

Women Struggle for Land Access in Uganda. Is Returning to the Customary Law in Uganda the Best Solution? Land Act of 1998: Its Consequences and Application

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1. Introduction

There are many societies in the world, where the right to land depends on the social status of a person. Land rights are especially crucial when it comes to rural areas as they decide the entire families chances of survival. Land tenure also has a direct impact on key issues such as education and health, just to mention two of the main factors. It empowers people and has immediate consequences associated with their basic living standards.

Speaking of women, their fight for their right to land has a long history that begins in the colonial period. Colonial laws gave more weight to men's rights, awarding them power over women and their access to land, as well as over many other aspects of daily life. The existence of women as legal persons was annulled by colonial laws. Therefore, they had no other choice than to fight for the recognition of their rights which are critical when it comes to ensuring their families dignity.

The question of land rights, speaking of Sub-Saharan Africa, is very complicated as it concerns areas that are not easy to define from a geographical point of view. This intricacy does not disappear when we think about Uganda which is a country with enormous ethnic and

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cultural diversity within its official borders³. However, the topic of the present paper is not cultural diversity. Here, we want to ask ourselves what does modernity and tradition mean when it comes to laws about land tenure in Uganda. More so, what logic underlies the discourse about the tenure of the land when we discuss state law vs. customary law? All of this brings us to the main issue of this work: can the customary law protect women's right to land, both when it comes to access and tenure? We hope to find some answers by analysing the situation in Uganda, after its Land Act of 1998 was put into place, and its clashes with supposedly *traditional* customary laws.

As the bibliography demonstrates, it is fundamental to understand the land's tenure diversification that one individual person might have or, as happens in 'most cases, when it comes to groups of people, including institutions' (Bohumangi et al., 3). According to Allan Bohumangi, Cheryl Doss, and Ruth Meinzen-Dick in the publication 'Who owns the land? Perspectives from rural Ugandans and implications for land acquisitions', those types of land tenure are: 1. Access: the right to be on the land, such as the right to walk across a field; 2. Withdrawal: the right to take something from the land, such as water, firewood, or produce; 3. Management: the right to change the land in some way, such as to plant crops or trees, clear brush, or make improvements to the land; 4. Exclusion: the right to prevent others from using the land; 5. Alienation: the right to transfer land to others through rental, bequest, or sale. Access and withdrawal are considered use rights, while management, exclusion, and alienation are control or decision-making rights.

Moreover, we need to distinguish between access to, use of, and control over land. When we speak about acquiring certificates of ownership it is really complicated to decide if titling is good or bad⁴. Rural

³ There are 10 main ethnic groups in Uganda, distributed throughout all of the counties and over 40 different languages spoken. If we assume that language is one of the main features that define one culture, the comprehension of the Ugandan society becomes even more complex. This information may be found in '*Uganda. Guide to the country*', issued by Spanish Economic and Commercial Office in Nairobi (2012)

⁴ This is a wide extended discussion among many researchers and experts in the field who still debate themselves between customary laws and human rights approach.

sociologists, Judy Ribot and Nancy Lee (2003) have distinguished the differences between the 'access to land' and the 'rights to land'. Access to land would be considered a 'bundle of power' rather than a 'bundle of rights' (Ribot and Lee-Peluso, 153-181).

In the majority of African countries women can access land through their fathers, husbands or children and are not recognized as legal owners of the land, individually speaking. This may have particularly dramatic consequences in the case of widows, orphans or second wives in polygamous relationships. As a result, women are not recognized by society as farmers or actual owners of the land which 'limits their access to agricultural services, including credit, extension, and other inputs. The result can be an endless cycle whereby women are not given land because the farming women are seen as less productive, and their farming is less productive because they have less access to land and other inputs' (Bohumangi et al., 3).

The security of land tenure is under a constant threat. This happens primarily due to lack of agreement and social cohesion on the coexistence of official and local laws. It is indispensable that these two legislative approaches work together, in order to enable the protection of most the vulnerable persons. In most cases, these are women who are not only the weakest ones as they are abandoned by state administrations, but still live under patriarchal systems where their social position depends entirely on men.

In this paper we searched for information both within the diverse bibliography and in informal conversations with African friends that we were fortunate enough to be able to speak with. One of the persons we spoke to is a nun from the San José order. She comes from the Democratic Republic of the Congo and has worked in different African countries, particularly in education and empowerment projects focused on women. When it comes to the bibliography itself, we have researched literature regarding the land access situation, Ugandan state law and, gender related literature, as well as the literature related to the issues of tradition and modernity and social movements.

2. Tradition vs. Modernity in the Context of Women's Rights to Land

When we think about different land tenure regimes in Africa, we usually refer to customary land tenure systems which represent the



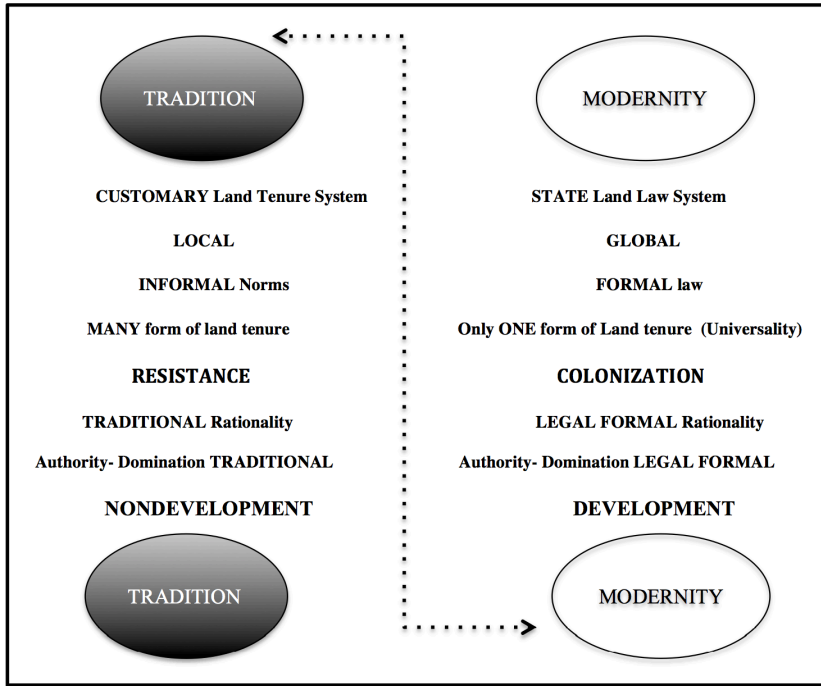
culture of local traditions. That means there are many different forms of “informal” customary tenure.

Here, we will review this against state law and titling as a concept of modernization and development by the majority of policy makers and academia. On the other hand, the customary land tenure system often contains no equivalent to the western concept of ‘ownership’.

The legal logic that underlies the norms or laws, regarding land rights, is completely different. The logic of state law is the formal legal logic that was taught to us by one of the founding fathers of sociology, Max Weber (Weber). He proved that the same logic covers all aspects of Western state nations and their bureaucratic mechanisms. According to Weber, the legal formal rationality was only applied to Western society during a specific time in its history and was a fundamental tool in the development of capitalism as we understand it today. This rationality that belongs to Western culture is characterized by the calculation of a means to an end, and is represented under rules and regulations that have been universally founded and applied mostly by economic, legal and scientific institutions. Western societies have imposed on the rest of the world their own rational culture which they refer to as, ‘MODERNIZATION’. The process of acquiring or achieving the same level of Western legal formal rationality is called ‘DEVELOPMENT’, among other things. Weber had an evolving perspective of Western rights from the cultural system of norms to another, more structured system, of formal laws which can be considered positive progress.

In opposition to this unique rational legal logic we have the diversity of traditional logic based on local customs. This type of rationality, according to Weber, has to be confronted with other types of rationalities which actions are guided by values and customs. We have created this outline where we can see the two collective imaginaries.

COLLECTIVE IMAGINARIES



The most interesting for us is the *traditional rationality* where action is guided by customs. And also, there is Weber's way of understanding the *formal legal rationality* as a form of authority, therefore a way of domination over *others*.

It is without a doubt that the Western formal legal rationality has been a basic instrument that helped the construction of colonial power in its plan for social, economic, cultural and judicial domination. This is one of the main reasons why so many anthropologists, sociologists, and post-colonial theorists defend customary law as the law based on cultural tradition, in part because it is coated with a self-hallo that confers the bases of authority on customs. Therefore, after the colonial period and its repudiation for what it brought to the dominated communities, any woman who confronts or contradicts the local law has to face the imaginary collective idea of going against her own culture because someone who defends Western culture is seen as a feminist (with a clearly pejorative meaning). However, is this all really true? Can we just simply focus on this analysis and keep applying these criteria?



In every social analysis it's important to stop and observe the games of power that are hidden under the different discursive logics. In order to correctly explain the situation of women in the context of land rights it is obligatory to introduce a gender studies' perspective. Here, we would like to point out four main issues that affect women when it comes to their rights to land:

First, western legal formal rationality is a way of masculine, and not only a capitalist, domination. Western rationality is a kind of patriarchal one. There are many scholarly works that prove that women under colonial rules lost most of their power, due to the importation of the patriarchal structure of social organization. Since then, we have seen women gradually losing power in local communities. This means that customary tenure has changed substantially over time and does not provide neither static nor harmonious structures. The masculine discourse appears, as Adoko and Levine (2008) have stated in their study, when men say: 'Woman do not own land under customary law' or when they deny their wives ownership of any land just because of 'their being a woman'.⁵ Both expressions reflect, among other things, the interpretation and decision making that men take when concerning customary law and how it affects the role and place of women in their society. They try to pretend that this has been so forever that is "traditionally". Second, as we pointed out before, there are many different rights for land that are distributed, allocated, used and passed on. So when we speak about acquiring certificates of ownership, it is really complicated to say if titling is good or bad for women because there are various forms of customary laws concerning women's rights to land. The interpretation of these customary laws to formal law, to the practice of titling, most of the time has resulted in disastrous cases for women because the power to enforce the law is in the hands of men. Third, gender analysis is even more complicated when we introduce more variables like, age, marital status, education, and other economic statuses that women face. These situations substantially change women's position when speaking of access to land. There are, however, groups that always end up being left without any protection neither from state nor customary laws. Those are women

⁵ See more in chapter 'Falling between two stools' (Adoko and Levine, 2008) and in 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda.' (Tripp).

who are not formally married or from polygamous relationships, widows, orphans and singles. These social groups are more marginalized because they have hardly any rights to land under customary or state law. Last but not least, Robin Palmer (2009) mentions another quite delicate issue while saying that the 'conflict of access to land for women are more complex because "they operate at the domestic level of the household"' ⁶. Conflicts about land tenure don't simply exist in public spaces but also in private spaces. For this reason some social feminism movements have coined the slogan '*The personal is political*'⁷. How Amartya Sen (1995) has stated; 'once note that gender struggles are even more difficult than class struggles because unlike women and men the capitalist and the worker do not normally live under the same roof'⁸. In academia we don't address this problem in detail but it doesn't mean it is not crucial. One of the characteristics of the formal legal rationality that we spoke about before is the radical division between the public *and* private spheres. This radical division doesn't occur in other societies dominated by another kind of rationality.

The result is that women are marginalized from the private and public spheres, including all decision-making bodies. We can conclude that land is often regarded as a symbol of male dominance in a very obvious way and, in the case of Uganda, the land titling that followed a strictly western way of thinking, has concluded in deterioration of women's status and situation.

⁶ Palmer raised this issue at "Foreword" in *Challenges in Asserting Women's Land Rights in Southern Africa*. (Palmer)

⁷ The origin of this expression is from Carol Hanisch who wrote a brief essay called 'The Personal is Political' in the Redstockings collection *Feminist Revolution*. Her essay is dated March 1969. The 'personal is political' refers to the theory that personal problems are political problems, because many of the personal problems women are the result of systematic oppression.

⁸ Robin Palmer (2009, XI) write this quote from Amartya that became very popular within gender studies when Amartya Sen published it at 'Gender Inequality and Theories of Justice' (Sen).



3. Case study: Apac District, North Uganda. Agricultural Reform in Uganda (Ugandan Constitution from 1995 and *Land Act* from 1998)

The Ugandan Constitution from 1995 brought many new concepts, in terms of land ownership, but ended up needing legal reinforcement while implementing its models. This is why, in 1998, Uganda adopted the Land Act. It was approved in a very uncertain social atmosphere, as its voting and implementation were followed by rejection expressed by some of the most traditional and conservative power groups in Uganda (Rugadya).

Nonetheless, it is important to point out the main goals of Uganda's land reform. As Margaret Rugadya explains in her work "*Land reform: the Ugandan experience*" from 1999, those were:

- A) To ensure safety for all users of the land (in the case of Uganda they are mainly owners based on local laws);
- B) To solve a legal impasse between registered owners of the land (according to the official law) and lawful and bona fide occupants;
- C) To recognize customary tenure as legal and equal to other forms of tenure.
- D) To ensure an institutional framework for the correct management of land under a decentralised system.
- E) To ensure proper and coordinated development of urban planning.
- F) To ensure sustainable land use as to preserve the environment.
- G) To resolve the differences as well as historical injustices when it comes to use and occupancy of land.
- H) To define the role of the state while managing public lands in accordance with the common good of the citizens.

There are many, particularly interesting factors to take into account when we want to understand the approach to land reform in Uganda. They are even more remarkable as they had a direct impact on the most vulnerable groups within Ugandan society. Following Margaret Rugadya again, we can distinguish three main aspects:

A. *Security of Land Tenure*

- a) Land ownership: Article 237 of the Constitution establishes that land in Uganda no longer belongs to the state but to its citizens. The four established forms of land ownership are the following: Local Laws (Customary), Freehold, Mailo Property (established by

the British Government in 1900) and Leasehold. This way, individual rights to land have been secured by virtue of occupation.

- b) Customary ownership: Article 237(4)(a) of the Constitution recognizes customary tenure as a valid legal form of land ownership. Owners are entitled to acquire an official certificate of the land's registration.
- c) Tenants on registered land: the Constitution guarantees their safety through the possibility of renting or purchasing the land and obtaining an official certificate. An economic limit for such transaction is also set.
- d) Communal ownership of land: The Land Act of 1998 recognizes the possibility that it is a community who owns the land.

B. Women and other Vulnerable Groups

The Land Act of 1998 institutes that, in the case of any transaction related to land, it is essential to consult and have the consent of those persons whose maintenance depends on the property. This refers to spouses, children of age and, in the case of minors, the Land Committee. Those aspects are included in the so called "consent clause" that aims to protect women in their quest for equal treatment. In practice, however, this clause is violated and not respected. The Land Act of 1998 states that any local law that would result in discrimination of women and children should be interpreted as null.

C. Institutional Framework

In the Land Act of 1998 decentralized land management and agrarian reform in general, as to obtain correct implementation at the local level. Many new institutions were created as to ensure community participation. This radical change of the administrative structure made it necessary to adapt very quickly to this new legislative framework (Rugadya).

In 2007, the Ugandan Parliament drafted amendments to the Land Act of 1998 because of security problems of bona fide occupants. Many registered owners made illegal sales and were trying to expulse



them from their lands⁹. The government's response was the adoption of additional amendments that were signed by the President in 2009. This attempt to ensure the rights of one of the most vulnerable groups in Uganda met, however, strong opposition from different power groups in the country. The amendments were criticized by registered owners as well as by different clans and groups and considered these changes as a threat to their independence and social status in Uganda.

3.1 Implementation Challenges of Land Reforms and the Land Act of 1998

The implementation of the Land Act had many challenges to overcome. It had to confront an institutionally weak country with huge ethnic diversification and, consequently, strong local cultures where the concept of individual land ownership had hardly existed before.

In this sense, it is very important to mention the 'lost clause' or 'Matembe clause' from the Land Act 1998 that intended to establish joint ownership of land between spouses. The clause was withdrawn from the document as a result of political manipulation. Those who supported the removal of the co-ownership clause called themselves guardians of tradition, empowering different governing clans in this way. Many social movements of women in Africa disagreed with the situation but were not able to make any changes. The loss of the co-ownership clause is a clear example of lack of a social base in the Ugandan society. In addition to the co-ownership clause, at the time of implantation, the Land Act faced also other challenges including lack of institutional capacity, lack of knowledge and acceptance of the reforms by Ugandan communities and, finally, lack of any strategic plan for its implementation. Political pressures and economic difficulties would make this process even more complicated (Rugadya).

3.2 Land Tenure Laws in the Apac District, Uganda

It is generally understood that the land owned under customary law is collective. The clans often expressed that 'land belongs to the

⁹ This was the case of Livingstone Kenya, among many others, who has seen himself forced out of his home at the age of 64 as the registered owner sold his land to international investor (BBC).

clan' (Adoko and Levine, 2008, 106). However, individual households in Apac have historically owned land and these possessions are individualized. If families of the same clan cultivate land together it is mostly to be efficient and to help each other, and not because the land is a collective property. Families own farm land and its 'management is passed on from fathers to sons' (Adoko ad Levine 2008, 108). The real power over the land is held by its administrator while he or she is also a formal head of the family. The administrator's responsibility is to take care of the land and his or her household. In Apac land, family welfare and social status are directly interconnected.

In recent times, land's value has increased from an individualized point of view. This is why family territory is more often divided between all of the children; instead of going to one of them (usually the eldest son) that becomes the head of the family. This process of fragmentation is also 'accelerated with an increase in land sales' (Adoko and Levine 2008, 108). When there is a sale transaction involved, the clans still retain the right to investigate both the buyer and the seller as to ensure that the land won't go to anyone who could harm the family. However, given the population density in Apac, sales transactions are less influenced by clans. Once the land is sold, the family no longer has any power over it.

3.3 Women's Land Rights in Apac under Customary Law

a. Customary Laws from a Historical Point of View

A newly wed woman, automatically began to be under the protection of her husband's clan. Protection of her rights was the responsibility of her new family. If her husband decided to have more wives she was still guaranteed sufficient land to support herself and her children. Traditionally, there was an assumption which stated that when a woman was married, she converted into a member of her husband's clan and ceased to belong to her parents' clan. Divorced or single women had 'rights to be allocated land to use by their own parents' clan' (Adoko and Levine 2008, 108). In the case of the husband's death, his wife could claim the social and economic protection of the latter's clan. Widows could, theoretically, choose not to remarry. This way they kept their right to the land which the deceased husband had left them as inheritance. Even so, under customary law, 'the rights of married woman are limited because though she has rights to be given



land to use by her husband, she has no right to sell this land' (Adoko and Levine 2008, 110). However, under customary tenure, neither could men freely sell land without the consent of the clan so, in theory, this was not a problem for women until modern times.

b. Economic Development and Land Sales

The number of land sales in Uganda grows dramatically. Transactions occur in an informal way and under customary tenure laws, without any official record or administrative control. Their goal is not expansion or increase in wealth but simple survival. Most sales are not agreed by both spouses. The land is often sold by the husbands in social meetings, bars and under the influence of a considerable amount of alcohol. Women 'have no control over such transactions and often do not know they have been made until their husbands come home with money. They are also afraid to express their concerns. One of the women in the district says: *Consent is never sought. (...) and when you ask where the money is coming from you are told to pack and go back to your home because you do not own land.*' (Adoko and Levine 2008, 109) There are also cases when it is the family who sells the land without any prior consent. The buyer is usually a politician who takes advantage of his social status. The main purpose of these transactions is to speculate and does not bring any benefit to the communities where they concur. The transactions, from a legal point of view, stay in a grey area where customary tenure overlaps with the official law and everyone chooses what best suits them, as to complete the sale. Furthermore, clans lost their social status and no longer have the power to perform necessary pressure as to protect the most vulnerable (Adoko and Levine 2008, 111).

3.4 Customary Law and Official Law Disadvantages

Although it is undeniable that customary laws are part of the tradition of Uganda communities, when it comes to women's rights to access land, there are three key disadvantages.

First, as they are not written law, 'there is no clear jurisprudence and the verdict depends on each person who establishes it' (Adoko and Levine 2005, 1). This leads to a lack of clear principles and similar or even identical cases don't always obtain the same verdict, depending on the judge. Second, as customary law is directly connected to

the power play within and between different clans, for women and their children it is 'virtually impossible to challenge and appeal decisions of judges' (Adoko and Levine 2005, 18). Clans, on the other hand, cannot admit the weakness of their decisions, or acknowledge changes that are taking place in the Ugandan society as they want to keep their authority. This lack of recognition of the existing problem makes it even more impossible for women to feel protected. Third, there is a huge misunderstanding when we talk about who really influenced and established the customary law we know at present. Is it really the customary law from pre-colonial times? Or is it a hybrid law that we found left over from the colonial times that influenced pre-colonial cultures and traditions? More precisely who *invented* or *imagined* the customary law of the indigenous people from Africa? What role did western civil servants play in the construction of the *customary law*?¹⁰

When it comes to the official law it attempted to protect women and other vulnerable groups. However, several mistakes in the implementation process and its combination with customary laws have decreased its impact. The ambitious attempt to unify the administrative system of land management, through the Constitution of 1995 and the Land Act of 1998, failed to bring together tradition and culture with state law and official requirements, and this is the key factor to why Ugandan citizens still find themselves without any real protection. The authors Judy Adoko and Simon Levine in the Chapter "Falling Between two stools: women's land rights in Northern Uganda" from "Women's Land Rights & Privatization in Eastern Africa" (2008), make an interesting synthesis of the main reasons for the failure of state law.

Why the official system doesn't work? First, the state policy of Uganda assumes that customary laws don't have any positive impact when it comes to the protection of land rights. For some time now, the state administration has begun to grasp power from the traditional representatives. In this way the administration officials monopolize all decisions regarding land rights. Second, the Ugandan Government assumes, without any constructive criticism, that all citizens operate under the official law and that the state fulfills its role of controlling

¹⁰ We ask this question in the same way that Terence Ranger wrote 'The Invention of Tradition in Colonial Africa' (Ranger).



and monitoring proper implementation of its policies. However, the vast majority of Ugandans haven't a clue about their rights and the best example is the complete lack of knowledge about the consent clause. Women don't know that this clause even exists and don't pursue their rights. Third, there are situations where affected persons know their rights but it is their communities or families who violate them. This is the case of widows and orphans who are thrown off the land belonging to their husbands or fathers by other family members. Although victims bring their cases to court and win from the official law point of view, the verdicts are rarely executed. There is also a problem of free reinterpretation of customary and state laws depending on personal interests. According to Simon Levine and Judy Adoko, these cases do not fall wholly within the term of violating the law because they are a hybrid. And finally, the rights of women and other vulnerable groups cannot be forfeited simply because the administrative and institutional frameworks are insufficient.

All of these issues make us wonder if the subscription of the Land Act of 1998 was not just a political game to ensure the government, both with the support of women groups in parliament and a greater acceptance of Museveni rule worldwide. To guarantee fundamental rights on paper is a simple task but without rigorous and correct implementation of laws, all these promises remain worthless.

4. Discussion and Conclusions. Can we do better?

It seems that women in Uganda find themselves in the situation of *no man's land*. Neither customary laws nor official rural reform have brought clear solutions to their vulnerability and exclusion when it comes to the access to land. This is mostly because, from the perspective of gender studies, both systems are a male construction of social reality. They speak about *his-story*¹¹. Legal practices are expressions of power in a society. Michael Foucault defines the *regime of truth* as specific historical mechanisms (Foucault) which produce discourses that function as being true in particular times and places. In the case of land rights, women have suffered a process of exclusion in both land

¹¹ As many feminists have argued that history is the story of a specific form of domination, namely of patriarchy, literally 'his-story' (Tuhiwai Smith, Linda, 2006)

tenure systems because, in any case, men created their own *regimes of truth*, excluding women from decision making and robbing them of their voice. The voice of tradition and the voice of modernity derive from their mouth, while the voices of African women are silenced.

Therefore, for all of these reasons the question is not really: tradition *vs.* modernity, but rather: how can we empower rural African women? Which tools can we use to raise their voice? Or how can we reach to the real subaltern memories of rural African women as to construct *THEIR regimes of truth*?

A very common question when debating human and land rights is the scope of formalizing different laws and putting pressure on titling the land (Ik Dahl, 40-60). It is an important issue, especially when considering the preservation of local traditions and laws within the indigenous communities. It is a widespread dilemma of deciding how far we can go and where the necessary limitations should stand as to enforce the human rights framework that, initially, were intended to be universal for all of us. It is unquestionable that the cultural richness and traditions of the different indigenous communities must be protected. However, when it comes to land rights, customary tenure allows situations that conclude in the unremitting discrimination of women. In most cases, they are completely unprotected and exposed to unimaginable risks when driving them out of their homes and, consequently, from sources of food and water. Moreover, in the context of the land privatization processes, customary tenure is no longer able to protect its citizens against the risk of losing land. Not only women need a formal legal framework to protect their land access rights, but the citizens in general need them too. Human rights can provide the necessary generic framework for the protection of land rights. It is crucial, however, to reach a consensus between customary tenure, which contains key culture values and defines traditions of each community, and official laws, that must accomplish the real protection, respected by all of the involved parties. It is also necessary to debate the *authenticity* of customary laws we know nowadays and re-think them from the gender perspective, taking into account the fact that those laws were created by men and *their* interpretation of the reality. It is very difficult to find the interpretation that went "back to its origins". This is why we consider it important to "start a new" when it comes to re-writing any law and to do it including a gender perspective.



What tools might be useful while attempting to achieve the above mentioned goals? In our opinion, first of all, it is obligatory to really include women in the process of redefining their rights and cultural contexts as we cannot keep excluding them both from public and private decision making spheres. This would, hopefully, conclude in the construction of a new public, collective and individual identity of women as such, and society as a whole. As long as public governance bodies do not let women take an active part in the creation of the new social paradigm and exclude them both from design and execution of the new legislation concerning land rights, women will be suffering from social exclusion forever. It is also crucial to have coordinated actions between new women social movements and international institutions that have many tools at hand to push for necessary reforms and, also, to create discursive space where African women may speak as sovereign subjects.

We consider that this might be a shy start to developing a new legal framework that would include other forms of tenure and would be culturally closer to Uganda's society. It is no longer about designing solutions for Ugandan women as to protect their land rights. It is about giving them the tools to do it and, if we are very lucky, maybe they will let us be part of it.

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