

FOCUS ON LAND IN AFRICA BRIEF

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Uganda

Lesson 4:

Women and Customary Land Rights

INTRODUCTION

Research shows that Ugandan women in Acholi, Langi and Iteso societies have significant land rights under customary tenure arrangements. Many, however, face challenges in realizing their rights. Despite formal laws that forbid discrimination against women, significant disparities between the rights of men and women arise from violation of customary law. The power of the clan authorities to enforce rules governing customary tenure have eroded over time, such that clan elders now often fail in their traditional duty to protect women and children. This lesson explores the struggles women face in benefiting from their customary land rights. Uganda is currently developing a National Land Policy which provides opportunities to address these challenges.

CUSTOMARY TENURE ARRANGEMENTS

Many scholars and advocates have argued that customary tenure arrangements are biased against women and should be replaced by statutory tenure systems that provide and guarantee women and men equal rights to land and natural resources. Although women have land rights under some customary tenure arrangements, including Ugandan women in Acholi, Langi and Iteso societies, few actually realize and benefit from their rights. Moreover, women's property rights are often weakening in the face of rising competition for land and natural resources. Yet, customary tenure also offers many advantages for both men and women. Rather than replace customary with statutory systems, some Ugandan advocates are now arguing that traditional institutions responsible for implementing and enforcing customary rules should instead be strengthened in ways that will enhance women's property rights.

Some human rights advocates have argued that securing women's land rights is one of the more important issues for enhancing the wellbeing of Ugandan women and will have the largest positive effect on women. They argue that while women's land rights also need to be strengthened in the statutory tenure system, women who hold land under freehold and leasehold tenure generally have more secure rights than women accessing land under customary systems. Moreover, because customary tenure is widespread in Uganda (and even across sub-Saharan Africa), addressing women's land rights under custom needs to be a priority.

Uganda's Constitution of 1995 and Land Act of 1998 recognize four land-holding and tenure systems—freehold, mailo, leasehold and customary—each with its own rules and each bestowing different rights and responsibilities on concerned individuals. More than 80% of land in Uganda is held under undocumented customary tenure systems, the situation for the vast majority of Ugandan men and women. The Land Act defines customary tenure as “a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons.” It defines mailo tenure, a customary form of freehold tenure, as “the holding of registered land in perpetuity and having roots in the allotment of land pursuant to the 1900 Uganda Agreement and subject to statutory qualifications.”

Land held under customary tenure is governed by rules generally accepted as binding and authoritative by the class of persons to which it applies; and applicable to any persons acquiring land in that area in accordance with those rules. Customary tenure arrangements vary across ethnic groups and even clans within one group, and can change to accommodate new challenges and opportunities. While undocumented, customary tenure has for generations provided security in land for the majority of people in Uganda. The Land Act provides that if, according to local custom, a person is considered

the owner of a piece of land, the law of Uganda recognizes him/her as the real owner. The individual does not need to have any title documents, and should follow the local rules which custom has established. Tourism, one of Tanzania's fastest-growing economic sectors, already accounts for 17% of national GDP and is the country's largest foreign exchange earner. Tanzania's command-and-control approach to wildlife management, however, has not resulted in sustainable biodiversity conservation or rural economic development. The government lacks the resources and capacities to effectively manage the protected estate, and there are insufficient incentives for conservation by local communities. A key challenge is to develop policies which encourage communities to protect wildlife, especially on private lands outside the core protected areas.

BIASES IN CUSTOMARY TENURE ARRANGEMENTS

In Uganda, customary tenure is becoming increasingly fragile. While customary tenure is equal to other forms of tenure in law, in practice it is often accorded a lesser status than other forms of tenure. For example, in cases of disputes statutory rules and forms of evidence often trump customary rules and evidence, adversely affecting those who subscribe to custom. Moreover the legitimacy of traditional leaders and institutions is increasingly being challenged as citizens seek out the authority of statutory institutions to administer land and resolve disputes. The fact that some local leaders are increasingly making decisions to advance personal interests and at the expense of the needs of communities has further weakened the legitimacy of traditional authorities. As a result, it is becoming harder for traditional institutions to perform their roles, including implementation and enforcement of customary rules.

Research has demonstrated that many customary tenure systems in Africa are biased against women. While customary tenure systems vary widely, in many societies, women's rights over land and natural resources are subordinate to those of men. For example, daughters typically do not inherit land or inherit much less than sons. Land they are “gifted” by their parents is often given over to their brothers when daughters marry because they are seen to be leaving their natal family and transferring to the community of their husbands. Yet, once married, they are not considered full citizens in their husband's community. Married women typically can only access land through their husbands. Even if she is given her own plot(s) to farm by her husband, a woman typically has limited decision-making rights over that land. Evidence has shown that such limitations adversely affect the livelihood and wellbeing of women and their children.

Women also face higher risks of losing access to land, especially as widows and divorcees.

Because many customary tenure arrangements discriminate against women and have failed to protect women from losing their access to land, a number of activists in Uganda have argued for legal solutions that guarantee women the same land rights as men. They view tradition as being backwards and something that must be reformed or replaced to promote equality and development. Many advocates have called for sensitization and training, and for changes in the Constitution and for enacting new laws that override the principles and rules embodied in customary tenure regimes.

But not all customary tenure systems are uniformly discriminatory against women. In Acholi, Langi and Iteso society (which include the majority of people in northern and eastern Uganda) land is passed from father to sons, but the customary tenure systems grant women significant land rights. Everyone born of the clan



on inherited land, whether male or female, has the right to use land. Within these societies, land is considered to be owned by families, not individuals or the clan. Heads of the families act as trustees over family land, responsible for its management and ensuring all family members get access to land. Although most family heads are men, they can also be widows, unmarried mothers, or divorced women. The family head is responsible for managing family land, ensuring that all family members have land to use, and protecting the land for future generations of the family. Moreover, clan elders are responsible for ensuring that all family heads manage their family land well and that they give every family member land to use (e.g., ensure the family heads do not take the land for themselves). They are also responsible for safeguarding the land for future generations of the clan and must approve the sale of any clan land.

When a woman marries, she leaves her parents' clan and joins her husband's clan and has the rights to access and use land allocated to her

husband's clan and has the rights to access and use land allocated to her husband. The husband does not have the right to deny his wife her own land to farm. If a woman does not marry she has the right to be allocated and use land by her natal family. Likewise, if she divorces, she can return to her natal family and receive land. If a woman has children outside marriage, she will manage land by her natal family for her children. Those children are then considered members of their mother's clan and have rights to access (and inherit in the case of sons) land from his mother's family and clan (unless the father claims the child and pays a penalty).

If a woman's husband dies, the widow becomes the family head and takes over the responsibility of managing and protecting the family land for their children. She also retains rights over land which her husband had allocated for her. Since she remains a member of her deceased husband's clan, it is the responsibility of the clan elders to protect her rights to this land. This is the case even if she is taken as a wife by one of her late husband's brothers. Traditionally, one of the late husband's brothers would provide a more formal protection role for her place within the clan by giving her the status of his wife. This practice, however, is now discouraged and dying out because of the fear of spreading HIV/AIDS. In the case of both parents being deceased, clan elders ensured that the orphans' families look after their rights and interests on their late parents' land.

While women in Acholi, Langi and Iteso society have land rights under custom, they face challenges in realizing and benefiting from the rights they do have under custom. Significant disparities between the rights of women and men arise from violation of customary law. Increasingly in Uganda, widow's rights to remain on her husband's land are being contested by her in-laws. Women are also increasingly facing challenges (from their own brothers or other family members) returning to their natal families and accessing land, especially in cases of divorce or abandonment. When women lose access to land, they confront a life of destitution and social isolation. This threat keeps many in subordination to their husbands or their in-laws.

Violation of the principle of trusteeship is becoming a major threat to women. Many men in Acholi, Langi and Iteso societies are now selling land without informing their wives or the approval of clan elders and use the money for his own benefits. In cases where a woman—at widowhood, separation or divorce—becomes the family head and trustee of the land, she often faces threats by other family member trying to lay claim to the land. Women-headed households constitute about 23% of all households in Uganda and are at particular risk of being denied access to land by their relatives. Widows (and often her children) are at particular risk of losing their land rights in the face of growing eviction practices by in-laws.

The principal problem is that women in such situations are challenged to protect their land rights from more powerful people, including their

husband and family members, and the clan is no longer protecting the rights of women. Over time, the power of the clan authorities to enforce rules governing customary tenure have eroded, such that clan elders are often failing in their traditional duty to protect women and children. In some cases, they simply take the man's side. In other cases, the elders themselves are exploiting the clan's vulnerable members (e.g., wives, daughters, unmarried women, widows, and children born to unmarried women). Further, cultural bodies involved in the mediation of land disputes have not, in all cases, paid due regard to customary land rights of women.

FORMAL LAW

Formal law in Uganda recognizes property rights for women and outlaws discrimination. The Constitution of 1995 forbids discrimination against women. Section 33 provides that women have “full and equal dignity of the person with men,” and mandates that the state will protect women and their rights, and provide the facilities and opportunities necessary to enhance their welfare. Section 33(6) states “Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.” Section 32(1) provides “the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.”

Both the Constitution and Land Act of 1998 recognize customary tenure, but the Act makes an important exception in relation to the rights of women, children and persons with disabilities. Section 27 provides, “Any Decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally shall be in accordance with the customs, traditions and practices of the community concerned, except that a decision which denies women or children or persons with a disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void” (Section 33. Rights of women; Section 34. Rights of children; and Section 35. Rights of persons with disabilities).

The Land Act also provides for the direct participation of women in various local land institutions. Specifically, it stipulates that at least one-third of the members of each District Land Board and each Communal Land Association (CLA) must be women. District Land Boards are established by the government to hold and allocate district land which is not claimed by any person or authority; and facilitate the registration and transfer of interests in land. CLAs are groups of individuals who wish to assert communal ownership and management of land, whether under customary law or other tenure system. The District Land Registrar has the responsibility to approve every CLA constitution before it can be legally recognized.

Section 39(1)(i) of the Land Act provides that no person shall sell, exchange, transfer, pledge, mortgage or lease any land “on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse.” The “consent clause” is designed to protect the rights of family members from abuse of trusteeship at sale. As a result, the sale of land by a husband without the written consent of his wife is legally invalid. No authority in central or local government, however, has the explicit responsibility to verify written spousal consent of land sales. Although the Land Act also makes provisions for Parish Land Committees to advise District Land Boards on customary law, and safeguard the interests and land rights of “women, absent persons, minors and persons with or under a disability,” these committees have not been established nor are they explicitly made responsible for verifying spousal consent. As a result, considerable land is sold without spousal consent, including customary land.

For widows, the Succession Act (Amendment) Decree of 1972 which sets out the persons eligible for inheritance and their respective share entitlements has not provided much support. Section 27 provides that a widow acquires only 15% of the estate, the children (included her husband's children out of wedlock) receive 75%, the legal heir 1% and the range of other dependents 9%. The nearest lineal relative—generally the eldest son—has the power of administration and inherits the primary residence, although the widow retains a right of occupancy, including the right to cultivate any normally farmed land adjoining the residential holding. This right of occupancy is limited, however, and terminates upon remarriage, 6-months continuous absence from the premises, the availability of “suitable alternative accommodation,” and if the premise is not kept in good repair or the normally farmed land is not cultivated. On 5 April 2007, the Constitutional Court declared Section 27 and Rule 8(a) of the Second Schedule that provides for a widow's right of occupancy only until she remarries, unconstitutional. The law, however, has yet to be amended by Parliament, thereby denying widows an opportunity to defend their land rights through legal channels.

In summary, both customary institutions and the state are failing to protect women's land rights. Women's land rights under custom are increasingly disregarded and clan elders have lost their authority (and sometimes will) to uphold them. Customary courts have been replaced by Local Council (LC) courts, which are perceived by many as biased. Moreover, few rural women have the money to go to court, and even when they do and win their cases, the judgments are often ignored and not implemented or enforced.

Reforms designed to strengthen women's land rights are needed both in customary rules and practices as well as in formal law and government practices. Reforms should be carried out in such a way as to ensure that statutory and customary systems are complementary and reinforce one another.

There is a considerable range of customary tenure systems among Uganda's more than 60 ethnic groups. Because of the multiplicity of systems and the fact that most customary rules governing land rights are not documented, most policymakers will likely have limited knowledge about specific rules and authorities governing land rights under these systems. In order for reforms designed to strengthen women's land rights are carried out appropriately, research on the customary tenure systems of Uganda's various ethnic groups is critical.

Some gender advocates argue for the documentation of customary land law in order to verify that such law is non-discriminatory and abides by the constitution when it comes to respecting women's land rights. When confirmed, customary law should be formally accepted by the government and given the force of civil law. These advocates also argue that customary authorities should have the legal obligation to ensure that the customary land rules, including the principles for protection of women's land rights enshrined in their customary system are implemented and that the state should hold them accountable. If such an approach is pursued, it would be important that the documented rules are reviewed regularly to ensure that they are current with custom. If such an approach is pursued, it would be important that the documented rules are reviewed regularly to ensure that they are current with custom.

Some land rights advocates in Uganda argue that customary institutions that grant women land rights should be strengthened to ensure that these rules are implemented and enforced. For example, efforts are needed to strengthen the authority of clan elders responsible for ensuring that family heads manage their family land well and that they give family members land to use. Customary law in northern Uganda also gives the clan responsibility for verifying the consent of all the family members, but this process no longer sufficiently protects women's land rights. By law, spousal consent of land sales must be in writing, but such written consent does not need to be filed with or approved by government. The law supports customary protection by giving judicial force to the elder's protection, but few clan elders, women or local government officials are aware of this authority. Some advocates are calling for giving local government units (e.g., Local Councils or

sub-county chiefs) the responsibility to verify written spousal consent of all land sales, including customary land, and also to verify that clan leaders have validated family consent of all land sales.

In addition to documenting customary land rules, many land rights advocates argue for the need to document and register customary land rights, including all transactions of customary land. Customary tenure represents the bulk of landholdings—between 70% and 80% of the land—only 15%–20% of the land is formally registered (most unregistered land is undocumented customary land). When land is allocated by traditional leaders or family heads, or is passed to the next generation, transactions are rarely documented and recorded, mainly because the transactions are known to others in their communities. When customary land is bought and sold in Uganda, the government does not require the seller or buyer to file any documents or register the sale with the government (although people may prepare and sign private agreements). To reduce conflict, secure customary land, and protect women's land rights, advocates argue that customary land should be registered and all transactions documented and filed with local civil authorities.

Although the Land Act of 1998 recognizes that occupancy of customary land conveys legal rights without documentary evidence, it nevertheless provides for a "certificate of customary ownership" which can be registered with the state (all customary land may also be converted to freehold land). Unregistered customary land is vulnerable to expropriation by the government and grabbing by political and economic elites, such that registration provides an added measure of protection for customary land rights. Unfortunately, the law requires that the certificate be issued in the name of the family head, rather than the family. The latter would be more in keeping with the principles of customary land rights and also do a better job of protecting women's interests in land. Some also argue that family members should be able to document their specific interests in the land ("living" land rights) by having them recorded on the certificates as encumbrances. Although many customary land owners would like to receive a certificate of customary ownership, few have been issued to date.

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In Uganda, women head almost a quarter of rural households and grow between 70%–80% of the food crops, yet they own less than 8% of the land. Women are handicapped by both formal and customary land systems. In cases where custom provides women with relatively strong land rights, efforts are needed to revive and further strengthen these rights as well as to hold customary institutions accountable for protecting women's land rights. Where custom accords women weak access and rights to land, measures to mobilize women and traditional authorities to reorient attitudes and behaviors in support of women's land rights are critical. Legal reforms are also needed to protect the land rights of unmarried women, wives, divorced women and widows. A National Land Policy is currently being developed in Uganda which provides an opportunity to further protect women's land rights. To be successful, however, legal and policy changes will need to "fit" with custom and build on those customary principles and rules that lend support to women's land rights.



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