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The Contemporary Ugandan Discourse on Customary Tenure:

Some Theoretical Considerations

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This paper will focus on how the question of customary land tenure has been constructed by key Ugandan NGOs in the debate on the impact of the 1998 Land Law in the districts of Lango, Acholi and Teso. I focus on the Land and Equality Movement in Uganda (LEMU) and the Uganda Land Alliance (ULA). I seek to historicize the customary – in particular customary access and use of land, and the resolution of disputes arising from these – from the pre-colonial to the colonial and post-colonial periods. My object is three-fold: (a) to locate the customary in the relationship between state and society in each period, and (b) to ask how the customary has changed under the influence of forces linked to the market and state, whether as a consequence of ‘spontaneous’ social processes or through coercive action from above, and (c) to link these diverse influences to different kinds of accumulation, both from above (outside the peasant community) and from below (within the peasant community). I discuss these issues with respect to two questions of great concern in the NGO community: titling, and ensuring the rights of vulnerable groups, in particular, women and children with respect to land. I conclude with reflections on two key questions: security of tenure for the direct producer, and the reproduction of the peasant community in the context of rapid class formation and social differentiation.

Custom and customary are terms of colonial vintage. We can trace their genealogy to Sir Henry Maine’s response to the Indian Uprising of 1857.¹ Maine made the distinction between custom and civil law in his polemic against Austin: whereas civil law is abstracted and travels, custom is specific to a place and a people. Maine argued that the secret of India’s millennia-long stability was not positive law enacted by a sovereign power (for Indian princes only made commands, not positive law) but the reproduction of custom in thousands of villages. His object was to warn his contemporaries that the enactment of positive colonial law to “civilize” India would only undermine the stability of custom. To achieve stability, Maine argued, British power needed to reinforce and stabilize custom.

Custom was the name the colonial state gave to rules, regulations and authorities by which colonized societies had over time regulated social processes and arbitrated conflicts. The pre-colonial ‘customary’ neither referred to state law nor to state authorities that imposed positive law. The pre-colonial ‘customary’ was part of society rather than an artifact of

¹ Sir Henry Maine, Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, Classics of Anthropology, 1986; also see, Sir Henry Sumner Maine, “The Effects of Observation of India upon European Thought,” The Rede Lecture of 1875, *Village-Communities in the East and West*, London, 1876

political power. *The first important issue to grasp is that what is called “customary law” today was not a part of the institutions of political power in the period of colonialism; it was a part of society.*

Modern colonialism involved a double move: on the one hand, the implantation of a modern colonial state from the outside and, on the other, the colonization of society. Critical to this endeavor by the state to colonize society was a detachment of the dispute settling mechanism from society and its incorporation into the colonial state as a set of “customary” laws. This process took place in large sections of the colonial world. In India, where it was first put into effect, it involved the construction of different sets of *religious customary laws*: Anglo-Mohameddan, Hindu, and so on. What had hitherto been a set of social/religious mores and conventions became a part of state law. Developed as a model in British India, Anglo-Mohameddan law was transported to Sudan, and then to Nigeria. Colonization also involved the construction of a second set of *customary laws*, *ethnic* in this case. In their Indonesian colony, the Dutch codified *adat* as a set of ethnic customary laws, meant to counter pose Islamic sharia, and the British formulated ethnically-based customary laws in their African colonies.² The movement in this case began from Nigeria to Sudan, and then southwards to Uganda, Tanganyika and so on. In all these cases, whether articulated in the language of religion or ethnicity, the process of the construction of the customary involved a radical shift in state-society relations.

But the process remains incomplete. For this reason, the customary is both official and unofficial, a part of the state as well as a part of society. The state customary is identified with the authority of chiefs and the hierarchy known as chiefship, and the social customary is identified with clans and clanship. Whereas chiefship became a part of the state in its colonial form, clanship is part of society. The supremacy of the modern state, whether in its colonial or post-colonial form, is embedded in the claim that the powers of chiefship must override those of clanship. This is why the customary as part of society (clan heads and convention) continues to lend vitality to the imaginary we call the pre-colonial, and at the same time provide a vantage point from which to critique how the customary has become part of the state project (as in “customary chiefs” or “customary law”).

I shall situate the 1998 Land Act in Uganda in the context of this process, so as to understand its significance as part of this history. My point is to provide a critical reading of how the principal Ugandan land NGOs – Uganda Land Alliance (ULA), Land and Equity Movement of Uganda (LEMU) and Civil Society Organisations for Peace in Northern Uganda (CSOPU) – have understood the significance of this Act. Ugandan land NGOs have celebrated the 1998 Land Act as a step forward; in contrast, I shall argue that it needs to be seen as the latest phase in the modern state’s endeavor to colonize society. The Land and Equity Movement of Uganda (LEMU) has argued that the 1998 Act signifies “the recognition, for the first time in Uganda’s history, of customary ownership of land (i.e., where landowners have never had

² On *adat*, see, Christian Snouck Hurgronje, *The Achehnese*, A. W. S. Sullivan (trans.), Leiden: E. J. Brill, 1906

any papers for their land, but everyone has always recognized the family as the ‘rightful’ owners of that land).”³ I shall argue that the recognition of “customary ownership of land” in the 1998 Act is really a prelude to the subordination of clan leaders to state authorities, part of a larger effort to subordinate the social customary to state authorities. Put in this larger context, the 1998 Law also appears as an endeavor to apply key provisions of the 1900 Buganda Agreement to the rest of Uganda. I will argue that the attempt should be seen as retrogressive since it ignores a key lesson in Buganda’s history: whereas the Bataka movement in Buganda forced the colonial state to introduce the 1928 Busulu and Envujjo Law as a way to guarantee security of tenure for peasants, the 1998 Law contains no such safeguard. Whereas the experience of Buganda shows that it is security of tenure for direct producers – and not freehold – that was key to the growth of commodity production in Buganda, the 1998 Law presumes that key to commodity production in Uganda is the free flow of capital in rural areas.

Changes in the Customary

The colonial state gave the name ‘custom’ to mores and conventions that regulated social processes and called as ‘customary’ the authorities that oversaw these conventions and arbitrated conflicts arising in the process. These mores, conventions and authorities were clan-based, especially when it came to land use and regulation of conflicts arising from it.⁴ Cultivated land was under clan supervision and oversight. Land transfers took place with the approval of clan elders.⁵ Large areas of land, say for hunting or the collection of forest products or grazing⁶ were regulated for the benefit of all clan members. Dispute resolution was a clan affair and it was based on social mediation rather than court judgments.⁷

Mainstream social science has tended to oppose the “customary” (traditional) to the “modern.” The implication is that the former is non-historical, and the latter historical, imbued with the dynamic of change. When Ugandan NGOs write of the “customary,” the tendency is mainly to portray it as non-changing in the period before colonialism. *There is no history of the customary available to us.* When it comes to histories of the colonial and the post-colonial periods, the tendency is to construct these around a single binary, the

3 Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, January 2007, p. 4

4 Civil Society Organisations for Peace in Northern Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. xi

5 “Generally land is allocated and managed by a grandfather who provides plots to each male family member according to need and perceived ability to use the land. When the grandfather dies, a new family head is appointed.” Civil Society Organisations for Peace in Northern Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 5

6 “In Gulu the *olet* (grazing land) was generally used communally by all cattle owners, but ownership of the area was divided among them as individuals, with each one having his own ‘plot’, although each one would allow the others to graze their cattle freely over the land as a whole.” Civil Society Organisations for Peace in Northern Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p.

7 Within this larger context, there were developments leading to other forms of tenure, leading to both village and individual forms. See, Margaret Rugadja, *Land Tenure and Land Management in Uganda: 1900-1998*, Uganda Land Alliance, March 2003

“customary” (traditional) and the statutory (“modern”). I propose to move away from this binary opposition between society as the embodiment of the “customary” and the state as the agent of the “modern.” The growth of the market undergirds the development of both society and state.

Changes in the customary are both ‘spontaneous’ and coerced, the former under the influence of market and the latter a result of pressure from state forces. As such, these changes need to be understood as the result of a trilateral relationship – one between state, society and the market – and not just a bilateral state-society dynamic. I will illustrate how the combined effect of the market and the state has led to social change with reference to social practices relating to bride price, widowhood and land ownership. *Bride price*⁸ was historically (traditionally) paid in cattle but has been monetized over the past few decades in large parts of northern Uganda. LEMU has explained this shift as a consequence of widespread looting of cattle by soldiers in the National Resistance Movement following the overthrow of the northern-based military government: “... nearly all the cattle in the district were lost in the years following the rise to power of the National Resistance Army.”⁹ Thereafter, social institutions were forced to adapt to this change: “Bride price was traditionally paid in cattle, but since the loss of cattle in the late eighties and the increasing monetarisation of the economy nationally, this now translates into a cash need.”¹⁰

A second instance of change concerns the institution of *widowhood*, which has gone through two different forms over the past half century. In Lango, a man may acquire a wife through two different ways: either by paying a dowry, or by inheriting a widow. The former is called *dako* (pronounced daho), the latter is called *lako* (pronounced laho). Historically, a wife’s position was defined by her relation to the clan of the husband: if he died, she was inherited by his closest relative. The exception was if the woman had no children: if she was newly-wed and had no children, her family could return the bride price and recall her; if she was beyond child-bearing age, she was free to cohabit with any man of any clan, without the repayment of bride price. But should she have children and still be of child-bearing age, her family would have to forfeit not only the bride price but also the children for her to be free.

The *lako* enjoyed a relative freedom that the *dako* did not have. Whereas the latter was more or less unconditionally wedded to the man who paid the bride price, the *lako* was free to reject a clansman cohabiting with her on grounds that he was cruel or negligent and choose to cohabit with another. It is this “traditional” freedom that provided an avenue for a wider freedom under the pressure of market forces: whereas traditionally the *lako* was inherited by the nearest clansman (according to blood ties), today she is more likely to have the freedom

8 Abby SebinaZziwa, one of the two discussants of this paper at the MISR workshop on “the land question”, argued that “brideprice” is a misreading of what in reality is “an exchange of gifts” leading to “an allocation of land to a man and a woman when they create a family.” My intention is not to enter into the debate on the discourse on “bride price” in colonial literature but to engage with Ugandan NGOs in their understanding of how “bride price” changed from cattle to cash. I use the term “bride price” following its usage by the NGOs I discuss.

9 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 1

10 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 1

to choose; at the same time, her agency is likely to have the unmistakable imprint of market forces, since she is more likely to choose one of the richer clansmen.

LEMU, however, explains the change in terms that exclude the effect of long term market forces: “Previously, the biblical tradition was practiced, where a brother of a widow’s late husband would agree to take her on as his wife in order to protect her position within the family. This practice is now rare, because of the fear of HIV. (Under state law, the woman receives 15% of the estate of her husband in cases where he failed to make a will, with the majority going to his ‘lineal descendants’.) Widows too can be chased away by their brothers if they try to return to their parents’ land.”¹¹

My research in Lango in the 1980s showed that the change in the social position of the *lako* preceded the scourge of HIV and its widespread fear and affect on social behavior. Villagers then pointed to the shift as an example of the power of money and a result of social differentiation in the village community.¹² Some even complained that the few rich men in the village were using their wealth to monopolize control over widows. I will later return to the need to come to grips with the ways in which market forces and social differentiation are both eroding and changing the nature of the (social) customary.

NGO researchers have noted that *land ownership*, too, is going through changes that strengthen the tendency to individuation when it comes to access and control over land. Today, a son who inherits land tends to assume powers over it identified more with individual than family ownership. Similarly with the purchase of “customary” land: clan authorities tend to treat it as sole property of the buyer, rather than considering the buyer as a custodian who must ensure the right of access and use of the entire family.¹³ The same processes that have led to the strengthening of individual rights over purchased and inherited land have also led to the erosion of clan control, both in the management of land and over resolution of conflicts around land as most land matters are dealt with either at the village level or by state acknowledged agencies, including Local Councils (LCs).¹⁴ The consequence is a development of “hybrid forms.” Researchers confirm that the tendency is for the rich and the powerful, both within and outside the community, to turn these hybrid institutions to private advantage. The trend is for those in charge of land management, whether LCs or clan authorities, to listen to the

11 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 12

12 See, Mahmood Mamdani, “Forms of labour and accumulation of capital: analysis of a village in Lango, Northern Uganda,” paper presented to 3rd Mawazo Workshop on “A Hundred Years after the Berlin Conference: A Perspective on Africa’s Liberation,” October 12-14, 1984, *unpublished*, pp. 16-17

13 “Inherited land is being given to an individual son who increasingly assumes absolute individual ownership of the land, rather than holding it as a ‘steward’ on behalf of a wider family unit. Secondly, land which is purchased is often regarded by customary authorities as belonging to the buyer alone with fewer birth rights claims to the land being entertained.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?* p. 19, also see, p. 45

14 “For various reasons, clan control over land has progressively weakened over the past decades. Most land matters have progressively been dealt with at the village level. However, even at village level, this power has been eroded, with the penetration of the state authority to village level.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?* p. 45

rich and to disregard the poor. LEMU researchers cite comments from a community meeting to make the point that the force of money tends to corrupt both state and clan authorities: “The behavior of the clan leaders is very similar to that of the LCs with both of them having an interest in money first.” Another member of the community points out that the poor are inevitably the victims: “If one is poor, the clan members will not assist you. Instead they laugh at you with your problems. It is only the rich who will be assisted. Clan leaders are now elected like the LCs ...”¹⁵ The plurality of authorities also presents those involved in disputes with a range of choices: “different actors appeal to different legal or normative rules to resolve conflicts of interest.” This is how LEMU researchers formulate the dilemma that is a consequence of social change: as the male head of the family assumes individual powers “with all the authority to use, sell and control land” and in the process downplays his social duty as “the responsible representative of his family”, and as “the authority of clan elders to regulate sales” weakens, who is to protect the legitimate interests of women and children in the face of those who seek to turn market forces to advantage?¹⁶ Faced with this dilemma, land activists have tended to offer two alternatives: one calls for doing away with the customary, as both practice and as authority, and the other calls on the state to acknowledge and strengthen the customary in statutory law. Uganda Land Alliance (ULA) has championed the former position, whereas Land and Equity Movement of Uganda (LEMU) is most identified as the champion of the customary. Ironically, both turn to state authorities and positive law for a solution, even if the solution each offers is different. Whereas each acknowledges changes forced by the market, neither draws its *full* consequences, either for the customary or for the statutory. Whereas both turn to the state for a solution, even if in different ways, neither sees society as a possible source of a political practice that can shape both the market and the state in ways that may hold each socially accountable. I will illustrate this through a fuller discussion of the 1998 Land Law.

The 1998 Land Law

The 1998 Land Law was based on the 1995 Constitution and bore the imprint of the NRM. It replaced Idi Amin’s Land Reform Decree of 1975 that had vested land in the Uganda Land Commission and converted all freehold titles to leasehold. A coalition of civil society organisations in Uganda celebrated the new Land Act: “The Land Act now vests land in the citizens of Uganda and recognizes, for the first time in the history of Uganda, customary tenure.”¹⁷ The statement was wrong and misleading. I have already pointed out that the very notion of “the customary” was a construction of colonial power, part of a larger political

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16 “In practice hybrid forms are emerging as different actors appeal to different legal or normative rules to resolve conflicts of interest. ... The man as an individual rather than as the responsible representative of his family, has become the person with all the authority to use, sell and control land. The authority of clan elders to regulate sales has weakened, as has their power to protect women and children from land grabbing and ‘irrational’ land sales which bring them into poverty.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*, p. 53

17 Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. ix

project that sought to subordinate (pre-colonial) society to the (colonial) state. I will now argue that when the 1998 Land Law explicitly acknowledged “customary tenure,” its point was not to reinforce it but to *target* it for immediate control and eventual elimination. I will argue that the model and the inspiration for the 1998 Law was the 1900 Agreement effected by the colonial state in Buganda.

The significance of the law acknowledging “customary tenure” was four-fold. *To begin with*, the significance was legal: even if land was unregistered, so long as land was held under “customary” tenure, the law recognized it as legally owned. The point of legal recognition was to bring it under the direct supervision and governance of positive state law. *Second*, the law explicitly affirmed not only ownership according to custom but also customary rules: “the rules governing the administration of this land should be those very rules by which ownership of the land was claimed. i.e., ‘customary’ or ‘traditional’ rules (of the clan).”¹⁸ The effect was to subordinate not only “customary” land but also “customary” rules to positive state law.

Third, the law aimed to establish a unified land tenure system throughout the country. As LEMU researchers noted, the ambition to create “a uniform system of land tenure throughout the country” was explicitly stated in the report of the Agricultural Policy Committee which counseled a go slow approach: “This uniformity need not be immediate ...”¹⁹ I shall argue that this particular ambition of the law would be fulfilled by extending key provisions of the 1900 Buganda Agreement to the rest of the country.

From this followed the *fourth and final* effect: the law gave itself the sovereign right to alter any provisions of the customary, particularly if it considered this necessary in the interest of “protecting” vulnerable groups. In doing this, the 1998 Law followed colonial practice as embodied in “the repugnancy clause” which declared the sovereign right of British power to expunge from “the customary” any provision it considered “repugnant” to “civilized” norms and practice. One result was the adoption of the “consent clause” requiring spousal consent for any “sale” of land.²⁰

LEMU’s critique is that the official claim to “protect” those “vulnerable” is in practice no more than rhetorical. Its complaint is not that the 1998 Law gave teeth to state sovereignty with which to dominate “the customary” but that the teeth were not sharp enough to bite. This is why, says LEMU, the “protection” promised by statutory law turned out to be ineffective

18 “According to the wording of the law, the rules governing the administration of this land should be those very rules by which ownership of the land was claimed. i.e., “customary” or “traditional” rules (of the clan).” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 3

19 Thus the tendency in practice to withhold support from customary land administration so that customary rules are administered by State judicial institutions rather than according to local law. Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*, p. 11

20 “The law also offers protection to wives: where customary rules do not protect them, then the law (and the constitution) take precedence. ... This protection is intended to cover children, through their mothers defending their interests. No sale of land on which the wife depends is valid unless the wife consents to the sale.” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 3

in practice; in contrast, “the old customary system had provisions for protecting the rights of women and children.”²¹ LEMU also complained that the result was perverse: whereas the law disabled “customary” protection of “vulnerable” groups, it failed to provide the same groups with effective statutory “protection.” The result was that people lost confidence in the “customary” and looked for alternative sources of protection: “However, people are turning to the LC system instead of to the customary system, because state law is seen (erroneously) as superseding customary law.” [Note: “erroneously” is in the original LEMU document]. The effect of this “hybrid development,” LEMU researchers complained, was to further erode the power of “the customary”: “Even if the clan elders tried to stop or to put conditions on a sale, the seller (invariably, an individual male) may go ahead anyway, and gain the LC1’s ‘consent’ for the sale. When challenged as to their implementation of the consent clause, the LCs use a paradoxical argument for approving a sale without the wife’s consent. Under customary law, they argue, women had no right to own land, so there is no reason to ask a woman for her consent!”²² If “customary” authorities are not in a position to provide “protection” to “vulnerable” groups, and if state authorities claim to do so is no more than rhetorical, is there a third alternative? This is a question LEMU researchers do not raise.

On the face of it, LEMU’s critique was contradictory. On the one hand, LEMU researchers acknowledged that the point of the state ‘recognizing’ the customary was to subordinate it formally: “the Government’s interest in recognizing customary tenure was in order to facilitate the privatization of land, to enable the growth of a land market, and the acquisition of land by ‘investors’.” On the other hand, they argued that the problem was not with the law but with its implementation: “Various provisions made in the 1998 act to support and protect customary tenure have never been implemented. ... The Government has taken away the authority of ‘customary’ institutions of land administration for administering land under customary tenure, despite the clear statement of the 1998 Land Act. Given that one of the rules of customary ownership is that land sales are *prime facie* not allowed (though a sale can be accepted if good reason is shown for allowing it), it is clear that giving authority on land disputes to state institutions will tend to accelerate the privatization of land and undermine the protections built into customary tenure.”²³

The basis of the contradiction becomes clear if we recognize that LEMU’s critique developed through two stages: in the first stage, LEMU contrasted the provisions of the law, which it upheld, with its implementation, which it criticized; but in the second stage, LEMU turned a critical eye on the law itself: “Recognition of customary tenure has two major consequences: (a) it brings it into the framework of state law, enabling it to be regulated (i.e., changed)

21 “Women should have to consent to any sale of any land on which they and their families depend. However, the Act does not give specific responsibility to any individual or body to verify the consent (though this task could and should have been an integral part of the recorder’s function.) ... The old customary system had provisions for protecting the rights of women and children: these were never written down, but they were part of the social obligations of living within the clan, and they were enforced by clan elders.” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 8

22 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 8

23 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 3

through Act of parliament. This makes customary law subservient to state law, rather than ‘parallel’ to it as previously; and (b) by bringing freehold and customary tenure into a single framework, it made it possible to transfer a piece of land from customary law to state law – potentially removing customary law altogether, apparently without having violated anyone’s rights.”²⁴I have already pointed out that LEMU was mistaken to claim that customary law was ever parallel to state law: and it is this mistaken notion that led to its initial impulse, a wish to celebrate official “recognition” of customary law while bemoaning its consequences, both in law and in practice. At the same time, the ideal for LEMU is to combine official “recognition” of customary law with ensuring that it functions “parallel” (rather than subordinate) to state law, is this not tantamount to calling for a return to an idealized version of colonial practice?

The NGO debate on the 1998 Law has focused on two main issues. The first concerns the significance of titling of land under customary tenure: Is titling a good thing or a bad thing? Will it ensure security of tenure or will it lead to dispossession of land? Will it accelerate investment in agriculture, thereby leading to its modernization, or will it promote the entry of non-productive, speculative, capital into the countryside and lead to absentee ownership in land? The second issue is that of “protection” of “vulnerable” groups, in particular women and children. The focus here has been both on married women and their rights over family-cultivated land, and the welfare of orphans and “children born at home” (meaning out of wedlock). Below, I will elaborate on what is at stake in both debates, before turning to the judicial process as defined in the 1998 Law.

NGO Debates

(a) Land Titles and Land Markets

The debate on land titling developed as the consequences of the provision became clear in practice. The debate focused on formal titling of land held under customary tenure. Was the introduction of Certificates of Customary Ownership a good thing because it made possible the registration and acquisition of land titles at a nominal cost? Or was it a bad thing because it made it easier to alienate land since it was already titled? When it comes to provisions for the titling of land under customary tenure, the stated objective of the law is two-fold. The first is to give owners of land greater security of tenure. The second is “the development of a land market, so that investors can acquire land and use it more productively.”²⁵

Two points of views emerged. One hopes that the law would deliver on both pledges. LEMU celebrated the “provision for certificates of customary ownership (CCO) which would function in a similar way to a title, but would not involve the expense of surveying.”

²⁴ Judy Adoko and Simon Levine, *A land market for Poverty Eradication?* P. 8

²⁵ Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 4

At the same time, it hoped that the introduction of CCOs “would not involve a change in the ownership system of the land from customary law to freehold – that means that rights and obligations in the land would remain unchanged, and customary rules regarding land would still have to be followed.” And finally, it heralded the provision for setting up a “communal land association” (CLA) as official recognition of communal ownership, which it celebrated as “potentially one of the most important sections of the Act.”²⁶

LEMU’s hopes are pinned on the provision for setting up CLAs: “However the CCO can be used constructively to help people construct a barrier around temptation, by having the certificate in the name of a wider family, marking their rights to a portion of the land as a subsidiary right.”²⁷ To argue so is to ignore what LEMU had pointed out time and again: no matter how inclusive, registration of titles, whether for one or many individuals, was sure to negate the rights of the rest of the clan excluded from the title. To put it simply, the registration of a title is the registration of an (exclusive) property right. A title in the name of several individuals was still underpinned by the assumption that, even if shared, property rights were exclusive and absolute and did not involve social obligations. The assumption turns individual ownership into the norm and group ownership into the exception: even if provided for in law, group ownership must dovetail and reproduce the assumptions of individual ownership!²⁸

Is it possible to register and title land without introducing changes in the system of rights and obligations, and even ownership? Like LEMU, Civil Society Organisations for Peace in Northern Uganda (CCOPU) too hoped that the courts would uphold – even strengthen – provisions integral to the reproduction of “customary tenure.” When it came to the sale of “land held under a CCO,” CCOPU argued that “the legal position should be that courts would not approve the sale, since the customary rules that gave the owner his claim to the land themselves forbade its sale where the clan did not give permission.”²⁹ And yet, it also remained aware that “the law also provides for conversion of a CCO to a freehold title, that is transferring the system of ownership outside customary tenure.” If the law was informed by the ambition to facilitate – even accelerate – movement to freehold, how then could one expect that same law to strengthen provisions that would impede that same movement?

26 “The 1998 Act had a very different intention. It made provision for certificates of customary ownership (CCO) which would function in a similar way to a title, but would not involve the expense of surveying. Crucially, they would not involve a change in the ownership system of the land from customary law to freehold – that means that rights and obligations in the land would remain unchanged, and customary rules regarding land would still have to be followed. In addition, in what is potentially one of the most important sections of the Act, provision was made for setting up a “communal land association” (CLA). This is to cover a case where not all rights to a piece of land are held by one person – which is the usual case in customary law in Apac (as elsewhere).” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 4

27 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 21

28 see, Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*, p. 9

29 “The law also provides for conversion of a CCO to a freehold title, that is transferring the system of ownership outside customary tenure. ... For land held under a CCO, the legal position should be that courts would not approve the sale, since the customary rules that gave the owner his claim to the land themselves forbade its sale where the clan did not give permission.” Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 9

LEMU seemed aware of this dilemma. “Government policy,” LEMU acknowledged, “has been to encourage titling of land for freehold tenure.” Furthermore, LEMU spelt out the implications of registering and upholding ownership in law. Whether that ownership be for one individual or many, it was sure to undermine wider social obligations identified with customary tenure: “This gives all rights in land to named persons, usually a single individual, and frees the owner from any social obligations that may be held under customary tenure regarding the land.”³⁰

LEMU pointed out that the very allocation of government resources confirmed that titling was among the government’s top priorities. “The amount budgeted for systematic demarcation in four Districts is more than the amount financing either DLBs [District Land Boards] or DLTs [District Land Tribunals] in the whole country, and is thirteen times more than the amount budgeted for all the sub-county land institutions in the country!”³¹

Titling and Security of Tenure: Will titling prevent dispossession? The most influential voice in favor of titling is that of the Uganda Land Alliance which argues that “because of the existence of customary land largely without documentation, the wealthier members of the community tend to take advantage of the situation to grab communal land.”³²

LEMU researchers do not share this sunny optimism for a variety of reasons and have cited the results of several studies to make their point. To begin with, the main cause of landlessness continues to be distress sales from economic hardship; as the Ministry of Lands reported, these constituted “a disturbingly high percentage of land transactions.” A study in Eastern Uganda found that “distress sales are the overwhelming majority of all land sales, and that those who have sold land are much poorer than those who have not.”³³ They pointed out that land sales were in fact lower in areas where agriculture was thriving: “IDPs from the eastern part of the region (Lira District) reported that land sales were not nearly as common there as they are found in the west, and this was linked to the fact that animal traction was more common and agricultural productivity higher.”³⁴ They underlined two related developments: one, that those selling land “in all sites” are mainly “poor peasant farmers” and that they are

30 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 4

31 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 9ff

32 Uganda Land Alliance, *Milestones towards the integration of informal justice mechanisms into the formal system: Findings from Amuru, Apac and Katakwi Districts*,” p. 13

33 “A recent study for the Ministry of Lands found that 80% of respondents had bought or sold land. Even in Lira, 61% of the people interviewed had bought land. ... Distress sales from economic hardship constituted ‘a disturbingly high percentage of land transactions,’ and this was causing increasing landlessness. They also found that the sales were not taking place with the consent of spouses (i.e., wives) as laid down in the Land Act. ... Another study in Eastern Uganda found that distress sales are the overwhelming majority of all land sales, and that those who have sold land are much poorer than those who have not.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*, p. 17

34 Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. p. 31,33

doing so in response to “emergency needs”³⁵; and, two, that those buying land are not “the more commercially minded farmers, but civil servants (mainly teachers) and businessmen and politicians.”³⁶

There is little doubt that popular opinion in peasant communities is decisively against titling. As LEMU points out, the government’s program for systematic titling was giving rise to widespread popular resentment against titling itself. LEMU argued that the government’s dedication to “surveying every plot of land where the owner wishes” – systematic titling – is driven by the “presumption is that there is a single owner who already holds all rights in that land – a patently false assumption, under customary tenure.” This is also an assumption not shared by the rural population. As evidence, LEMU cited the example of Aminit Parish in the eastern part of Soroti District where local people “almost beat the surveyors to death.”³⁷

Aminit Parish was not an isolated occurrence. These fears were widely shared wherever customary tenure was prevalent. “One fear often expressed by people in Apac was that poverty may tempt them to sell their land, so that they will progressively become landless. Registering land can make it easier to sell it, which is why many have opposed the idea of applying for title.”³⁸

Civil Society Organisations for Peace in Northern Uganda agreed with LEMU: ““There is little demand for title in rural areas, because people feel their rights to their land are secure under customary tenure and that a title could potentially facilitate the sale of land.”³⁹ A former Acholi Member of Parliament concurred: “People won’t be landless for as long as they don’t have titles. As long as there are land-grabbers, we need to discourage titles.”⁴⁰

LEMU’s logic betrayed its larger aspiration, that the law could be employed to hold the statutory and the customary in balance as two parallel parts of a single system. To hope so was to ignore that the ground was shifting from under the customary, and that the law was not only responding to social change it was also reinforcing it. If the community was differentiating in the face of social change, and if this differentiation was giving rise to contradictory pressures within the community and was in turn being reflected in how clan

35 “In all sites, the people who were said to be selling land were the ‘poor peasant farmers’. The common reasons for selling land were to respond to emergency needs such as: (a) paying school fees, meeting medical costs for sicknesses resulting into admission in hospital or resulting from a vehicle accident; paying court damages, bails or paying to get children out of defilement or murder cases. Other common reasons were: (b) because they are sick and think they will die. (c) Because they have no children, and would rather benefit from the land themselves than see it revert to the clan.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. p. 27

36 “In all sites visited the attitude towards Certificates of Customary Ownership was one of deep suspicion, with a deeper-seated belief in trickery on the part of govt to rob them of their land. ... People fear that acquiring certificates will lead to them losing land or being taxed on the land.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. p. 29

37 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 4

38 Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 21

39 Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 11

40 Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 9

authorities and local councils were responding to issues on the ground, what then is the way forward?

Whereas it has been easy for LEMU researchers to dispel the sunny optimism characteristic of ULA publications on how titling may strengthen security of tenure for peasants, LEMU has found it far more difficult to charter a way forward. It has argued “that protection against distress sales could hardly have been built into the Act, since it is difficult to legislate against such sales”⁴¹ I shall later argue that this assumption does not hold in light of attempts in Uganda’s own history to use legal intervention to ensure security of tenure for direct producers. It also fails to learn from attempts in the region (e.g., Rwanda, Tanzania) to intervene legislatively against distress sales so as to reinforce security of tenure.

Titling and Increasing Agricultural Productivity: Both the 1998 Law and the debate around it share an overriding assumption, that titling is essential to increasing investment in agriculture and that the flow of capital into the countryside is key to increasing agricultural production. The assumption does not hold in light of Uganda’s agrarian history, especially through the colonial period. I have detailed this elsewhere.⁴² Here, it will suffice to point out the following. There were two key periods when the British were forced to acknowledge that key to the expansion of agricultural productivity in Buganda was the initiative and labor of peasants, and not of large-scale plantations. The first was the period after World War I when it became clear that peasant producers had survived the post-war decline in commodity prices far more successively than had plantation owners. Thus the decision not to continue with official subsidies to plantations and shift support to peasant production. I have already pointed out the need to draw appropriate lessons from the 1930s, the period that followed the passage of the 1928 Busulu and Envujjo Law: key to dramatic expansion of peasant production in that period was the legal guarantee of security of tenure for direct producers. In brief, peasant commodity production has not only been the backbone of Uganda’s agrarian economy, it has also provided the force behind expanding production in agriculture.

(b) Women and Rights

Both the “customary” and the “modern” systems claim to protect the interests of vulnerable groups: women, young and elderly. The “customary” system invests the responsibility to protect – if I may borrow a term from the modern discourse on rights – in society in general and, more specifically, in the clan system. The “modern” system invests this responsibility in one particular part of the state system – the judicial – charged with ensuring specific “rights” of individuals.

Ugandan NGOs have indiscriminately resorted to evoking both discourses – community-based “customary” rights and individual “modern” rights – as and when opportune, but have

⁴¹ “It is true that protection against distress sales could hardly have been built into the Act, since it is difficult to legislate against such sales.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*, p. 10

⁴² See, Mahmood Mamdani, *Politics and Class Formation in Uganda*.

chosen to disregard the tension between the two. The tension arises from the fact that the “customary” discourse on “rights” is primarily with reference to birth communities whereas the “modern” discourse is primarily with reference to communities of residence. The resulting contradiction is most evident in the case of those groups whose birth community is not the same as their community of residence: women in general – but in particular, the widowed and the divorced.

Women’s rights are anchored in two different communities, natal and residential. There are two different – and sometimes contradictory – discourses on women’s rights in Uganda. Each has its proponent among Land NGOs. One side argues that women do most of the work but own hardly any land. In the words of the Uganda Land Alliance: “It is established that between 70 – 80% of the country’s agricultural labor is supplied by women. Statistics indicate that women are responsible for 70 – 80% of the food production. Despite these, only 16% of these actually own land.”⁴³ From this point of view – which one may term modernist – the problem is the absence of rights over land for women in the customary. The other side argues that this claim ignores the rights women do have and the land they do “own” in the “customary” system.

The NGO community has been an avid proponent of statutory recognition of women’s rights in their residential communities, i.e., in the “modern” sense. It called for joint spousal ownership of land when the Land Act was first discussed in 1997/98. That provision was passed by parliament but excluded from the legislative record known as the Hansard. An attempt to rectify this exclusion in 2004 was unsuccessful. Parliament instead accepted a diluted version which called for spousal consent to any transactions regarding family land.⁴⁴

An alternative position emerged when LEMU called for a “paradigm shift” in 2008.⁴⁵ To make its case, LEMU began with a series of questions: “Why have gender activists had so little success in mobilizing grass-roots women to fight for women’s rights? And why have gender activists attacked ‘traditional practices’ rather than enlisting indigenous beliefs about fairness as allies? ... why, despite so much work on raising gender awareness, is the situation for rural women’s land rights not getting any better?” It then targeted the modernist position: “The conventional starting point in the battle is often the ‘fact’ that traditionally women are not allowed to own land. ... The objective then becomes to increase the number of women

43 The National Land Policy draft report indicated this percentage to be 7%. However, the Gender baseline Survey conducted by the Ministry of Lands, Housing and Urban Development indicates an increase to 16%, as of 2006. Sarah KalutaBasangwa, *Strengthening Gender Relations on Customary tenure*, Uganda Land Alliance, p. 2

44 “Joint Ownership: This proposal has been floated since 1997/8 when the Land Act was being debated. Although it was passed by Parliament, it was however not captured by the Hansard, and later came to be known as the Matembe Lost Clause. There was an unsuccessful attempt in 2004 to re-introduce it, in the Land (Amendment) Act. That time, the legislators only accepted spousal consent to dealings on family land. Currently it is one of the proposals in Domestic Relations Bill.” Sarah KalutaBasangwa, *Strengthening Gender Relations on Customary tenure*, Uganda Land Alliance, p. 6

45 LEMU, *Fighting the wrong battle? – Towards a new paradigm in the struggle for women’s land rights in Uganda*, LEMU, December, 2008; reprinted May, 2012, 3 pages

holding titles. The proportion of titled land owned by women (7%) is frequently quoted as an indicator of gender equality in land rights – a quite bizarre idea, for a country where over 80% of land is held without title, since it says absolutely nothing about the situation for the vast majority of the women in the country.”

LEMU argued that “the distortion (has) so often been accepted” because “it rests upon a very common misunderstanding about how land under customary tenure is owned and administered.” To correct these distortions, it pointed out “some fundamental differences between the two systems.” The key difference, LEMU argued, is that “under customary tenure land ownership is by families, not individuals. ... Ownership is stewardship, or a trusteeship, and it comes with the responsibility to protect the land itself, and to protect the land rights of all those with a claim in that land – all family members, including future generations. If a man dies leaving a widow, she assumes the role of head of family. The specific rights that the widow and her late husband held are exactly the same.” Thus the paradigm shift: “LEMU argues that the real struggle is to establish the enforcement and not the abolition of customary principles.”

The new paradigm, argues LEMU, involves a shift in the focus of the debate: “Rights and responsibilities always derive from a social context: in Ugandan society, 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.” The old paradigm led to “a strategy of replacing community practice and community protection with State law and State protection.” The new paradigm recognizes that “this is impossible.” Rather, “implementation of protection for women’s rights can only come with community acceptance.” But “the problem is that the customary system is not working.” This is a “system problem, and not due to any individual.” The problem is not the male or the husband but the system: “Fixing the system and making it accountable becomes the new strategy.” The problem is that “the current rights paradigms are based on individual rights: this means that unless women have the same individual rights as men, it would be discrimination.” The new paradigm is based on “accepting the notion of culturally embedded rights” which “means accepting that people (both men and women) have rights and responsibilities as family members.” The point being that “a person’s rights change as their family situation changes, and men and women will frequently have different rights and responsibilities.”

Difference is not necessarily discrimination: “This should not result in discrimination.” And what if difference does become the basis of discrimination? The answer can not be titling – for “more titles in women’s names (which) is only of relevance to urban and educated women.” The new model had a different conception of the way forward: “The old model looked to pass legislation protecting women ... specifically ... to help women to title as much land as possible either in their own name or jointly with their husbands.” In contrast, the new model looks to state authority to ensure that customary authority remain true to their claims:

“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.”

The debate around gender and land ownership is complicated by the fact that there is no simple answer to whether or not women own land in the “customary” system. LEMU researchers have consistently argued that women do own land in the customary system as do men and yet their research shows, just as consistently, that the communities in question do not always recognize what these researchers hold to be an obvious fact: “In Lango, one regularly hears that ‘women can’t own land’, but this is not such a constant echo in Teso. Both men and women talk about farming together, making joint decisions on how to use family or household land.”⁴⁶ So why the difference between the two places? LEMU researchers imply that this is because the “customary” system continues to function, more so in Teso than in Lango.

When respondents in Lango say that “women can’t own land,” should we understand this as a categorical answer, indeed a preference? Or should we understand it as a limited description of women’s rights in the “customary”? Or as an even more limited claim that, when it comes to the “customary”, women cannot own land in the community into which they married (as opposed to their natal community)? All understandings of the “customary” agree that individual proprietorship as an absolute right did not exist in the customary. But right of use – whether that of the individual or the family – did, and women partake of this right of use but differently depending on whether the community in question is that of birth or marriage.

It is this difference which explains the limited effect of the consent clause. LEMU researchers acknowledge this much: “The consent clause was never intended to protect all women’s rights to land. It has no role in protecting the rights of widows or unmarried women, but only of married women on their husband’s land. However, even this measure is not currently being enforced by authorities who are governing the sales of land.”⁴⁷ But before insisting on the right of women in the communities into which they marry, land researchers and activists need first to be clear about one question. So long as marriage is patrilocal, with the bride moving residence from their own clan and community to that of the husband, which of the two should be the primary basis of women’s land rights: the community where the woman was born or the community into which she marries? More specifically, how should land rights of widows and divorced women be defined?

Similar questions arise with regard to “children born at home”? LEMU researchers point out the following: “According to Teso customary law, children of unmarried girls (“children born at home”) are members of their mother’s clan, and as such have full rights to inherit

46 Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 15

47 Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. p. 40

land from their maternal grand-parents.”⁴⁸ The same document points out that these rights are hardly stable in today’s changing context: “They (children of unwed parents) are, however, an easy target if their mother’s brothers are land-hungry. An excuse which is often advanced for stealing their land is that they have to be sent away because they are ‘badly behaved’ and ‘don’t belong.’ (The excuse of bad behavior is an easy one and also used against widows.)”⁴⁹ The question is not just of academic significance. Widows constitute up to a third of households in war-affected districts. According to the 2002 census, a fifth of the children in Apac district are orphans.⁵⁰

The Judicial Process

The 1998 Law both acknowledged “that customary tenure is governed by traditional laws” and created modern statutory bodies for administering the same law. The inevitable result was to subordinate the working of the traditional to the logic of the modern.⁵¹ Civil Society Organisations for Peace in Northern Uganda identified “the way in which so-called ‘modern’ institutions have taken primacy” as one of the effects of the 1998 law: “LC1s are considered a higher authority than *Rwodi Kweri* although the Act does not even give them any judicial role in administering land.”⁵²

When it came to the judicial process concerning land, however, the 1998 Law made no concession, not even rhetorical, to the customary. Formally, the law made District Land Boards (DLB) supreme in all matters of land, whether customary or statutory, thereby marginalizing the customary as part of the legal process. Even the setting up of Communal Land Associations became the responsibility of the District Registrar.⁵³ LEMU researchers noted that “law courts have no jurisdiction to treat cases involving land, because this authority was given solely to the DLT.” The law provided for cases over 50 million shs to be brought directly to the District Land Tribunal (DLT) which was the highest authority for appeal in the

48 Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 15

49 Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 15

50 “Due to war, AIDS and other causes, widows can constitute up to third of households, and most are in their thirties and forties. ... According to the 2002 census, in Apac 9.5% of the total population, or around one in five children, are orphans. ... Inheritance law grants a widow only 15% of the estate of her late husband in the case that he dies without a will, though there are no mechanisms capable of enforcing this where the husband’s family opposes the widow.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?* p. 41

51 “Although the Act recognizes that customary tenure is governed by traditional laws, it creates new modern institutions for administering it, potentially undermining traditional mechanisms of governance.” Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 11

52 Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 8

53 “A District land Board (DLB) was created in order to administer land matters in the District. ... A District Registrar is responsible for the setting up of Communal Land Associations.” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 6

district when it came to cases involving land. After that, cases could be taken to the High Court in Kampala.⁵⁴

Hybrid forms of authority have evolved to regulate land affairs in village communities. These authorities partake of both the statutory and the community (“customary”). When it comes to the statutory, the LC1 – the locally elected Local Council 1 – both “accessible and relatively cheap,” is “effectively displacing the *Jan Jago* except for minor issues.”⁵⁵ Hybrid forms of village councils have evolved – involving “a partnership of LC1 and family heads ‘elders’” – with authority to grant permission to use communal assets, such as cutting trees (including logging) or farming forest land.⁵⁶ At the same time, case after case demonstrates that no authority, whether customary (“elders”) or statutory (LC1), is impervious to the influence of money or the power of political office.

But the law is not followed in practice. LEMU researchers note that “the only recourse for land disputes is the LC1 chairperson of the village council, an unpaid elected office.” Though they bitterly complain that these persons have “no legal authority to decide land matters, an almost total lack of knowledge of what land law actually says – and no legal training or support to help,”⁵⁷ LEMU researchers do not ask why popular sentiment turns to elected LCs to settle land issues, and only then to elders (clan authorities)– even though both lack legal training – and only then to state authorities.

The point is that people in the community, whether poor or rich, do make choices. A Paramount Chief complained: “The people selling land do not want elders to know about it because they know they will be prevented from selling land. Unfortunately, when the clan stops them from selling land they go to the police. When the land is sold and the clan takes it back, they go to court.”⁵⁸

The development of the market has differentiated both the statutory and the customary. Among statutory authorities, there are those subject to hierarchical discipline and temptations of bureaucracy (“chiefs” and District officials) just as there are those who are elected and are subject to varying degrees of local accountability (Local Councils, especially at the lower level). As the community differentiates, its different sections decide who to turn to

54 “... the government sub-county chief, the senior civil servant at sub-county level, is the land recorder, responsible for issuing and recording all certificates of customary ownership. However, there is no requirement to update such certificates (as the pattern of rights changes with births and deaths, or with sales) and there is no register of land sales.” Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. pp. 7, 23

55 “... the LC1 is accessible and relatively cheap, typically charging 2-3 pounds for a case. However, because the LC1 is seen as being the ‘legal authority’ with mandatory powers to give an absolute ruling, they are effectively displacing the *Jan Jago* except for minor issues.” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 7; also, Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. p. 46

56 “Authority to permit cutting of specific trees in forests is now often claimed by LC1, while larger or more permanent decisions, for example permission to farm in the forest, or large scale logging, can only be granted by some form of village council (e.g., a partnership of LC1 and family heads ‘elders’).” Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 6

57 Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. p. 24

58 Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*. p. 48

on a specific issue, whether to state or elected officials. Similarly, the customary, too, is differentiating in the face of market and popular pressures. The debate on the customary and the statutory needs to take these developments into account, just as it has taken note of the development of hybrid practices, forms and authorities. To charter a way forward, Ugandan NGOs need to go beyond the static and ahistorical frame that opposes the “customary” (or the “traditional”) to the “statutory” (or the “modern”).

These changes highlight the need to take into account the role of the political in shaping both the statutory and the customary. The statutory is enforced not simply through the hierarchical and bureaucratic authority of chiefs and district officials but also through the authority of elected organs such as local committees answerable to local councils. Similarly with the customary: here, too, there is a debate as to whether the customary should be identified with the non-territorial community (the clan) or with the territorial community (the village). The clan is trans-territorial and joins rich and poor, rural and urban, in a single community defined by descent; the village, in contrast, is residence-based. The debate is evidence that the community is both disintegrating and reconstituting under the pressure of twin forces: the market and the political agency of those affected by it. It underlines the need to bring into focus the political alongside the economic.

Two related modes of accumulation, ‘statutory’ and ‘customary’

Marx used the term *primitive accumulation* to refer to primary accumulation, whereby capital accumulation was a consequence of forcible dispossession of primary producers. The preferred contemporary term to describe practices that use state institutions for private advantage is *land grabbing*. To this process, this accumulation *from above*, there is a counterpart, one we may refer to as accumulation *from below*. Its springboard is the soil of commodity production. Lenin often remarked on the tendency of commodity production to generate capitalist relations “hourly and daily.” Whereas accumulation from above is often justified in the language of development, the language of accumulation from below is that of community rather than the market. The language of kinship and the customary seeks to turn identity and belonging to private advantage.

Plenty of examples of how both statutory and customary authorities collude with the greedy can be found in research carried out by Ugandan NGOs in the northern regions of the country. LEMU researchers record case after case in which the line between the community and the state got blurred as state and clan authorities colluded with individuals in the community: “Some individuals are claiming community land as their personal land and are selling it for their own personal profit – where the buyer is a ‘powerful person,’ this would facilitate the sale.” Neither the LCs nor state officials seem to be in a position to stop these sales: “... even if the LCs felt able to stop such sales, concerns were raised by the community that

those in charge of land management favor the rich over the poor. Similar statements are made with regard to clan leaders who are expected to assist the vulnerable.” When asked which of the two, clan leaders or Local Councils, could provide an effective check on private greed, a chief was skeptical: “The behavior of the clan leaders is very similar to that of the LCs with both of them having an interest in money first.” I have already cited a response from a member of the community speaking at a community meeting: “If one is poor, the clan members will not assist you. Instead they laugh at you with your problems. It is only the rich who will be assisted. Clan leaders are now elected like the LCs ...”⁵⁹ LEMU researchers noted of Teso: “Although it is often said that under customary law, land could not be sold, land sales date back many years in Teso.”⁶⁰

As may be expected, regional variations are important. Teso, Lango and Acholi signify three different kinds of processes when it comes to differentiation in land ownership and accumulation of assets. “Customary tenure has proved more resilient in Teso than in northern Uganda, and has better adapted itself to modern economic realities whilst still maintaining a greater degree of respect for the values underpinning customary law. Major threats to land rights come from three main sources: within the wider family, from family heads personalizing property ownership, to the detriment particularly of the wives, widows and the ‘weak’; more obvious theft from within the community; and from local authorities taking over land without compensation.”⁶¹ The dominant tendency in Teso is that of differentiation within the community; sale of land is mainly between land-rich and land-poor households within the community.⁶²

In Lango, the sale of land is mainly from poor rural households to well off families with little interest in farming.⁶³ This is how LEMU researchers record these developments: “In Lango, the leasehold titles of the 1970s had brought about significant accumulation of the most fertile land by a few individuals. However, these had not been progressive farmers, but rich businessmen who were not using the land productively, but wanted the land for other reasons – prestige, land holding for collateral for loans for their businesses.”⁶⁴ Somewhere in between these tendencies – one characteristic of Teso and the other of Lango – is Serere,

59 Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*, p. 36

60 Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, unpublished memo, LEMU, January 2007, p. 8

61 Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 22

62 In Teso, “purchases are mainly by local people with little land, who are looking for more land to farm themselves. Sales are far more likely to be within the wider family, or at the very least within the clan.” Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 16

63 In Lango, “land purchases were often by the rich, and urban-based people, who were using the land as an investment, rather than for immediate settlement and to farm personally.” Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 16

64 Judy Adoko and Simon Levine, *A land market for Poverty Eradication?*, p. 14

“where the population immigrated more recently,” where “the clan is much weaker” and where “many clan elders there are selling land to finance consumption.”⁶⁵

The most extreme development of accumulation from above, primitive accumulation with the barrel of the gun, is to be found in Acholiland, where dramatic transition have been compressed in a radically short period of time. Half a century ago, there was hardly any land scarcity: “... until one or two generations ago, an individual could ‘claim’ land as his own by settling and using virgin ‘free’ land. Many villages were established as recently as 50 years ago, with a small group of people settling in forested areas and becoming the owners of often very large holdings (up to 400-500 acres).”⁶⁶ The big change came with war, as state forces confronted, first the Holy Spirit Movement of Alice Lakwena and then Kony’s Lords Redemption Army (LRA). The government’s response to the war was to resort to classic counter-insurgency tactics, and herd the population into ‘protected’ villages, seeking to isolate the insurgents in a countryside drained of its population. The process began in 1996 in Gulu District when much of the rural population was ordered into camps or ‘protected villages.’ The following year, 1997, displacements were extended to Kitgum District, where they reached a culmination in 2002. By September, 2002, “almost the entire rural population of the three districts of Acholiland (Gulu, Kigum and Pader) were forced into camps by the security forces.” The NGO coalition called Civil Society Organisation for Peace in Uganda noted: “The current humanitarian situation is one of the worst in the world, with over a million displaced living in appalling conditions.”⁶⁷ This is the context in which the Acholi population was almost universally dispossessed of cattle. The process now continues with the dispossession of land.

The Specter of Landlessness

Ugandan NGOs with a core interest in the land question are haunted by the specter of landlessness and the challenge of how to face it. The challenge has led them to seek views of affected communities and to record their responses faithfully. The majority in the community express a consistent preference for two sets of authorities: “traditional leaders followed by Local Councils and lastly magistrate’s courts.” Traditional authorities “are cheaper and had

65 Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 16

66 Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 4

67 Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 1; “... no one is trying to find out how many people are dying in camps or why. The few pieces of evidence collected are worrying: children are dying every day from camp conditions; HIV figures that translate into an additional tens of thousands of IDPs living with HIV/AIDS (over and above the figures one could have expected without displacement). Hundreds of IDPs are killed each year and many more are abducted, either in attacks on camps or because hunger and poverty forced them to go back to their villages or to earn money. Thousands of young men have ‘disappeared’ after volunteering as local civil militia, tens of thousands more have probably become alcoholics, which what long-term consequences no one can guess. The international headlines caused by the Barlonyo massacre seem to have made the Army understandably concerned to avoid a repetition of such a tragedy.” Civil Society Organisations for Peace in Uganda, *Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them*, p. 33

better knowledge of the land boundaries compared to other courts.” Local Councils “were hailed for their fairness in passing judgment.” Magistrates’ Courts, in contrast, are “corrupt and slow”; yet, their decisions are “respected” because they are authoritative, i.e., hard to turn down or around.⁶⁸ This is how the Uganda Land Alliance sums up its investigation: “Traditional leaders are cheap; they are faster; they have better knowledge of the boundaries. Council courts give equal treatment (they are normally unbiased). Magistrates’ courts they are normally respected.”⁶⁹

It is interesting that land-focused NGOs are practically agreed on the nature of the reform they seek. The Uganda Land Alliance has called for an amalgam of the ‘traditional’ and the ‘modern’, thereby joining clan-based dispute resolution mechanisms with state-directed statutory processes in a single hybrid process. If the lofty language of the 1995 Constitution recognizes “traditional institutions,” then the land law should give practical effect to that bold proclamation.⁷⁰ LEMU “has already begun working with the traditional leaders to agree on a traditional court system, with the aim of making the *janjago* and the *Rwot* (clan head) the accepted first court and the first appellate court respectively for all land cases involving customary tenure.” The result would be a hybrid court system in which clan heads are the legally acknowledged arbiters in the first instance for cases that involve customary tenure, with the statutory District Land Tribunal being the second court of appeal.⁷¹ In line with this, LEMU is also pursuing codification of customary rules as part of its agenda for legal reform.⁷²

The choices different sections in the community make are, of course, limited by the choices they face. By restricting their vision to existing choices, NGOs tend to dovetail community

68 “Most respondents in all districts preferred reporting land disputes to traditional leaders followed by Local Councils and lastly magistrate’s courts. The main reason for going to traditional courts is that they are cheaper and had better knowledge of the land boundaries compared to other courts. Communities however concurred that magistrates’ courts though corrupt and slow tend to be respected by the conflicting parties in a sense that whenever they pass a judgment, it is normally consented to by the consenting parties. The LCs were hailed for their fairness in passing judgment.” Uganda Land Alliance, *Milestones towards the integration of informal justice mechanisms into the formal system: Findings from Amuru, Apac and Katakwi Districts*,” p. 14

69 Uganda Land Alliance, *Milestones towards the integration of informal justice mechanisms into the formal system: Findings from Amuru, Apac and Katakwi Districts*,” p. 16

70 “The constitution of Uganda 1995 recognizes traditional institutions as important in managing community affairs. However, the traditional institutions are not formally recognized in the hierarchy of administration. For example, the Land Act 1998 recognizes LC2 as courts of first instance in land dispute resolution. The Act does not recognize that there is a strong structure of traditional authorities to which most of the land related cases are reported and resolved. In order to strengthen the work of these institutions, they should be recognized in the hierarchy of dispute resolution institutions so that their decisions are recognized in the higher courts of law. The communities ... recommended that the traditional institutions should be considered as courts of first instance and their decisions should be respected in the [higher] court.” Uganda Land Alliance, *Milestones towards the integration of informal justice mechanisms into the formal system: Findings from Amuru, Apac and Katakwi Districts*,” p. 24

71 “LEMU has already begun working with the traditional leaders to agree on a traditional court system, with the aim of making the *janjago* and the *Rwot* (clan head) the accepted first court and the first appellate court respectively for all land cases involving customary tenure. The DLT would then function as the second court of appeal and it would work with clan leaders in adjudicating cases in accordance with customary rules (except in so far as they may breach the constitution or specific provisions of land law).” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 23

72 LEMU wants “to work with clan elders to codify the rules and principles of customary tenure.” Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 23

views rather than also provide leadership in the face of a near impossible situation. An external reader is struck by two absences in the NGO literature. The first is historical, the second comparative. Both the colonial and the pre-colonial period are *tabula rasa* in this literature. The assumption is that what we know as “the traditional” today was actually the practice in the pre-colonial period and the problem was that it went unacknowledged in the colonial period. I have argued that the “customary,” both as a set of authorities and as a set of substantive rules, was crafted in the colonial period as a bulwark to the development of the market. The colonial system sought to quarantine society and justified that quarantine in the language of the customary – as safeguarding “custom.” I have argued elsewhere that this process reached its most extreme culmination in colonies where the market was developed, i.e., with influx control in apartheid South Africa.⁷³ By keeping the market out as an external and “non-traditional” force, the colonial state sought both to manage differentiation within rural areas and control population movement from the rural to the urban. The post-colonial “recognition” of the “customary” needs to be understood against this historical backdrop, as an endeavor to bring to a close the quarantine of “customary” society. The result has been to let loose a range of practices that are leading to a semi-coerced integration of the customary into the market.

After a reading of Ugandan UGO literature on the subject, one is struck by its romance with the “customary,” one that goes alongside a sober realization of its corruption in practice. One is struck by a contradiction between the observations as NGOs record these and the prescriptions they make. The NGO analysis of developments on the ground shows that the more the community is differentiated – and the more market forces accelerate this differentiation – the more the tendency is for clan leaders to huddle alongside the rich and the powerful. Yet, NGO prescriptions stoically ignore the analysis.

The result is a paralysis. I suggest a double shift in analysis as a way forward. One, it will help to move away from a stubborn preoccupation with the empirical by placing it in a more historical context. This will bring a number of relevant historical facts in the limelight. The *first* of these is that the one exception to the colonial tendency to conserve society – “quarantine” it, as I have said – was colonial policy in Buganda. The reason was political. When it came to Buganda, colonial power had no hesitation striking at the very heart of the clan system (“the customary”), especially clan control over land. That blow was the 1900 Agreement. The point of the Agreement was to weld a historic alliance between the new landed class in Buganda (owners of ‘mailo’ freehold) and the colonial power.

The *second* relevant fact is that the Buganda Agreement of 1900 divided land in Buganda between that under cultivation and the rest that it brought under state control as Crown Land. Like the 1900 Agreement, the thrust of the 1998 Land Law sought to turn all uncultivated community land into state property. For a start, the 1998 land law made all wetlands state

73 Mahmood Mamdani, *Citizen and Subject*

property “on environmental grounds.”⁷⁴ Next, the Law targeted all land not under active use: “Land under most threat is where it is harder to show ownership through regular visible ‘use’ in a form that would be universally recognized as such – e.g., cultivation. Grazing land and forest land (for hunting and for collecting forest products) can easily be interpreted as ‘un-owned’ land by the District land Board (DLB), since physical improvement on the land is not possible to see (though conservation through management regulations should be recognized).”⁷⁵ The overall tendency was to divide community land into two: lands under active use, and those not. Whereas the former was acknowledged as clan-regulated family property, the latter was brought under the control of state authorities.

The *third* relevant fact is this: whereas the 1900 Agreement brought cultivated land in Buganda under the control of a small number of chiefs, the 1998 Law has at least formally acknowledged cultivated land outside Buganda – in particular the North and the East – as “customary” land. And yet, as with colonial law, “the customary” is subordinated to state law: as with “the repugnancy clause” under colonialism, law-making can invoke interests of either national “development” or individual “rights” to make changes in the customary.

The fourth relevant historical fact is that the 1900 Agreement provoked a mass movement in Buganda, a peasant (*bakopi*) protest against the landlords (*omwami*). That protest was led by clan heads (*bataka*). Its demand was to restore security of tenure over land to the peasantry. The Bataka Movement forced concessions from the colonial state. The main concession was in the form of a law, the 1928 Busulu and Nvujo Law, which put legal limits on the rent a landlord could extract from a tenant for up to three acres of cultivated land. Its practical effect was to give security of tenure to the small peasant.

Is statutory protection an alternative in contexts where the “customary” is so corroded or weakened that it is no longer capable of providing protection to society? At least two cases come to mind. One is that of Tanzania where the law incorporates the village as a corporate body with control over village land, and at the same time subordinates customary to state bodies with the creation of a single hierarchy of courts. Another is that of Rwanda where, faced with extreme population pressure and the real possibility of growing landlessness, the law places a limit on the amount of land that can come under the possession of a single owner. This is why we need both a historical and a comparative perspective on the contemporary Ugandan situation.

I close with an observation that all students of history and society know too well: whether or not state law can be an instrument for the defense of popular interests depends on the possibility of a popular movement to shape law to its interests. To say that is actually to see the state-society relationship from the vantage point of society. It is to face the challenge that Karl Polanyi formulated in *The Great Transformation*: how to ensure that market forces remain embedded in society and are thus regulated by society, and not the state.

⁷⁴ Judy Adoko and Simon Levine, *Land transactions in land under customary tenure in Teso: Customary land law and vulnerability of land rights in Eastern Uganda*, p. 9

⁷⁵ Judy Adoko and Simon Levine, *Land Rights: Where we are and where we need to go*, June 2005, p. 21

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