

13<sup>th</sup> December 08

Comments to Ministry of Lands on the research report on HIV.

### **A. What World View?**

The report's underlying assumption is that ownership is real for titled land. This is why it states that "a mere 7% own property". Given that Uganda has four legal tenure systems – Freehold, Mailo, Leasehold and Customary, the most predominant, it would be good to quote the source of this information as relates Uganda. MISR carried out a research on titled land and one would have hoped the statistics to be quoted would be from this report.

The second world view is that concerning customary tenure with a statement that "under customary law, a wife cannot inherit the husband's estate. Rather it passes to his sons or parternal relatives. Daughters are also denied inheritance and succession rights" (Executive summary no 4). Given that this is what has been said about customary tenure in most written literature about women's land rights in Africa, it would be good for the report to quote the source of its information describing laws governing customary tenure in the different parts of Uganda before concluding the way it has. If this is done, the conclusion given about customary tenure can be taken to be a myth a misconception that has characterised literature concerning customary tenure. This report defined gender to mean "a social construction of men and women by society, giving them stereotyped roles and responsibilities" If this is the case, why is the information in this report not different from literature written about land and gender in Africa? If it is based on analysis of what customary tenure really is, why is it very different from our information on customary tenure from Lango, Acholi and Teso.

### **B. We represent our position on gender and women's land rights below:**

#### **Traditional culture and women's land rights**

The starting point in the battle is often the 'fact' that traditionally women are not allowed to own land. The aim is then to replace traditional systems of ownership ('customary tenure') with more 'modern' laws which give women rights. **Titling** land takes it out of customary rules: a woman with freehold title is fully equal to a man with freehold title. The aim is to increase the number of women holding titles, and this number is frequently quoted as an indicator of gender equality in land rights – a quite bizarre idea, in a country where over 80% of land is held without title, since it says absolutely about the situation for the vast majority of women in the country.

We believe that the strategy has failed because it is based on a wrong premise, that according to custom, women cannot own land. As a result, we have fought the wrong battle - against 'tradition', instead of fighting for customary rights against a frequent distortion used by those who wish to violate women's rights. Men saw co-ownership as giving a woman individual ownership over land, rights that no-one, man or woman can have in customary law. Men and women were told that their culture was wrong – and even where they felt the injustices practised by their families or communities, such a call would always leave women feeling that their own specific injustices were not the same as the abstract campaigns being urged upon them.

Why has the distortion so often been accepted? It rests upon a very common misunderstanding about how land under customary tenure is owned and administered. There are some fundamental differences between these systems and the 'freehold' ways of thinking which are more common in urban contexts that is held by people who are more familiar with the rules of a freehold system. With a freehold title, the person whose name is on the title is the land owner, and has all the rights to the property. Under customary tenure, land ownership is by families, not individuals. The head of the household would nominally be referred to as the 'land owner', but it is a common mistake to interpret this as meaning that he has all rights in the land, and that his wife or others) only ever enjoys 'access' rights if he gives his permission. Ownership is stewardship, or a trusteeship, and it comes 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. If a man

dies leaving a widow, she assumes the role of head of family<sup>1</sup>. However, there would be extreme resistance to regard the land as the personal property of the widow – just as it was never the personal property of her husband. She has the duty to allocate land to her sons and daughters-in-law at the appropriate time, and to her daughters if they remain in their parents' clan because of divorce or not getting married. It is still common to be told that a widow 'holds' her late husband's land but that 'she is not really the owner' – because she cannot sell it. In fact, she can sell the land, with the permission of the clan, if there is a valid reason, which are exactly the same conditions facing a man who wants to sell land! The specific rights that the widow and her late husband held are exactly the same.

Fortunately, the “Principles, Practices, Rights and Responsibilities (PPRR)” have been written down by the customary authorities of the three largest groups in Northern and Eastern Uganda (the Acholi, Langi and Teso) making it a matter of fact what customary law said, rather than a matter of debate.

These principles also make it clear that unmarried women have rights to land from their parents, and that divorced women have rights to their parents' land (or from their brothers). These principles are frequently not being respected: that is why LEMU argues that the real struggle is to establish the enforcement and not the abolition of customary principles.

This would involve a significant paradigm shift, but one which is necessary to bring about an improvement in women's lot. It is worth exploring the implications of such a paradigm shift.

### **1 What is the focus of the debate?**

Currently, the discourse revolves around the ideas of 'control' and 'access' rights to land, with the aim of bringing gender equality. The new paradigm would look at specific rights in practice and how they should be protected. Rights and responsibilities always derive from a social context: in Ugandan societies, women and men have more different roles than in the West. The new paradigm would accept these different roles, and would fight for equity, rather than equality.

### **2 Diagnosing the problem**

The old paradigm was trying to fight bad customs and bad men. This needs a strategy of replacing community practice and community protection with State law and State protection. The new paradigm recognises that this is impossible. Implementation of protection for women's rights can only come with community acceptance. The problem is that the customary system is not working: this is a 'system' problem, and not due to any individual. Fixing the system and making it accountable becomes the new strategy.

### **3 What rights need protecting?**

This will be the hardest shift for many. The current rights paradigms are based on individual rights, and women therefore should have the same individual rights as men – otherwise this is discrimination. Accepting the notion of culturally embedded rights means accepting that people (both men and women) have rights and responsibilities as family members. A person's rights change as their family situation changes, and men and women will frequently have different rights and responsibilities. This should not result in discrimination. A married woman claims land rights from her parent's in law, not her parents: her claim is made in a different place from her brother, but neither claim can legally be denied.

### **4. Protection of rights.**

Land rights need defending at all times. Any sign of “weakness” renders one vulnerable to encroachment or land grabbing. Weakness of ALL women is physical. For men, their weakness comes from tender age, old age or sickness. The presence of a male supporter is important to ensure land is not grabbed. Under customary tenure, the system had an inbuilt protection. This comprised of the following:

- Uncles looked after the land of orphans until they married and passed it onto them;
- Widows were inherited but the rights to land did not pass on to the inheritor. Today, according to the law, a widow has 3 choices, to pick a man as a partner, to remain

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<sup>1</sup> This is certainly the case for Acholi, Lango and Teso tradition, and probably for many other communities.

- without a man in her marital home or to return to her father. Clans have accepted that a widow may choose a man from outside the clan.
- Ensuring family consent is given when land is sold with the clan acting as an overseer.

The problem is not in the law but in the practice. The emphasis should be for the clans to be held accountable to protect rights. The state cannot protect rights at all times but it can hold the traditional authorities and families accountable to protect rights.

### **5 *What are the practical solutions?***

The old model looked to pass legislation protecting women and to empower women to claim those rights against their societies. Specifically, it also looked to help women to title as much land as possible either in their own names or jointly with their husbands. In this report, the recommendations are heavily dependent on the state to bring change. The new model believes that claiming rights against one's communities will remain beyond the possibility of most individuals for a long time. Instead, women's rights and responsibilities in customary law need to be clarified. Customary authorities, who have been given the authority to determine land disputes by the State, need to be held accountable by the State for upholding their own principles. This necessitates finding ways of harmonising the customary and State judicial systems, so that they work together on agreed rights instead of against each other.

### **6 *Who is responsible for protecting rights?***

Current strategies make women responsible for claiming their own rights and the State responsible for answering these claims. The new strategy would accept that neither of these premises is plausible: research already shows that women who are capable of asserting their rights do not suffer many violations, and that the State has utterly failed to enforce its own laws<sup>2</sup>. Rights can only be held by community structures – held accountable by the State.

### **7 *How should we measure progress?***

Instead of looking to see more titles on women's names, which would only be of relevance to urban and educated women, the new paradigm would measure progress by the actual situation of respect for women's rights as a whole. (This, of course, is much harder to measure, but would ensure that we spend our time looking at what actually matters. Areas of support would be the implementation of family consent at land sales for customary land and spousal consent for registered land)

### **8 *which women are best served by the paradigms?***

The old paradigm was relevant only to urban women on registered land, and to those best educated and most able to claim rights. There will always be a place for these strategies because the struggle of these women is as important as any other women. The new paradigm is proposed as more relevant for the majority of Ugandan women – the rural, the less educated and those who see themselves as family and community members and not only as individuals.

### **9 *Can the paradigm help improve women's rights?***

This surely is the test of the different models. The current paradigms have not worked, because the violations of women's land rights in rural areas is as rampant as ever, and the belief in the principles that women have land rights is growing ever weaker. One weakness of the model is that it is drawn from an analysis that is foreign to the culture of those it is seeking to help. It therefore misses the responsibility which a community has for upholding protection, and instead places the duty to protect women outside the society – in the State Courts. This ignores the fact that the State justice system is already overwhelmed – magistrate's Courts take long to reach any judgements in land cases and even then leave the responsibility (and costs) for effecting enforcement on the women themselves. The more practical paradigm is one surely that holds communities responsible for justice and rights which they accept as part of their culture. The State will always maintain its role in combating any specific instances where custom is

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<sup>2</sup> LEMU will shortly publish its findings from several months field research on the state of land justice in northern and Eastern Uganda

fundamentally discriminatory, but as we have seen, these are not the major problems in relation to land law. The new paradigm works on a gender analysis rooted in the local culture, with protection enforced from within the village. It is not naïve in expecting this to happen on its own – the current realities are evidence that the struggle will not be easy. LEMU believes, though, that the struggle can only be successful if we fight on the correct battlefield.

### **C. Recommendation given in the report.**

The report finds problems with the customary tenure which is community based and recommends all the solutions to be by the government. This does not take note of the fact that government has limited capacity. It also does not take note of the reality on the ground in terms of implementation of similar recommendations already in the law. For example, it does not mention that the consent clause has never been implemented because there is not legal person responsible for it and it is also different from customary law which provides for family consent. The recommendation that institutions be passed to implement childrens' consent should be within this context. This same comment is applicable for the land fund, titling of land, presumption of marriage, training, etc. For more than 10 years provisions of the Land Act were not implemented and the main reason given is "lack of funds". To continue to make recommendations that require the government to spend is to ensure the report remains on the shelf.

Besides the recommendations by LEMU above, we also recommend the following:

It is high time customary tenure Principles, Practices, Rights and Responsibilities (PPRR) for all parts of the country is understood. It is only after this is done that rights can be protected and people held accountable. Some of the responsibilities can be included in state law.

Support the clans or traditional authorities to identify a particular tree and support communities to plant these on their boundaries together with the map and the names and signatures of all family members on the land. These maps should be registered with the recorder. If a husband dies or a father dies, the evidence exists of their land. The state does not need money to have this happen – only a policy and guidance.

The process of widow taking over the management of land is done without much ceremony or documentation. This allows others to abuse widows' rights. It is proposed that policy should cater for the recording of the widows 3 choices – and the clan to name a protector who can then be held accountable. The clan should also name the uncle who is to hold the land of the orphan in trust for the orphan. If the land had not been marked, the clan should do the marking, map drawing and the registration.

There should be a concerted effort by ALL actors against land grabbing. This report states that women have no rights to land and then it says there is land grabbing. LEMU believes land grabbing only exists when land rights are abused and land rights are abused all the time because of the physical weaknesses of women. To stop land grabbing, we need to stop saying "customary tenure does not allow women to own land" since this is not true in the first place. The practice is where the abuse is and not the law.