

## **Institutional Hybridity: An Analysis of Land Tenure Systems and Land Wrangles in Acholi-land**

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### **Abstract**

In 1953, the British colonial government's Royal Commission identified the customary land tenure system as one of the foremost constraints on economic development and recommended a gradual substitution of this system with individual land ownership. This led to the introduction of private land ownership based on a neo-liberal principle which runs counter to the principles of customary land ownership, leading to an institutional dichotomy of modern-state systems versus customary land systems in Uganda. With land wrangles worsening in northern Uganda, this paper examines the extent to which these wrangles are a function of the contradicting dual land institutional set-up in the region. This paper uses Malinowski's 'three column approach' to culture contact and change (1939), to empirically explore the principles, practices, interactions and evolution of these land tenure systems in Acholi-land while also assessing the consequences of these interactions in relation to women's claim to land access. Findings show that the regular and continuous land policy reforms to accommodate grievances since the 1998 Land Act support Malinowski's theory that contradictions between value systems play a big role in the refining of the law to create what is acceptable to more parties. The paper also finds that in the new set of land institutions in Uganda, women's rights to land access are continuously being recognised. Findings from this paper contribute to the search for a deeper understanding of the causes of land wrangles in Uganda as the government seeks to make policy adjustments.

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## **1. Introduction**

The British colonial government in 1953 formed a Royal Commission to examine and make recommendations on ways to promote economic development in East Africa. After two years of research, the commission identified the customary land tenure system as one of the foremost constraints on economic development and recommended a gradual substitution of this system with individual ownership of land.<sup>1</sup> This led to the introduction and extension of new individual property rights based on neo-liberal principles in areas where that extension ran up against the principles inherent in traditional property rights. Benjaminsen and Lund<sup>2</sup> argue that the restructuring of the indigenous customary laws to fit the set-up of modern state laws introduced the dichotomy of modern versus customary in Africa. This has created a situation where two sets of institutions, one backed by the law and bureaucracy and the other by ideas and age-long value systems, have produced real conflicts on the ground, with people who have customary tenure rights confronting people who want to alienate it from them.<sup>3</sup> The conflict often unfolds as one form of practice undercutting the other and offering ways to circumvent and replace the other.

Recently President Museveni, while speaking at the burial of a victim of land wrangles in Luweero, apportioned the blame for land conflicts to the British colonial masters.<sup>4</sup> Moore<sup>5</sup> views these conflicts as a process of evolution of institutions which is a part of human nature as they adapt to new and changing situations that they are faced with. She says it is the work of the state to manipulate, circumvent, remake, replace and unmake these rules in which people seem almost equally engaged.<sup>6</sup> Malinowski (1945) encourages an empirical investigation of the processes of these interactions between culture contact and change.

In northern Uganda, land conflicts have become a serious issue in the post-conflict times, with 98 per cent of all cases presented to LCII executive court committees and 70 per cent of all cases presented to traditional leaders being directly related to land issues.<sup>7</sup> A study by Phoug and Vinck<sup>8</sup> found that 35 per cent of the population in Acholi-land had direct encounters with land conflicts between 2006 and 2011 and Burke and Kobusingye<sup>9</sup> found the percentage at 50. The most common causes of land conflicts reported are loss of boundaries while people were in the internally displaced persons' (IDP) camps, issues concerning land inheritance and ownership/

management of land.<sup>10</sup>

In this essay, I empirically explore the principles, practices, interactions and evolution of these two systems in land tenure systems in Acholi-land. I also look at the consequences of these interactions in relation to women's claim to land access. I hypothesise that the clash of value systems brought by these two sets of institution has produced a hybrid situation in which women's rights to land claims have been amplified.

My analysis is based on the principles of Malinowski's 'three column approach'<sup>11</sup> to culture contact and change. Malinowski posits that the processes of transformation of cultures in Africa amount to trans-culturalisation caused by the diffusion of modern and unfamiliar institutions into age-long indigenous systems of operations. He asserts that the relationship between these two sets of culture with different goals and objectives produce new elements which are different from their original forms and this is what he terms as the 'second column'. Findings from this essay show that the regular and continuous land policy reforms to accommodate grievances since the 1998 Land Act support Malinowski's theory that contradictions between value systems play a big role in the refining of the law to create what is acceptable to more parties. The essay also finds that in the new set of land institutions in Uganda, women's rights to land access are continuously being recognised. These findings contribute to the search for a deeper understanding of the causes of land wrangles in Uganda as the government seeks to make policy adjustments.

This essay will start by reviewing the principles and practices of both traditional and modern land laws practised in Acholi, and then look at the land conflicts and land policy gaps and end with what this means for women in Acholi.

## **2. Land Ownership in Acholi-land: Principles and practices**

### **2.1 Customary Land Ownership**

Land tenure refers to the method by which land is owned, occupied, used and disposed-of within a community.<sup>12</sup> Contemporary narratives on land use in Africa are divided between advocates of tenure reform through state cataloguing of individual titles to land and others who posit that customary or 'communal, kinship' tenure is the best way to avoid landlessness among the poor and that 'pro-poor' land policies should seek to strengthen customary rights to land.<sup>13</sup> In sub-Saharan Africa only between 2-10 per cent of land is held under the individual ownership system<sup>14</sup> and the rest is held under customary tenure. Cheater<sup>15</sup> argues that, because the bulk of the land is still

held under the customary system of ownership, land access is continually determined by this indigenous system although it has evolved over time.

Traditionally, customary land in Acholi is divided into the following components: homesteads (including the family compound and a small plot for cultivation), agricultural lands, grazing grounds, hunting grounds, and forested areas used as sources of firewood, honey, medicinal herbs, and other necessities. The latter three types of land were used communally based on membership in a family, clan or region.<sup>16</sup> Customary land was traditionally managed by *rwodi kweri* ('chiefs of the hoe'), whose responsibility was to allocate land according to community needs and serve as a judicial body when disputes occurred.<sup>17</sup> Other elders and community leaders also participated in land management, and decisions regarding customary land were made by consensus between all male elders.

Although customary land is owned in common, its use is not permanently assigned. In the patrilineal society of Acholi, once a young man marries, the family allocates him a piece of land on which he may build a house and farm and settle with his new family.<sup>18</sup> Land is allocated to each individual family and a portion is reserved for communal use and general use. Family land is used for building homes, cultivating food crops and grazing domestic herds. If a man decides to settle in a place other than his own village, he can ask for permission to settle in the new community.<sup>19,20</sup> Permission is granted upon recommendation and confirmation that the applicant is of good character. If the applicant later decides to return to his own people, the land reverts to the clan and it is reallocated. Under the customary land tenure system women relate to land not as farmers or workers but only as wives, daughters and mothers.<sup>21</sup> In cases where a woman is not married to a man, in the eventuality of his death, land can be reclaimed by the brothers of the man's family, generating many land conflicts.

## **2.2. Modern Land Institutions**

The introduction of western land systems in Acholi-land came much later in the course of colonisation of Uganda as the British had largely ignored northern Uganda since they considered it too dry and sparsely occupied to be of much interest.<sup>22</sup> In 1902, Acholi was officially given district status and in 1910 an administrative centre was created in Gulu town. While the British colonialists attempted to promote cotton production as a cash crop in the area, one administrator argued in favour of such a venture to be combined with the introduction of a system of individual land tenure. His argument was that it would create a stable society and promote the intellectual, moral and economic progress of the people (Atkinson, 1994; UN-Habitat, 2007).<sup>23</sup>

This individual land tenure system was established under English law where the Crown is the undisputed owner of all land and its subjects hold estates which are basically divided into freehold and leasehold forms of land tenure. The law treats the 'estate' as property and a land 'title' given to a person indicates their 'interest' in the piece of land even though the land still belongs to the Crown (Heap, 1955).<sup>24</sup>

The 1995 Constitution of Uganda overturned this policy by putting ownership of the land in the hands of the citizens of Uganda, in accordance with the land tenure systems provided by the constitution. However, the terms and principles of the English property law continued in use and the courts of law would draw on principles established under the English legal system. For example, in Uganda's Judicature Statute 1996, there is a provision that 'in every cause or matter before the High Court, the rules of equity and the rules of the common law shall be applied concurrently.'<sup>25</sup> The law specifies that equity shall always prevail in matters of variance with the rules.

Though the 1995 Constitution draws much upon British law, it presents a new neo-liberal principle that observes individual rights to property ownership and one that is being pushed by big financial institutions such as the World Bank.<sup>26</sup> The neo-liberal agenda is based on the notion of 'inclusivity', by law, of all the 'poor people' because as long as some people are left out of the legal system, they cannot participate in the neo-liberal economic project which their nation is pursuing.<sup>27</sup>

Different new meanings have been attached to land and varying hopes invested in land reform in the course of the past couple of decades. The idea that land should do more than just provide shelter and a means of livelihood started being pushed.<sup>28</sup> To most governments in Africa land has become a vehicle for investing, accumulating wealth, and transferring it between generations.<sup>29</sup> With a proliferation of financial institutions, access to land became an incentive to make investments and a way for the poor to access financial markets.

### **2.3. Discussions on Principles and Practices**

From the above analysis of the two sets of land tenure systems we see that the push for the introduction and extension of new individual property rights based on neo-liberal principles in areas where that extension runs up against the principles set out by traditional property rights creates a contradiction between those systems and produces real conflicts on the ground, with people who have customary tenure rights confronting people who want to get hold of their land to alienate it.<sup>30</sup> Lule<sup>31</sup> found that 80 per cent of all

court cases in Acholi were related to land wrangles.

It is also possible that some people with customary rights have used modern state law to register their land under freehold systems. That means that the land has been taken away from the clan forever because if one decides to leave, the land does not revert to the chief to be reallocated. This disrupts the whole pre-existing customary system and conflicts with the principles of customary rights.

And it is because of this juxtaposition of two different existing systems that the need arises to critically understand what the principles of each of these two systems are and how they differ.

### **3. The Changing Face of Traditional Land Justice in Acholi**

In Acholi tradition and customs, the whole concept of ‘adjudication’ by leaders was not a part of the roles of clan leaders, except in situations where land conflicts had spiralled out of control and needed a high council of elders and leaders. Girling<sup>32</sup> argues that the concept of ‘customary justice’ was introduced by the European colonial masters, that it was more despotic than customary practice, and was better termed as ‘social ordering’, administered by appointed or elected members of the community. This form of ‘social ordering’ has continued to-date and many post-independence governments have continued to recognise it. Hopwood<sup>33</sup> argues that this ‘social ordering’ based its decision-making process on age-long practices of customs, focusing on ideas of appropriate resolution and very rarely on state law and notions of formal justice. The inclusion of traditional leaders as land conflict mediators with unhinged roles and responsibilities has since produced great results in land conflict management.

The ambiguity in the state laws has caused contradictions and clashes in value systems between the state laws and the customs and it is one that has struck through the idea of social ordering and the means by which it has taken shape within these communities. Porter<sup>34</sup> observes that priority is given to the continuity in practice of customarily appropriate social relations, over the concept of customary justice by legal process in contemporary Acholi. To Porter, social harmony takes centre stage in the mediation of conflicts because the need to maintain or achieve communal harmony is the ultimate goal of social ordering after wrongdoing. Individual penalties or retributions against an individual are always a side issue in matters where the concepts of ‘victim’ and ‘perpetrator’ are part of a social setting.

### **4. Uganda Land Laws and Policy Gaps**

One of the gaps that create conflict between traditional and modern state

institutions in Acholi has been the customary land tenure system in the north. Here different communities have their different ways of managing land, all of which are legal by law.<sup>35,36</sup> There is no codified system of management of customary land for courts to follow; each case is handled uniquely, creating the problem of non-uniform decisions.<sup>37</sup> The mandate given to traditional institutions to mediate some of the land conflicts through the Alternative Dispute Resolution<sup>38</sup> has gone a long way in covering the problem the courts of law face in resolving land conflicts, however, traditional leaders have limited powers as mediators and are unable to sanction anybody. Therefore, in cases where an offender refuses to heed their collective ruling they can only refer to the courts of law, which also have limited resources and inadequate numbers of staff and thus always have a heavy backlog of cases.<sup>39</sup>

The issue of land sales is one that causes great concern among most people in Acholi. In traditional Acholi, the sale of land was unheard of, but with the push towards neo-liberalism and the increasing monetary economy, the people have had to go against their own customary practices to sell pieces of their land in order to survive. However, some of the transactions involving land purchase and/or lease are highly impervious and only a few details are made public, and these have caused a lot of suspicions among the populace.<sup>40</sup> The investors sometimes buy a whole sub-county<sup>41</sup> (Mabikke, 2011) in the name of setting up development projects and because the people are desperate they just sell. Since there is no law that forbids the selling of customary land and the transfer of this land to freehold, chunks of land in Acholi have been bought and transferred to investors/businesses as titled land. This has led to loss of land, especially among women who are not usually involved in the process of land sales or the distribution of the proceeds. The children are also affected by these deals, and in cases where the parents are irresponsible with the money obtained from the sale of such land, these children grow up to become landless and unemployable and hence turn to crime.

In some parts of Acholi, traditional leaders have come together to guard against such acts and protect the land from being sold to outsiders through instituting ordinances that allow land to be sold only to a person who comes from the village where the land in question is located (Burke & Egaru, 2001). However, these ordinances are usually weak and unable to hold up in the courts of law, especially in instances where a member of the clan buys the land and then sells it off to an outsider. In such cases, the member of the clan usually pretends to be buying the land for themselves but, in fact, will be standing in somebody else – an outsider.



The law on bona fide occupants in the Land Act Cap. 227 has so far created the biggest hurdle. This falls under the modern law system of individual ownership, where if someone stays on your land for 12 years unquestioned or undisturbed, the law purports that the land automatically becomes his. This law is contradictory to the customary practice where land always belongs to the clan no matter how many years it has been unoccupied. This has become a bone of contention between people who went to the camps believing that they would return to their land but only to come out of the camps and find that somebody else legitimately owns the land because they have stayed on it for over 12 years. Many people lost their land this way, and the problem of returnees has been exacerbated by the fact that there were no legal instruments to address the issue of land abandoned owing to emergencies.

The other issue that has arisen due to the institution of modern land laws in Acholi-land has been the unclear and suspect Land Acquisition Act 1965 Cap. 226 and the Land Act 1998 Cap 227. The Act makes provision for compulsory acquisition of land for public use or/and such acts as are related to public purposes or on account of security risks. Sections 1,2,3 and 4 of the Land Act 1998 Cap.227 gives absolute powers to the Minister of Lands to 'authorise any person' to find out the suitability of a piece of land, make a declaration of its suitability and send assessment officers to assess the identified piece of land. This process is prone to corruption and malpractice as it vests so much power in the ministers. It is for this reason that the Act has made the returnees from camps suspicious that this eminent domain may be misused by government officials to grab land legally in the name of the state.

Mabikke<sup>42</sup> observes that communal lands have already been grabbed by powerful individuals such as army officers, politicians and government officials, leaving the extremely vulnerable persons, especially the women, children, youth and elderly, landless wonderers in their own homeland. There have also been several government attempts to acquire land in Acholi to give to rich business owners and companies such as the Madhvani Group.<sup>43</sup> This has led to the locals fighting back through local means such as the prostration by naked women in Apaa in April 2015<sup>44</sup> in defence of their land, which they claimed the government was attempting to take away from them. This perceived scarcity of land has driven everybody into a state of panic and has made everyone want to protect the little land they have; hence violent reactions will occur at the slightest provocation.

Although in exploring the above issues we have been able to highlight some of the issues women are faced with, the general idea was to establish



a basis for the complexity of land ownership in Acholi-land. In the next sections of this essay, we shall primarily focus our attention on the impact of these land conflicts on the women and, by extension, their children in Acholi.

## **5. Women and Access to Land**

Uganda has been recognised as having outstanding legal policies to protect women and as having institutionalised gender mainstreaming and gender-sensitive policies. Uganda has also ratified several international human rights treaties on gender equality and the protection of women's right. However, there have been gaps between the laws and the implementation of these laws, as stated in the National Land Policy 2013. The enforcement of these mechanisms is still lacking and although traditions, customs and practices which largely discriminate against women in matters of access to, use and ownership of land have since been outlawed, the practices still continue to persist undetected by the law keepers.<sup>45,46,47</sup> Cultural traditions such as land inheritance that favour only men, leaving the woman's rights to inheritance at the mercy of the male relatives (Uganda National Land Policy 2013).

Ugandan national land law has also not addressed this problematic practice in the Acholi sub-region where women's relationship to land is tagged to a male figure. Attempts have been made to redress this inequity in the Domestic Relations Bill but Parliament has declined to pass it, the fact that the speaker of the Ugandan Parliament is a woman notwithstanding. The *Court of Appeal in Uganda Women Lawyers and 5 Others vs. the Attorney General Constitutional Petition No.2/03* and the *Uganda Women Lawyers vs. the Attorney General Constitutional Petitions Nos. 13 /05 /& 05 /06 [2007] UGCC 1 (5 April 2007)* fortified the rights of women to equality under the constitution, specifically Article 26, which regards the rights of a woman to own property. The problem is that women do not have the same leverage with men. For example, in a cohabiting relationship, a woman is not legally recognised as married to a man even if the parties have stayed together for 10 years in that relationship. So in case of a break-up the woman is bound to lose everything; and even worse, in cases where the man passes on before marriage is contracted, the woman is ejected from the land, sometimes along with her children, by the man's relative since she does not have a right to his property.<sup>48</sup>

However, these cases are becoming few, having been largely averted by the inclusion of women representatives on the land committees at village level.<sup>49</sup> Also, the advocacy for women's rights by various NGOs has helped

bring justice to the women.<sup>50</sup>

Hopwood (2015) observed that the status of claims by the women and particularly their children (who are considered outsiders at their maternal homes) have been evolving over time with elders, clan leaders and community members tending to support such women's claims and sometimes those of their children as well. Girling<sup>51</sup> and Finnstrom<sup>52</sup> note that the chances of acceptance of these children into the clan are greatly increased by stronger bonds between the children and their mother's clan (*ibid.*).

The inclusion of traditional leaders as mediators in land conflicts meant that the traditional leadership became an official structure of the state and one whose rulings would be respected by the courts of justice, too. This is an important step towards land conflict resolution and women's land access claims. The meaning of this is that the traditional leadership now has to account both to the people and to the government and this has checked their otherwise patriarchal actions. This also means that the government and civil society organisations could advocate the inclusion of women representatives in these conflict management structures, something that would greatly benefit the women. LEMU, an NGO, has designed a document on the principles of natural justice to guide clan leaders in land conflict resolution.<sup>53</sup>

As shown above, a hybrid system has been adopted to include and protect women's right to land access where the clan leaders are now being asked by the government and various NGOs to observe women's and children's rights in the mediation of land conflict while also putting into perspective their principle goal of restorative and reparative social ordering. This situation promotes more equitable access and security of land use for women and children.

### **5.1. Women's Marital Land Claims**

The weak laws on marriage, cohabiting and divorce have played a big role in the eviction of women from their husbands' land and their return to their fathers' homes. The allocation of pieces of land to new members of the family is usually done by the heads of the family. In instances where the woman was not married or where the woman has been divorced by the man, the family is entitled to protect her. However, this has not usually been the case since women in these situations are usually evicted by the family-in-law, most commonly the brothers-in-law.<sup>54</sup> These evictions are done for several reasons, including the genuine threat of land scarcity, opportunistic greed because of the commoditisation of land, or through rejection of the

women's claims by the brothers' wives.

In instances where there is actual fear of land shortages, attempts are made to reduce the number of claimant to the land and in the process male members of the family are favoured. The reasoning, sometimes genuine, is that women will always get married into another family and, therefore, the men need the land the most because they are the ones who marry women and bring them home. However, this often leads to landlessness among those women who have no desire to get married, those who have returned home from a broken marriage or even the ones who have either lost their husbands or have been divorced.

Hopwood<sup>55</sup> found that these categories of women are now decreasing, as the clan leaders have stepped in to protect the rights of such women. She found that clan elders are more empathetic with the plight of women as they are more concerned with the interests of and their obligation to them in the social ordering of the clan as a whole.

So, as presiding members of the clan, their decisions override those of any family members or family heads. Furthermore, now that the 2013 National Land Policy gives them legal status as mediators in land conflict issues, women's right to land access has taken centre stage in the mediation of the cases of land grabbing or land deprivation. This assumption is supported by data from the study by Hopwood and Atkinson (2015). Another study that shows the effectiveness of these traditional leaders and their observation of women's right to land access is the one by Burke and Egaru (2011) for the UN Peacebuilding Programme on the identification of good practices in land conflict resolution in Acholi. Kimani<sup>56</sup> highlights the roles of the NGOs in bringing justice to women based on her discussions with Uganda Land Alliance from which she heard about cases where land had been returned to women who had lost it through unfair customary systems.

It should be noted that, while there is a positive turn of events for women, the cases where women receive redress are still few compared to those where women face injustices under the unregulated law and the unfair patriarchal arrangements provided for under the customary systems. But as both government agencies and civil society continue to carry out civic education on the right of women to access land, as Hopwood found, a shift is taking place in a positive direction for the women.

## **5.2. Women and Informal Land Markets**

An important factor that has played a role in helping the cause of the woman is what Hopwood (2015) calls the introduction of the notion of the 'paying guest' or renting of land. The notion is a sensitive one and one that

is a little obscure as permanent sale of land in Acholi still draws a lot of disapproval, but is also one that has enabled women to buy and rent land albeit at increasing cost.

The push for the neo-liberal system of individualistic land ownership has created a big advantage for this notion of informal land sales. These informal markets are now more common than ever as a result of an increasingly neo-liberal, monetary economy where the need for money has immensely increased. The sale of land on the informal or formal market raises serious issues, since distress sales are likely to predominate, leading to landlessness and extreme poverty (Burke & Egaru, 2011).

The existence of informal markets that are based on individual tenure actually favours disadvantaged woman who otherwise face massive discrimination within the customary tenure system and the common land ownership practice in the community. This informal market now gives the women the opportunity to gain access to land through renting or buying. Hopwood (2015) found that while a few women have the money to buy plots of land, many women now rent plots of farmland, often as a supplement to day labouring commonly known as *leja leja*, a local term for petty business. Community savings groups commonly known as Village Savings and Loans Associations (VSLAs) sanctioned by most livelihood NGOs in northern Uganda have also helped the women save some money with which they have been able to rent or buy plots of land.<sup>57</sup>

## 6. Conclusion

The British colonialists respected the traditional institutions and, in fact, used them in attempts to maintain their control over the people. However, as observed above, the establishment of modern private ownership systems threatens these rights. In a situation of increasing land scarcity and social disruption caused by war, this has also contributed to the ubiquitous social unrest in northern Uganda today. This problem has been compounded by commandist-state interventions that enabled elites to appropriate land and the weak policies and enforcement processes that did not safeguard the rights of people herded into concentration camps due to the LRA insurgency. The neo-liberal agenda in itself is not a bad idea, but in a society where there is uneven distribution of resources and a huge monetary gap, it is fair to say the poor will stand no chance against the mighty businessmen and investors. This push towards a neo-liberal society and land ownership has only compounded the problem further by commercialising the land and bringing into play the informal land markets, which has also worked to give access to land by 'investors' or 'businessmen' who in the end exploit the

poor.

However, in all this, this essay unearths the fact that the interactions caused by the entanglement between the traditional and modern state institutions have in a way had a positive influence on women's claims to land access. The traditional leaders are beginning to understand and value women's contributions to society and treat her as equal to their male counterparts.

President Yoweri Museveni, in his speech referred to earlier in the paper, calls for the Parliament of Uganda to amend the laws on land ownership but this amendment, like many others before it, must resist being a fire brigade amendment which tackles issues that arise without deeper understanding of the underlying cause. The appreciation of the roles played by the dual nature of these institutions through critical analysis will give the legislation clear policy recommendations. I would recommend the use of Malinowski's three column approach to enable the appreciation of the nuances in the process of change.

## Notes

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