Falling between two stools

How women‘s land rights get lost between State and customary law

Simon Levine, LEMU (Land and Equity Movement in Uganda)
The dominant paradigm...

- What is security of land rights?
  - Having a title
  - Privatised ownership
  - Individualised ownership

- What brings development?
  - Having a title
  - Privatised ownership
  - Individualised ownership
  - Land market
The dominant paradigm...

- How are land rights protected?
  - By State land administration
  - By State justice system

The relationship between the individual and the State is *direct*
Whose paradigm?

- Colonial powers
  - “Customary ownership is backward, primitive, retards development”

- Post-colonial Governments adopted foreign paradigms
  - Many countries: Western models (IMF? WB?)
  - 60s - 80s: some countries followed Soviet models (Tz, Mozambique…)

_African Governments rarely thought to base development models on an understanding of their own socio-economic realities_
A dose of reality…

- Land is owned by families, not individuals
- People live in a world of social obligations and social claims
- Land ownership is stewardship for future generations: the ‘unborn’ are also people!
- Land administration is regulated by communities
A dose of reality…

- Land tenure arises from an economic context
- Where land is not scarce, dispute resolution is as much social as economic/rights based
- Land law is situational, unwritten – but based on principles, not made up each time
- Women and men have different roles. Women join husbands on marriage (in Uganda)
  - so women claim land rights in their husband’s home!!
When two worlds meet

- Customary system undermined
- Customary culture changed
- Customary system mis-understood
- Practice = law
- Inoperative State system
- State system misunderstood
When two worlds meet

- Hybrid notions of ownership
- Hybrid legal codes invented

**Result:**
“women don’t own land”
*Systemic collapse of protection*
Whose paradigm? (pt 2)

- Gender activists and land rights activists adopted the same paradigms!
  - Educated elites
  - Urban elites
  - Gender theory dominated by Western models
Diagnosing the problem pt 1: the dominant paradigm

Gender activists:
“women only own 7% of land in Uganda”
“customary law doesn’t let women own land”
“women only have access rights, not control rights”
“customary elders are all men”

Women need **individual** rights
Women need the **same** rights as men
Diagnosing the problem pt 1: the dominant paradigm

The solution:
- abolish customary tenure
- title land for women
- enshrine protection in State law
- protect rights through State admin and justice

In practice:
- sensitisation, awareness raising (against culture)
- legal aid
Diagnosing the problem pt 1: the dominant paradigm

The Government
- Primitive agriculture
- Communal ownership
- No land market
- Primitive customary law

The solution: abolish customary tenure

*title land*

replace customary admin with State
Protection in Customary Law

Everyone has land rights
- The only question is where you claim them

Head of family as steward
- Duty to give land rights to family members
- Duty to protect ‘weak’ in the family

*Clan as ‘radical title’ holder, or “government”*
- *Power to set rules about ownership*
- *Vetting sales*
- *Protecting widows*
- *Holding family head to account*
- *Using communal clan land*
Protection in Customary Law

- Widow – inheritor or male adult sons.
- Orphan – Uncles
- Children born out of marriage – mother and grandfather, uncles
- Unmarried girls – father
- Wives – husband
Protection under State Law


1 Reinforcing protection
   - Recognised customary ownership
   - Gave legal force to customary rules

2 Double protection
   - Option of using state courts
   - Consent clause
   - Inheritance rights
   - Equality guaranteed by Constitution
A dose of reality (pt 2)

- 50-70% of widows have land conflicts
- >85% of divorcees, separated women have land problems (c. 25% of households)
- Orphans dispossessed
- Children born out of marriage without land rights
A dose of reality (pt 2)

- Customary protection not working
  - clan leaders don't know customary law
  - confusion over clan’s powers/roles
  - erosion of clan’s powers and respect
  - no integration with State system, forum shopping
  - clan not proactive
  - corruption in clan
A dose of reality (pt 2)

- State protection not working
  - No land administration for customary land!
  - Land Act never implemented
  - State justice doesn’t work
    - Forum shopping
    - Costs
    - Ignorance of customary land law
    - Decision by vote, corruption…
    - *No implementation*
Why are things so bad?

- Land is part of a way of life
  - Economic, social, cultural, normative, *family*
A woman is at the heart of this, have to address the problems within the context

- We’re ignoring the real problems
  - *Women’s rights is not a gender problem!* It’s the strong vs. the weak
  - Problem is not in the law, but in implementation

- Research based on misunderstanding, superficial
  - “who owns land”
  - “are you happy with the courts?”
Why are things so bad?

- Diagnosis based on inappropriate paradigms and mis-understanding
- No-one interested in practical solutions
  - All Gov’t money for systematic demarcation
  - Donor money for legal aid and supporting higher courts
- The Gov’t is not interested in a functioning justice system!
Why are things so bad?

- The State vs. culture, Women’s rights vs. culture – a fight you can’t win
- Protection is needed **all the time**, not as a one-off
- Protection can only come from the community
- More knowledge, less theory
  - Let rural women prioritise their problems
  - What does “equal rights for women” really mean?
- Need **system** solutions
A way forward?

- Integration of customary and State law
- State support for customary land administration – this is more important than justice!
- Power *and* responsibility – holding customary authorities to account