accrue to both, men and women, equally. In fact, it has commonly been argued that formal land ownership does not only enhance women's tenure security but also improves their access to credit and land markets while at the same time increasing their bargaining power at household level (cf. Lastarria-Cornhiel 2009: 6). Given that in Uganda the process of systematic demarcation has just started and is still decades away from being completed, it is too soon to tell the overall impact of land registration on women's tenure security.[37] Evidence from other African countries, however, has demonstrated that land titling tends to weaken, rather than strengthen, women's claims in family land (cf. Nyamu-Musembi 2008: 32). First figures from the areas already demarcated clearly indicate that this is also likely to be the case in Uganda. In Bulowooza I and II villages in Iganga District, for instance, only 14 percent of the identified land owners are female while 82 percent are male (cf. MLHUD 2010: 35).

One of the main threats to women's land rights in the titling process emanates from the fact that systematic demarcation is usually guided by the simplistic question of "who

[37] Phase I of the demarcation project covered the parishes of Rukangaro in Ntungamo District, Kabigi in Masaka District and Aminit in Soroti District. Phase II is currently covering the parishes of Bulowooza in Iganga District, Bumbobi and Bumasikye in Mbale District, Kasingo in Kibaale District, Rupa in Karamoja District, Gayaza in Wakiso District and Kinawataka in Kampala District (cf. MLHUD 2010: 35).

owns the land?" rather than "who has what rights in the land?" (cf. Adoko/Levine 2008: 118). In a customary setting, however, such an approach could not be more inappropriate given that under customary tenure different family members hold different rights in the same piece of land. Still, customary land is usually registered in the name of one family member only, depriving the rest of the family of the rights granted to them under customary law (cf. LEMU 2007a: 3). "In a society where access to land is through the male line and where the power in gender relations is so unequal, [this] means turning almost all land into men's property." (Adoko/Levine 2008: 115)

The primary reason for why the registration process in Uganda tends to favor men over women is the widespread assumption that under customary law "women do not own land". This phrase is not incorrect, but oftentimes severely misunderstood, especially when divorced from its original context. It is true that under customary tenure women do not own land, but individual men do not own land either. Actually, "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." (LEMU 2009a: 1) However, in a context of increasing individualization of land tenure the man's management role has become increasingly confused with the Western notion of individual land ownership leading to the gradual erosion of the customary concept of ownership as stewardship. In consequence, it is most likely the male family head that is identified as the land owner during the demarcation process (cf. Adoko 2000: 1f.). The tendency to regard women's customary land rights as rights of secondary character is also reflected in the stricture of the parcel registration form used during the demarcation process in Rukangaro, Ntungamo. In fact, the form required the names of the "owner" and the "spouse" without making provision for "other owners", revealing the inherent insinuation that under customary tenure the rights of one spouse are considerably inferior to those of the other one. In view of this, the relatively low incidence of joint registration of customary land by both spouses is not surprising (cf. Kamusiime/Rugadya/Obaikol 2005: 35).[38]

Another obstacle to women having land registered in their name is the strong male resistance to the idea of female land ownership prevailing in many parts of Uganda. In fact, there is a widespread fear among men that a woman owning land in her own right will no longer respect her husband, become stubborn and leave her marriage at the slightest excuse (cf. Asiimwe/Nyakoojo 2001: 36f.). Moreover, some men have fallen

[38] Joint registration is provided for under Sections 56 and 94 of the Registrations of Titles Act, Chapter 230 and Article 26 of the Constitution (cf. Obaikol 2009: 10f.).

prey to the idea that a woman is her husband's property based on the fact that he "bought" her at the time of marriage paying bride price to her family. The commonly reached conclusion to this it that "property cannot own property" – a frequently encountered justification for why a woman cannot or should not own land (cf. Joireman 2007: 476, MISR 2002: 84).

From the above it can be concluded that men are likely to emerge as the main beneficiaries of the government's demarcation efforts. Even though the Land Act provides for other rights to be recorded as encumbrances on a title, in practice this is unlikely to adequately protect women's rights. On the contrary, in the process of translating interests in land from one legal code into another, women's customary rights run a high risk of being devalued due to the fact that under Western legal tradition any rights not amounting to ownership are likely to be relegated to secondary status. Therefore, unless there is a direct translation of customary rights into state law, the transfer of land from customary tenure to freehold tenure will inevitably result in a significant weakening or complete loss of women's customary land rights (cf. Adoko/Levine 2005: 13, 2008: 115). This apprehension is not farfetched considering that evidence from other parts of Africa has clearly shown that "during the transition from customary tenure to private property systems, women tend to lose the few rights they had under customary tenure and do not gain the rights that, theoretically at least, every person has in a private property and market system." (Lastarria-Cornhiel 1997: 1326)

7 Conclusion

The legal environment has never been more favorable to women in Uganda. While the main objective underlying the legal reforms of the 1990s was clearly to facilitate the transition to a privatized land tenure regime based on freehold tenure, the Ugandan Government at the same time made a deliberate effort to redress gender-based imbalances existing in land access and ownership. The new constitution explicitly provides for equality between men and women, also in regard to the acquisition and holding of land, and furthermore directs the state to take affirmative action in favor of women and other marginalized groups of society. Adding to that, the 1998 Land Act contains a number of provisions aimed at strengthening women's land rights and safeguarding their interests in family land.

Apart from statutory law, women's land rights are explicitly protected also under customary law whereby, depending upon family membership and marital status, women are accorded secure access and use rights to land in either their maiden or matrimonial homes. During the land reform process the protection granted to women under customary tenure was further enhanced by the legal recognition of customary land laws which now have full judicial force in state law, provided that they do not violate any rights enshrined within the new constitution.

However, despite the favorable legal environment, the situation on the ground is still far from satisfactory with women fully enjoying their land rights clearly being the exception rather than the rule. In fact, in a context of increasing land scarcity, rising land values and rapid population growth women are frequently dispossessed of their land as men are taking advantage of their superior position within the patrilineal tenure system, advancing their own interests at the expense of weaker family members.

However, as the field research in Mbale, Apac and Ntungamo has clearly indicated, not all groups of women are exposed to the same threats. On the contrary, the different vulnerabilities experienced by women under customary tenure vary considerably according to marital status and changing family circumstances. While widows run a high risk of being chased away from their matrimonial homes by their in-laws, married women's vulnerability to land loss usually results from their lack of bargaining power within the conjugal households and the perils of polygyny. Separated, divorced and unmarried women, on the other hand, are commonly falling victim to land grabbing by their brothers and other male relatives in their maiden homes.

This situation is particularly alarming in view of the fact that in a customary setting most women continue to be crucially dependent upon their families for access to land as the emerging land markets still remain inaccessible to the majority of females due to their low purchasing power, social pressures and gender-based power inequalities at household-level.

To make matters worse, women's ability to successfully defend themselves against land grabbers and secure their claims in family land is currently severely compromised by a number of different factors. First of all, even though Ugandan women have never been granted more protection under national legislation, a closer examination of the legal framework governing land and property rights quickly reveals that there are still a number of shortcomings in the law that put women at a significant disadvantage. While the 1998 Land Act has a tendency to protect women only in marriage, Uganda's succession and divorce laws contain a number of discriminatory regulations severely undermining the constitutional provisions on gender equality and affirmative action in favor of women.

Apart from the legislative framework, threats to women's tenure security also emanate from the current state of Uganda's institutional environment. With the government spending most of its resources on systematic demarcation, many of the formal land management and dispute settlement institutions necessary for the protection of women's land rights are either not yet in place or so underfunded that they are hardly operational. At the same time, customary institutions are severely overwhelmed by the growing complexity of the tasks associated with their work and already struggling to fulfill their roles. Adding to that, customary authorities have been severely undermined by the establishment of parallel state institutions which are increasingly taking their place, sometimes even without the legal authority to do so. In consequence, this has led many traditional leaders to abandon their responsibilities altogether and pursue their own interests instead of safeguarding those of the vulnerable.

As a result, what people on the ground are now left with, is a multiplicity of uncoordinated and dysfunctional institutions whose members have fallen prey to corruption, frequently protecting perpetrators rather than victims. A certain degree of social strength and power have therefore become essential if a person is to successfully manipulate the multiple institutional pathways in their favor. In a context of highly unequal gender relations, this situation has proven particularly detrimental to women

who often lack both the social ties and financial capability necessary to assert their interests and obtain justice in a corrupt and male-dominated institutional environment.

Even though land titling has often been argued to be the key to women's tenure security, first figures from the areas already demarcated clearly indicate that men are most likely to emerge as the main beneficiaries of land tenure privatization in the Ugandan context. In fact, in a patrilineal society land is usually registered in the name of the male family head only, depriving other family members of their customary rights in family land. Therefore unless there is a direct translation of customary rights into state law, the transfer of land from customary to freehold tenure will inevitably result in a significant weakening or complete loss of women's customary land rights.

It is against this background that critics of current government policy have argued that if tenure security for women is actually to be achieved in the near future, policy makers will have to stop ignoring customary tenure and

> 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. (Adoko/Akin/Knight 2011: 6)

In fact, it has become clear that, contrary to common belief, threats to women's tenure security do not emanate from a lack of rights under customary law, but from the constant violation of their customary rights. Therefore, a solution more appropriate and (less expensive) than the replacement of customary with freehold tenure might be to ensure that both, customary and statutory provisions are actually implemented on the ground. This, however, will require some sort of integration of customary and formal land tenure, considering that the parallel operation of traditional and state institutions has so far only added to the problem, creating an institutional vacuum in which perpetrators of land rights abuses face no consequences for their actions (cf. Adoko/Levine 2008: 116f., LEMU 2008).

In this regard the National Land Policy adopted in March 2011 contains a number of very promising policy statements clearly aimed at supporting customary institutions and further integrating customary and formal tenure systems. Acknowledging that customary land tenure has been neglected for a long time, the policy directs government to “recognize the role of customary institutions”, “enforce decisions of traditional land management by local government and State institutions” and “ensure full backing for traditional institutions as mechanisms of first instance in respect of land rights

allocation, use regulation and dispute processing for land under customary tenure." (MLHUD 2011: 21) While these policy goals unquestionably bear great potential for increased land rights protection on the ground, it still remains to be seen in how far rhetoric will actually translate into action.

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Appendix A: List of Interview Partners

Mbale

Focus Group Discussions

M/FGD1	Bumbobi Community	09.08.2011
Teddy	married	
Edith	married	
Jennifer	unmarried	
Christine	married	
Rose	married	
Zita	married	
Rose	married	
Annet	married	
Victoria	married	
Anna	widow	
Base	unmarried	
Anna	married	
M/FGD2	Lukhonge Community	10.08.2011
Junik	married	
Minisa	married	
Violet	unmarried	
Betty	married	
Rose	married	
Florence	married	
Jane	married	
Juliet	married	
Eunice	widowed	
Jennifer	widowed	
Sylvia	widowed	
Lorna	married	

Agatha	married	
M/FGD3	Lukhonge Community	10.08.2011
Agnes	married	
Carolin	married	
Yiwanita	married	
Janet	married	
Sylvia	married	
Loy	married	
Michael	married	
John	married	
M/FGD4	Nakaloke Community	11.08.2011
Scoviah	unmarried	
Oliva	unmarried	
Juliet	married	
Mary	married	
Juliet	married	
Hadijja	married	
Esther	married	
Caroline	unmarried	
Catherine	married	
Mary	widowed	
Rebecca	unmarried	
Jonathan	unmarried	

Key Informants

M/KI1	Lois Wamutu, Women Concern Ministry	09.08.2011
M/KI2	Meresi Mutonyi, Probation and Social Welfare Officer	11.08.2011
M/KI3	Opio Henry Ogenyi, Land Officer	11.08.2011

	Ophelia, client of Mr. Ogenyi (spontaneously interviewed in Mr. Ogenyi's office)	
M/KI4	David Mabonga, Christine Siamanyia, Patrick Kojjo, Richard Etiang, James Wefukhulu, Mbale Paralegals	12.08.2011

Apac

Focus Group Discussions

A/FGD1	Upper Center	13.08.2011
Kathy	unmarried	
Restuta	unmarried	
Anna	unmarried	
Jane	unmarried	
Fiona	married	
Gloria	unmarried	
Margaret	married	
Lucy	married	
Rose	widowed	
Juliet	unmarried	
Nora	married	
A/FGD2	Angayiki	13.08.2011
Catherine	married	
Agnes	married	
Eveline	married	
Karen	widowed	
Consolata	separated	
Hellen	separated	
Enin	separated	
Silvia	married	

Gloria	unmarried	
Betty	separated	
Joan	separated	
Lilian	separated	
Hellen	married	
Nora	widowed	
A/FGD3	Abany Iping	15.08.2011
Harriet	separated	
Mary	married	
Molly	widowed	
Grace	widowed	
Rose	widowed	
Netty	married	
Rita	unmarried	
Esther	unmarried	
Eunice	separated	
Thomas	married	
A/FGD4	Aduku Senior	15.08.2011
Lilian	widowed	
Christine	widowed	
Anna	widowed	
Mildred	unmarried	
Anna	widowed	
Milly	widowed	
Janet	widowed	
Susan	married	
A/FGD5	Abotaber Village	16.08.2011
Karolina	co-habiting	

Nekolina	widowed
Scoviah	unmarried
Susan	divorced
Foibi	separated
Betty	separated
Lilly	married
Margaret	married
Jennifer	co-habiting
Jenty	separated
Yasin	married
Santo	married
Henry	widowed

A/FGD6	Amilo	16.08.2011

Mildred	married
Molly	married
Paska	widowed
Agnes	married
Molly	married
Esther	divorced
Betty	separated
Joyce	married
Cilly	married
Rose	married

Key Informants

A/KI1	Beatrice Adupa, Probation and Social Welfare Officer	16.08.2011
A/KI2	Solomon Adoko, LEMU Apac	16.08.2011

Ntungamo

Focus Group Discussions

N/FGD1	Bwongyera	24.08.2011

Provice	married
Winnie	married
Kedress	married
Harriet	married
Rovene	married
Sharon	widowed
Geofrey	married
Edith	unmarried
Lucia	widowed
Rwabita	married
Sharon	married
Fatuma	married
Mercy	unmarried
Mary	divorced
Generous	married
Sulaina	married
Fausta	married
Miduis	divorced

N/FGD2	Nyanga	25.08.2011

Christine	married
Constance	widowed
Pheobe	widowed
Loy	married
Jacinta	divorced
Edith	divorced
Harriet	widowed

Esther	married
Lydia	married
Loy	married
Molly	widowed
Medias	widowed
Betes	married
Molly	married
Sederous	widowed
Junice	widowed

N/FGD3	Rubaare Town	25.08.2011

Priscah	married
Edivine	married
Eylas	widowed
Hildah	widowed
Specioza	widowed
Hodira	married
Betes	married
Evas	married
Nsimire	widowed
Fortunate	separated
Justine	married
Jacqueline	married
Merabu	widowed
Phiona	unmarried
Peace	widowed
Evas	married
Patience	married
Olivia	married
Emily	married
Monica	married

Key Informants

N/KI1	Benon Mugume, Probation and Social Welfare Officer	23.09.2011
N/KI2	Joshua Mariiro, Land Officer	24.08.2011

Appendix B: Abstract/Zusammenfassung

Abstract

Even though women are the main agricultural producers in Uganda, only few of them enjoy secure rights to the land they till as ownership and control of land are mainly concentrated in the hands of men.

While the primary aim underlying the Ugandan land reform process of the 1990s was clearly to facilitate land tenure privatization, the Ugandan Government at the same time made a deliberate effort to redress gender-based inequalities in land access and ownership. The new constitution explicitly provides for equality between men and women, also in regard to the acquisition and holding of land, and furthermore prohibits any customary practices discriminating against women. Adding to that, the customary rules safeguarding women's interests in land now have full judicial force in national law and are to be upheld also by state courts.

However, despite the favorable legal environment abuse of women's land rights is still common, especially in the rural areas where women are frequently dispossessed of their land by members of their own families.

It is against this background that this thesis seeks to identify the different reasons for the high levels of tenure insecurity currently experienced by many women across Uganda. Drawing on existing literature and data collected during fieldwork in Mbale, Apac and Ntungamo Districts, the thesis provides a detailed analysis of the various factors determining and influencing women's access to and control over land while at the same time exploring the existing and potential threats to women's land rights in the Ugandan context. Special emphasis is thereby placed on the vulnerabilities faced by different groups of women under customary tenure, the dominant and most widespread form of landholding in Uganda. Central to this thesis is to show how in a context of increasing land scarcity, high population pressure and progressing land tenure privatization, men are increasingly taking advantage of their superior position within the patrilineal tenure system, advancing their own interests at the expense of weaker family members, first and foremost the women in the family. At the same time, women's ability to successfully defend their interests in land is severely limited as they often lack both the social ties and financial capability necessary to assert their rights and obtain justice in a corrupt and male-biased institutional environment.

Zusammenfassung

Ungeachtet der Tatsache, dass Ugandas landwirtschaftliche Produktion fast ausschließlich von Frauen getragen wird, haben nur wenige von ihnen sichere Zugangsrechte zu dem von ihnen bewirtschafteten Land, nachdem sich der Großteil des Landbesitzes gegenwärtig in Männerhand befindet.

Obwohl die Landreform in Uganda während der 1990er Jahre vorranging auf die Privatisierung von Landbesitz ausgerichtet war, bemühte sich die ugandische Regierung gleichzeitig auch darum, bestehende Ungleichheiten zwischen Männern und Frauen im Bereich des Landzugangs und -eigentums zu beseitigen. Die neue Verfassung anerkennt explizit die Gleichheit von Mann und Frau in allen gesellschaftlichen Bereichen und verbietet jegliche gewohnheitsrechtliche Praktiken, die Frauen diskriminieren. Darüber hinaus sind die Rechte, die Frauen unter dem Gewohnheitsrecht zukommen, nun formalrechtlich anerkannt und damit auch vor staatlichen Gerichten durchsetzbar.

Trotz des umfassenden rechtlichen Schutzes sind Landrechtsverletzungen an Frauen jedoch vor allem in den ländlichen Gebieten noch weitverbreitet, wo Frauen häufig durch Mitglieder der eigenen Familie ihres Landes enteignet werden.

Ziel der vorliegenden Diplomarbeit ist es nun, die verschiedenen Gründe für die gegenwärtige Landrechtsunsicherheit von Frauen in Uganda zu erforschen und aufzuzeigen. Auf Basis einer in Mbale, Apac und Ntugamo durchgeführten Feldforschung sowie sorgfältiger Literaturanalyse, wird eine ausführliche Darstellung der zahlreichen Faktoren geboten, die gegenwärtig die Landrechte von Frauen in Uganda bestimmen, beeinflussen und gefährden. Besonderes Augenmerk wird dabei auf die potentiellen Gefahren gelegt, mit denen sich verschiedene Gruppen von Frauen unter dem Gewohnheitsrecht konfrontieret sehen, welches nach wie vor den Großteil des Landbesitzes in Uganda regiert. Im Zuge der Diplomarbeit wird deutlich, dass sich Männer in einer von Landknappheit, raschem Bevölkerungswachstum und fortschreitender Privatisierung geprägten Umgebung, zunehmend ihrer mächtigeren Position im patriarchalen Landrechtssystem bedienen, um ihre eigenen Interessen auf Kosten schwächerer und vorranging weiblicher Familienmitglieder voranzutreiben. Frauen sind dem gegenüber zumeist hilflos ausgeliefert, da ihnen häufig sowohl die sozialen Beziehungen als auch die notwendigen finanziellen Mittel fehlen, um ihre Rechte in einem von Korruption geprägten und männerdominierten institutionellen Umfeld durchzusetzen.

Appendix C: Curriculum Vitae

PERSONAL INFORMATION

Full Name	Barbara Gärber
Date of Birth	18 July 1989
Place of Birth	Salzburg, Austria
Citizenship	Austrian

EDUCATION

10/2008 – present	Law (Diplomstudium Rechtswissenschaften) University of Vienna
03/2008 – 06/2012	International Development Studies (Individuelles Diplomstudium Internationale Entwicklung) University of Vienna
12/2005 – 07/2006	High School Student Exchange Sveitsin Lukio Hyvinkää, Finland
09/1999 – 06/2007	High School Wirtschaftskundliches Bundesrealgymnasium Salzburg
09/1995 – 07/1999	Primary School Volksschule Rif-Rehhof, Hallein

RESEARCH EXPERIENCE

07 – 09/2011	Research Internship with Uganda Land Alliance Kampala, Uganda Qualitative Field Research on Women's Land Rights in Mbale, Apac and Ntungamo, Uganda

PROFESSIONAL EXPERIENCE

03/2011	Internship with Asyl in Not Vienna, Austria
07 – 08/2010	Internship with Foundation for Millennium Promise Kampala, Uganda

07 – 09/2009	Volunteer work at New Life International Orphanage Cape Coast, Ghana
10/2007 – 02/2008	Volunteer work at Central Regional Hospital Cape Coast, Ghana
	New Life International Orphanage Cape Coast, Ghana

LANGUAGE SKILLS

German	First Language
English	Fluent in Spoken and Written
Finnish	Fluent in Spoken and Written
Kiswahili	Good Knowledge
French	Good Knowledge