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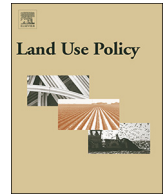
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# Gendered land rights, legal reform and social norms in the context of land fragmentation - A review of the literature for Kenya, Rwanda and Uganda



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## 1. Introduction

Recently, concerns have been voiced regarding the rapid increases in rural populations in sub-Saharan Africa and their consequences for rural livelihoods and food security (Headey and Jayne, 2014; Jayne et al., 2014) as pressure on land increases in already land-constrained countries. Generally speaking, the literature shows a number of parallel tendencies as demand for land increases: the marginalization of weaker groups' claims to land and a growing push towards individualized tenure arrangements. While intersectional aspects related to marriage, age, ethnicity and migrant status must be born in mind, from a gender perspective, women in sub-Saharan Africa have historically been discriminated against in property rights systems that either view women as property or severely curtail their property rights by assigning them rights to land through adult males, such as husbands, fathers or sons (Joireman, 2008). Such discrimination would be expected to be accentuated by growing demand for land, as the property rights of adult males take precedence over those of women.

While contemporary processes of population growth and commodification of land more generally are expressed in dwindling farm sizes in a number of African countries such tendencies should also be situated in relation to increasing policy experimentation with privatized land rights more generally, either on individual or communal basis. Here, the literature suggests that formalization of land rights may enshrine gender-based discrimination through formalizing the customary land rights of male right holders. Simultaneously, however, legal reforms in

several countries, at least ostensibly, have attempted to improve land rights for women.

The aim of this article is to review the literature on women's rights to land in Kenya, Rwanda and Uganda against this broader backdrop of fragmentation, commodification, individualization of land rights and legal reform. The review explores a set of research questions, which take their point of departure from the hypothesized links between gender-based discrimination and the parallel processes of land fragmentation and privatization, but also explores the country level empirics of such discrimination in the context of recent legal reforms. The following questions underpin the analysis

- Does gender-based discrimination exist in the land tenure systems and land use practices found in these countries?
- If so, what role do formal and informal legal mechanisms and social norms, respectively, play in upholding this discrimination?
- How do growing demand for land and privatization of tenure affect rural livelihoods from a gender perspective?

A sizeable literature exists with respect to the first two questions, and most attention will therefore be paid to these. While the literature on livelihood changes is limited, contrasting theoretical perspectives highlight the link between privatized tenure and livelihood outcomes (whether positive or negative). As such the inclusion of this question is warranted despite the relative lack of literature on the topic.

The article begins by describing the methodology including the

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selection of countries and sources used. This is followed by a description of gendered patterns of land control and ownership. A theoretical section follows, outlining theories related to land rights and privatization and individualization of tenure and the presumed linkages between redressing gender discrimination in land rights and positive outcomes such as raising productivity and improving child welfare. A descriptive section introduces the tenure systems, land legislation and the current situation of women's access to land in each country, tracing the inequities and discrimination that are present in the contemporary tenure, market, and inheritance systems for land. Following this descriptive section, I synthesize the findings for the countries overall, identifying the formal and informal mechanisms through which discriminating practices are perpetuated and if and how they have been affected by recent legal reform efforts and changes in land policy. Finally, I discuss the gender consequences of these developments for rural livelihoods.

## 2. Methodology and sources

This review covers Kenya, Rwanda and Uganda – land constrained countries that have all experienced declines in farm size over the past few decades. The countries have been selected based on two criteria: sustained decreases in land size over the past few decades (based on the findings reported by Jayne et al. (2014):4) and the availability of sufficient literature to conduct a review.<sup>1</sup> These countries, have however also embarked on legal reforms intended to privatize tenure rights, while at least theoretically aiming to enhance and safeguard women's land rights.

Average farm size varies among the countries with Kenya having an average farm size of 2.1 ha in 2010, compared with 0.9 ha for Uganda and 0.7 ha for Rwanda (both for 2006) (Jayne et al., 2014:4), and as such population pressure differs dramatically between the three countries. Although all three countries are likely to face several *general* social and economic challenges related to increasing population pressure and diminishing natural resources, from an institutional perspective they cover a spectrum of property rights regimes and land use systems. From the vantage point of gender relations specifically, moreover women's tenure rights and the political and practical enforcement of such rights vary greatly among the countries. As such the three countries together constitute an interesting possibility for comparing the evolution of gendered land rights against the general backdrop of shrinking farm sizes, but under different legal, political and historical conditions.

The paper reviews the literature from the year 2000 onwards. Despite substantial theoretical and policy-based interest in the topic of gendered land rights, the recent empirical literature is quite limited. Moreover, few quantitative or longitudinal studies exist, with the literature in general being comprised of qualitative case studies, albeit sometimes conducted over several years. Given that the topic at hand is strongly linked to formal legislation relevant to inheritance, marriage regimes and land law – laws which in some cases have been recently reformed, a challenge has been to find up-to-date, accurate academic work that descriptively outlines relevant legislation for the countries under review.

The FAOs Gender and Land Rights Database (<http://www.fao.org/gender-landrights-database/en/>) compiles key facts related to gender and land rights for 84 countries across the world. These include legal frameworks that regulate land access, use and inheritance, policies and institutional mechanisms, systems of land tenure, and customary norms, religious beliefs, social practices and inheritance practices that

<sup>1</sup> Five countries fulfill the criteria of land constrained countries that have seen declines in farm size over the past decades, apart from the three countries covered by the review, they also include Madagascar and Nigeria, but for these countries there was insufficient literature. For more details on the country selection, please see Andersson Djurfeldt and Sircar (2018).

influence women's rights to land. The country reports presented on this database are one of the major sources of information for addressing the first research question, while the remaining two questions are covered through a review of existing literature. The depth and scope of this review is very much conditioned by the availability of relevant, peer-reviewed literature, which varies significantly from country to country, but it should be noted that there are few quantitative studies documenting systematic variation in land rights. Moreover, while there is a fairly substantial literature on the implementation of land reforms and the discrepancies between theory and practice with respect to the gender equalizing ambitions of such reforms, few studies exist of broader changes to livelihoods tied to these reforms. A number of legal reforms have been undertaken in the late 1990s and early 2000s with the literature review covering the period 2000–2017.

## 3. Gendered patterns of land control and ownership

In many countries, especially in sub-Saharan Africa, land access is based on user rights rather than individualized ownership. Here land is held in trust either by the state or community leaders on behalf of the community. Members of the community hold user rights to family land, which include the right to bequeath the land, sub-divide it for use by adult children, or rent out the land. Restrictions are often placed on sale of land by individual farmers to members outside the community, however as land is considered communal property. As noted by Berry (1989) a person's rights to land therefore commonly rests on belonging to a descent group, either by birth, marriage or other social arrangements. Individual claims to land are also embedded in social relations within the kin group, as emphasized by the anthropological literature (see Kingwill, 2016 for a discussion). The practicability of using communal land as individual land (for instance as collateral) may be limited, even in situations of formalized, individualized rights to such land. Moreover, as shown by Kingwill (2016), even where formal, individualized, freehold tenure exists, land may be treated as family land, with land in practice being held by the family rather than the individual.

As suggested by Doss et al. (2014) rights to land vary by sex, with women in Africa generally gaining user rights through men. Although exceptions exist, primarily in central and southern Africa, patrilineal systems of descent and inheritance are predominant. All family members who belong to the male line of descent have rights to land, but the practice of primogeniture means that daughters have weaker land rights than sons. Fathers can allocate land to unmarried daughters on a temporary basis, but when they marry they access land through their husband's lineage. Daughters can return to their natal family upon divorce or the death of their husband, or they can continue to hold rights to land through their sons as long as they do not remarry (Peters, 2019:46). As such, women's rights to land in land tenure systems based on patrilineal descent are dependent on a functioning relationship with a husband, father or son. The positionality of women within such systems, therefore, is of utmost importance, as noted by Kingwill (2016). Daughters have claims to lineage or family land which wives, who come from a different natal lineage do not. The nature of women's land rights under patrilineal descent are therefore conditioned and shaped by birth (consanguineal relationships) and by marriage (affinal relationships), albeit these are changing.

Doss et al. (2015) provide a useful conceptualization of land ownership and different levels of land ownership. The authors distinguish between reported ownership, documented ownership and effective ownership. In the case of reported ownership, survey respondents simply state that they or their household owns land, whereas documented ownership involves presenting written evidence of such ownership. Effective ownership, finally, means that the owner is able to make decisions related to land use and most importantly holds the right to transfer the land to another person. The statistics presented on the FAO Gender and Land Rights Database, define the landowner as the

**Table 1**  
Share of female landholders, share of female landowners and share of agricultural land owned by female landowners, by country (year in parentheses).  
Source: FAO Gender and Land Rights Database, all figures refer to agricultural land.

Country	Share of female landholders	Data source	Share of female landowners	Data source	Share of agricultural land jointly owned by male and female landowners	Share of agricultural land owned by female landowners	Data source
Uganda	16.3 (1991)	Agricultural Census	49.6 (2011)	LSMS-ISA 2010-2011 GHS Panel Surveys (GLRD team own estimate)	48.0 (2009-2010)	18.0 (2009-2010)	LSMS-Uganda National Panel Survey Doss et al. (2015)

legal owner of the agricultural land, taking into account geographical variations in the definition of legal ownership. Such ownership is not necessarily documented through title deeds or other legal documents. The landholder is defined as: “The civil or juridical person who makes the major decisions regarding resource use and exercises management control over the agricultural holding operation. The agricultural holder has technical and economic responsibility for the holding and may undertake all responsibilities directly, or delegate responsibilities related to day-to-day work management to a hired manager” (FAO, 2005).

Statistics on gender-based patterns of land ownership and control are patchy and in many cases outdated. Indeed, for the three countries, data is available only for Uganda. As suggested by Table 1, the share of female landowners at 49.6% is relatively high, but multiple owners may be reported for the same household, so this group of women includes owners of jointly owned land.

Around half (48%) of all agricultural land is reported as jointly owned by male and female landowners. Around a fifth (18 %) of agricultural land was owned by women and 34% by male landowners, showing systematic bias in land ownership based on gender (Doss et al., 2015). Given the general lacuna in gender differentiated statistics on land tenure dynamics, quantifying the extent of gender biases in land ownership and control is difficult. While land rights that are based on patrilineal descent systems generally discriminate against women, the outcome of this discrimination in land ownership is not possible to establish for the countries.

#### 4. Theoretical perspectives on land rights and gender

Several theoretical perspectives have influenced the debate on gender and land rights over the past decade, linking to a broader development discourse related to property rights, capital and collateral, raised for instance by the UN *High Level Commission on the Legal Empowerment of the Poor* (see Nyamu-Musembi, 2008). Policies inspired by this standpoint call for the formalization and regularization of land rights more broadly speaking to enhance the rights of individuals and groups in what is sometimes referred to as privatization reforms (Englert and Daley, 2008). Influenced by the work of Hernando de Soto (2000), the argument for formalization of land rights revolves around the possibilities for turning assets into landed capital that can be transacted and used as collateral for loans. Even at this general level, there is a strong emphasis on the possible outcomes from privatization in terms of enhanced investments, increasing productivity and commercialization.

In the grey area literature, such as the FAO (2011) *State of World Agriculture – Closing the Gender Gap for Agriculture*, the redress of gendered differences in access to and ownership of land is put forth as something of a panacea in terms of closing productivity gaps in global agriculture. Moreover, broader welfare effects are theoretically linked to the boost in women’s empowerment generated by enhanced female control over land, as women are shown to make wiser and more compassionate consumption decisions, focusing especially on the welfare of their children.

These policy perspectives have their counterpoints in the theoretical literature from the 1990s, with some schools of thought being more influential than others in guiding the policies of the 1990s and early 2000s. The strongest advocate for individualized land rights is perhaps the economist Agarwal (1994, 1997, 2003a,b), who uses the Indian case to document the linkages between individualized land rights, women’s empowerment, rising agricultural productivity and broader welfare gains. Positive dynamics in this respect include greater independence, stronger bargaining power within as well as outside the household, stronger female tenure security following a divorce or widowhood and possibilities for leaving a violent husband without jeopardizing one’s livelihood (Agarwal, 2003a). Apart from such rights-based advantages, a number of efficiency gains are also noted as the adoption of capital-

intensive technologies may increase when land can be used as collateral for credit. Better use of inputs and command over capital generated from sales can enhance production as well as raise women's incomes (Agarwal, 2003a: 194–195). A number of secondary welfare effects of enhancing women's bargaining power are also documented, especially with respect to children's welfare and food consumption (Allendorf, 2007; Beegle et al., 2001; Kennedy and Peters, 1992).

A contrasting viewpoint is presented by the political economy literature which questions the viability of privatization reforms, pointing to several failed historical examples of tenure reforms in colonial and post-colonial Africa (Nyamu-Musembi, 2008). Here the loss of rights by marginal groups, especially, women, youth and seasonal users have taken place as such programs have been captured by elites, and marginalized users with secondary land rights – that is groups who attain rights to land through primary rights holders (Alden Wily, 2011; Meinzen-Dick and Mwangi, 2009; Razavi, 2003, 2009). A point often made in this literature is that land rights (or indeed property rights in general), regardless of their geographical provenance are actually social relations embedded in the norms and institutions that uphold them. While customary land rights award usufruct rights to women, such rights are therefore connected to norms that regulate how these rights can be exercised (Andersson Djurfeldt et al., 2018).

More recent privatization efforts – at least in the context of sub-Saharan Africa - have moved beyond individualization initiatives and instead focus on giving “*statutory support /.../ to customary property in its own right*” (Alden Wily, 2006:25-26, cited in Englert and Daley, 2008). As such, contemporary reform efforts centre on the formalization of existing customary land rights, be they individual, family, clan or community based (Englert and Daley, 2008). The broader development focus on property rights and capital, hence envisages formalizing rights that in general award only secondary user rights to women, and as Englert and Daley (2008) remind us: “there are questions to be asked about the extent to which the recognition of customary land tenure can have a positive effect on women's land rights, as customary rights and institutions are often not equitable and indeed often outright discriminatory” (p. 10). As noted by the authors, even in countries where women's groups have successfully lobbied for changes to property rights legislation, the challenges of implementation can be formidable in contexts characterized by legal pluralism, noting that the necessary “change in the culture of practice [is] something far more difficult to achieve than law reform” (p. 11).

As noted by Peters (2019), moreover, a more nuanced understanding of the gender consequences of recent land reform efforts is needed, as the effects of land reforms on different categories of women may vary greatly. Gender-blind land reforms generally aim to strengthen women's rights to land in the context of customary land tenure systems considered to be discriminatory, but Peters (2019), commenting on the case of the 2016 Malawi land policy, points to the potentially devastating consequences of this policy for women in regions where matrilineal, matrilocal post-marital residence patterns of descent and inheritance prevail. More generally, even outside these areas, Peters (2019):47 argues that: “The aim to sweep away a practice of land allocation considered discriminatory will disrupt the basis for kinship-based practices of cooperation and inter-dependence on which rural life (and much of urban life) depend”. Resistance to policies that aim to redress gender biases in land rights, hence should be understood not only at the individual level but also as a more generalized resistance to the gradual undermining of patrilineal descent systems as the underpinning principle of land allocation. In the case of patrilineal descent systems for example, as wives' rights to lands are strengthened, the position of the descent group, including female siblings, in controlling the ownership of the land is weakened as is the husband's position of power as head of household. Moreover, the consanguineal rights to land of sisters who are part of the patrilineage may be weakened through efforts to strengthen affinal land rights among wives. At the systemic level, meanwhile, strengthening wives' rights to land by enabling them

to permanently retain land after a divorce or widowhood in the long run can undermine patrilineal descent as the foundation of land tenure systems.

Privatization schemes and land reform efforts need to be situated also in relation to commercialization processes that indirectly enhance the value of land and affect rural livelihoods. While the theoretical literature points to several possible, positive outcomes of enhanced tenure security for women, the literature on commercialization suggests that women's prospects for participating in agricultural markets may be limited by restricted mobility, lower productivity and higher domestic responsibilities relative to men. Lower labour availability among female landholders has a direct effect on farm sizes in usufruct tenure systems, and in turn also affects the ability to produce a marketable surplus (Andersson Djurfeldt, 2018a, 2018b). The combination of commercialization, privatization and growing demand for land may lead to a stratification of farm size based on gender and difficulties in defending female land rights. As noted initially, however, these processes need to be situated in the context of legal reforms that in theory at least have the ambition to enhance the tenure security of women.

## 5. Tenure systems, legislation and land policy

In general, the three countries are characterized by a pluralism of tenure systems and legal frameworks that regulate the use, control and ownership of land. Nonetheless, tenure systems vary between the countries, while the political will and practical efforts to redress gender imbalances in land ownership differ greatly.

### 5.1. Kenya

In Kenya, like in many African countries, several land tenure systems co-exist, sometimes also overlapping geographically. Such systems fall into four major categories: private/modern, communal/customary, public/state and open access. Each of these tenure types is linked to different kinds of property rights regimes, with government, county councils, communities and individuals owning land. Individual property rights (freehold ownership) are held to land that was previously settler occupied and land that has been converted from customary land to individually registered landholdings. Trust lands cover tracts of land that were not alienated for settlement or other purposes by the colonial government, but were not registered by individuals or groups (FAO Gender and Land Rights Database, 2017). Such land is vested in councils (local authorities). In 1990, trust lands constituted nearly two thirds of the total land area (Bruce, 1998). Since the early 1990s, however a sequence of land reforms has aimed to convert trust land into privately tenured land based on formalizing existing individual or group claims to land. Finally, pastoralist tenure is based on membership of a particular group (“tribe, clan, family or other group of persons”) which exercises rights to so called group ranches. Since the early 1990s, however population pressure, rising land values and increasingly sedentary livelihoods, in combination with political pressures towards formalization and privatization of tenure has encouraged subdivision of group ranches into individually held plots of land (Kyalo and Chiuri, 2010). From a gender perspective, the assessment in the literature is that the individualization and privatization of tenure since the early 1990s has weakened women's tenure security by usurping their secondary land rights through allocating title only to their husbands (Bruce, 1998).

At an overarching level, the new Constitution of 2010 (section 60(1)) enshrines four major rights to land: “equitable access to land, security of land rights, elimination of gender discrimination in law, customs and practices related to land and property in land and encouragement of communities to settle land disputes through recognised local community initiatives” (FAO Gender and Land Rights Database, 2017). The Land Registration Act of 2012, specifically states that “a spouse may acquire an interest in his/her spouse's land if this spouse

contributes by labour or other means to productivity, upkeep and improvement of the land. The spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered" (Section 93(2)). As such, the contribution of a wife's labour to her husband's land could be expected to influence her right to land. In practice – as detailed further below – women's rights to land (as enshrined in the Kenyan Constitution) are undermined by several mechanisms, however, which either in combination or separately infringe on the possibilities for women to own and access land on terms equal to men.

## 5.2. Rwanda

Rwanda is often put forth as one of the most progressive advocates of women's rights in sub-Saharan Africa, both with respect to land legislation as well as more general policies aimed to enhance gender equality. The aftermath of the 1994 genocide produced an unprecedented demographic shift as households became increasingly women or orphan-headed. This shift occurred, however in the context of patriarchal gender norms and land tenure arrangements governed by patrilineal kinship systems that upheld the husband as the head of household and landowner. This situation created unexpected complications as "women and orphan (children) household heads were inheriting land on a scale not previously known in Rwandan history" (Daley et al., 2010:132). As noted by Daley et al. (2010), the vacuum left by men in public institutions as well as a concerted move by the new government to enhance gender equality, had far-reaching effects on women's rights to property. Comprehensive reforms of the legal and policy framework for property rights in general and land tenure specifically, must also be placed in relation to broader measures to enhance gender equality in the post-genocide period as well as more recently. An example of the latter is the enactment of a Gender-Based Violence Law in 2009 and a policy against the same in 2011 (see Kagaba, 2015).

While the official land tenure reform programme was not initiated until 2006, several legal reforms that aimed to equalize women's access to property and land were enacted prior to this. The Inheritance and Marital Property Law of 1999 (The 1999 Succession Law), established the right for women to inherit property. The community of property marriage regime, which gives joint and equal rights of ownership to property brought into as well as accumulated during the marriage, was introduced as the default regime for couples entering into marital unions. This protects women's property from her husband's relatives in the case of separation or widowhood. Moreover, the 1999 law also established equal rights of inheritance among sons and daughters (Ansoms and Holvoet, 2008; FAO Gender and Land Rights Database, 2017). As noted by several studies (Ansoms and Holvoet, 2008; Bayisenge et al., 2015; Daley et al., 2010; Kagaba, 2015), the law, however, only applies to formally registered, monogamous unions entered into after 1999, and the offspring of these unions. In the case of Rwanda, therefore both the affinal and consanguineal rights of women have been strengthened.

The new Constitution which was passed in 2003, constituted a renewed push towards gender equality, but also clarified the status of civil monogamous marriages as the only marital unions recognized by Rwandan law. The new law outlaws polygamous marriage, but as noted by Ansoms and Holvoet (2008) polygamy remains a common custom, which has negative consequences for women and children living in such unions. Finally, the 1999 Law does not apply retroactively and as such does not "protect the inheritance rights of the numerous widows and orphans left behind after the civil war and genocide" (p. 142).

Together with the 1999 Law of Succession and the 2003 Constitution, two additional pieces of legislation, The National Land Policy of 2004 and the Organic Land Law (OLL) of 2005, constitute the core legal and policy framework for Rwandan land relations. These two documents reiterate and specify some of the key principles enshrined in the first two viz. rights to land specifically, prohibiting discrimination

in land ownership or possession of rights to land (Daley et al., 2010). The OLL, moreover requires the consent of family members with respect to land transactions, such as sale, donation or exchange, but as noted by McAuslan (2010), such consent is limited to joint owners and spouses in legal marital unions (p. 118). In 2006, the Rwandan government embarked on a land tenure reform programme, to implement the corpus of land laws and to consolidate landholdings to deal with problems of falling land productivity connected to land fragmentation. A major component of the programme is land registration and titling, which was carried out initially in trial areas in 2006 and then extended to the country as a whole, with 1.7 million titles being issued by January of 2012, covering 93% of all plots (Santos et al., 2014).

Several positive effects of the legal and institutional reforms are noted in the literature. Broadly these can be grouped into primary effects related directly to land use and ownership and secondary effects on gender relations in general. Daley, Dore-Weeks and Umuhzoza (2010), trace the impact of the 1999 Succession Law<sup>2</sup> and note several positive initial effects on women's rights to land, such as an increased likelihood of daughters receiving land from their fathers. Moreover, women who had left marriages and returned to their parents were increasingly receiving permanent, rather than temporary, rights to land, including the right to transfer the land. Finally, the authors note that women were increasingly able to resist customary practices of polygamy, through the equalized land rights given them under the new legal framework. Kagaba (2015) confirms these findings based on qualitative data collected in 2013 in Kamonyi District, which constituted the best-case scenario in a national context. Decision making in relation to land matters has been equalized as wives now need to sign the sales documents for land sales to occur. Moreover, land inheritance from their parents provides women with resources of their own to bring into the marriage, which gives the woman "value in the household and equality with her brothers" (p. 579). Bayisenge et al. (2015) on the basis of interviews with local level mediators in land conflicts (Abunzi) confirm that decisions related to sale, transfer, lending or buying of land requires the consent of both wives and adult children (p. 80). Broader secondary effects include a reduction in domestic violence and the right to earn an independent income (Kagaba, 2015). Overall, Rwanda's land tenure reform programme has been described as state-of-the art in an African context, both in terms of its scale and design (Ali et al., 2014) as well as its gender-equalizing ambitions (FAO, 2011).

## 5.3. Uganda

Like Rwanda, Uganda has undertaken several far reaching legal and administrative reforms, centred on privatizing property rights and formalizing customary ownership to that effect (Adoko and Levine, 2008). Constitutional reforms during the early 1990s and the ensuing ratification of the new Constitution in 1995, provided the legal foundation for the subsequent land reforms (as later enshrined in the Land Act of 1998) by moving all the landholding rights in the country from the government to the citizens of Uganda (Joireman, 2007).

Four types of land tenure systems are recognized under the Ugandan Constitution, and specified in the Land Act. *Mailo* tenure concerns land that was apportioned between the British Protectorate Government and the King of Buganda under the 1900 Buganda Agreement. Land under *mailo* tenure is held in perpetuity, often by landowners who hold large tracts of land that is then sub-let to tenants (*bibanja*) or squatters. Squatters become bona fide occupants after living on the land for at least a decade, whereas *Bibanja* in return for rent, have the right to sell, lease, mortgage or bequeath the land (Doss et al., 2012:602). Doss et al. (2014) note that successive governments have sought to protect the rights of *mailo* tenants since the end of colonial rule, providing them

<sup>2</sup> National Land Tenure Reform Program (NLTRP) field consultations and African Rights – for more details see Daley, Dore-Weeks and Umuhzoza (2010).

with “the right to acquire freehold title to mailo land” (p. 82). Freehold tenure holders can use, sell, lease, transfer and bequeath their land. Land under freehold tenure is commonly held by religious and educational organizations with individual freehold tenure being limited to specific groups of elites (Doss et al., 2014). Leasehold tenure entitles the lessor to rent, and the lessee to the use of the land for a specified time period, and is regulated by a contract between the two parties. Finally, customary tenure – which covers more than 80% of all land in Uganda (Doss et al., 2014:81): – is “governed by the customs, rules and regulations of the local community” (Doss et al., 2012:602). With respect to customary land specifically the Land Law provides for landholders (as individuals, families or clans) to receive certificates to their land. Group ownership of land is regulated through membership in Communal Land Associations, governed by constitutions that dictate the principles for sharing and managing land held in this way (Adoko and Levine, 2008:103). Doss et al. (2012):602 note that land tenure arrangements vary geographically, with *mailo* tenure (and the associated *Bibanja* holders and squatters) being most prevalent in the Central region, while leasehold tenure is most common in the Western and Central Regions of the country. Although most land is held under customary tenure, this type of land tenure is most pronounced in the eastern and northern regions of Uganda.

Adoko and Levine (2008) point to a dissonance between a government policy focused on privatizing and formalizing customary land and the parliamentary efforts to safeguard the interests of weaker groups (such as women) through protective legislation, during such processes (p. 103). The titling process formulated by the government, like in Kenya and Rwanda, involves the certification of customary land titles, formal surveying of the plot and eventually the issuing of a freehold title to the certified owner (p. 104). In this sense, the impetus and justification for Ugandan land policy lies in the perceived economic gains from formalized and privatised land titles (pp. 103–104).

The protective measures put in place in the Land Law, are several. As described by Asimwe (2001), they include a consent clause (Section 40), which requires both spouses to provide their consent in writing for any transactions that concern family land, while Section 28 “prohibits decisions affecting customary land that deny women access to ownership, occupation or use of any land, as well as decisions that impose conditions violating constitutional provisions protecting women” (The Land Act §28 cited in Asimwe, 2001:177). Moreover, the Act makes provisions for female membership of key institutions, such as the Uganda Land Commission, the District Level Land Boards and Communal Land Management Associations (pp. 177–178). Despite such provisions, the Land Act has become infamous for its “missing amendment”, a co-ownership clause which had been debated and approved in parliament, but did not appear in the final version of the Act (Joireman, 2007; McAuslan, 2010:123-124). Women’s and human rights groups who had lobbied for co-ownership viewed the amendment as a way of challenging social mores and customary laws that prevent women’s ownership of property, thereby addressing the low land ownership among women as a way of improving livelihoods and enhancing women’s bargaining power within the household (Asimwe, 2001:178).

In a country where women are frequently prevented from holding property by the justification that they *are* property (Bennett et al., 2006; Doss et al., 2012; Joireman, 2007), laws regulating women’s rights to property within marriage and after the dissolution of marriage or the death of a spouse are also central to women’s access to land. The Customary Marriage (Registration) Act and the Marriage Act, are both silent on the issue of rights to property brought into or acquired during a marriage, or how such property should be divided upon the dissolution of a marriage (Doss et al., 2012:601). Widows in particular are hard hit by the Succession Act of 1972, which stipulates that in the case of intestate succession (where a will is lacking), the property of the husband, that is “the home, household chattel, and surrounding land passes to the intestate’s legal heir, which is the nearest male lineal

descendant to the deceased, usually the eldest son” (Bennett et al., 2006:463). As such the legal framework surrounding land encodes the legal pluralism and the influence of patrilineal kinship systems on property rights, while also discriminating directly against widows in statutory law. Even if the Constitution specifies that state law overrules customary law in the case of discrepancies between the two, in practice the implementation of customary law trumps the former.

## 6. Informal tenure practices versus formal legislation

Formal legal frameworks and land policies tend to stress and safeguard women’s rights to land and particularly those of wives. The discrepancies between legal ideals and ground level realities are vast, however, especially in the case of Kenya and Uganda. Although details of practices around land access, control and adjudication vary from one ethnic group to the other, in general, access, control and inheritance of land in Kenya is a male domain, that is land systems (with the exception of two minor ethnic groups) are governed by patrilineal kinship systems (Hakizimana et al., 2017; Ong’wen Okuro, 2008; Walsh, 2003). Daughters therefore do not inherit land from their fathers, but rather attain secondary rights to use the land through their husbands when they marry (Benschop, 2002; Cotula, 2006; Henrysson and Joireman, 2009; Ong’wen Okuro, 2008; Walsh, 2003). Women’s rights to land are surrounded by a number of limitations, in the sense that their use of the land is restricted to farming it. Therefore, they cannot themselves own land, bequeath it, use it as collateral or sell it. Mothers, and widows especially, can keep the land in trust for their sons, however. Women’s affinal rights to land are therefore strongly tied to the number, gender and age of their children, with childless widows having the weakest land rights, and thus being at the greatest risk of being “chased” from the land. Unions need to be formalized through marriage for wives to be able to exercise their secondary rights to land. While mothers have an obligation to provide their children with food, the ability to do so is severely compromised if they are not formally married to the father of their children (Henrysson and Joireman, 2009). The same basic discriminatory practices, characteristic of land tenure systems based on patrilineal kinship systems can be noted also in the case of Uganda: women access land through a male relative, primarily the husband. Customary rules subject women to a double exclusion as they are not viewed as members of their husband’s clans, while the payment of bride price in practice may end membership of their native clans, and “as a result they are alienated from land ownership from childhood to widowhood” (Asimwe, 2001:175).

The point is often made that property rights need to be understood primarily as social relations. The enforcement of property rights therefore requires broad based support for the norms that they represent in the communities where they are operating. Herein lies a conflict between the ambitions of the policies and legal reforms of the political centre and the legal praxis of most ethnic groups. At an overarching level, moreover, an important distinction exists between land policies aimed to encourage individualized tenure and the communal mores enshrined in customary law as noted by Henrysson and Joireman in the context of Kenya (2009): “Customary law provides a system of rules for the allocation and adjudication of property rights. Typically, it is used as a tool through which traditional leaders (chiefs, elders, or headmen) can evaluate claims to property and resolve disputes regarding land. The logic of customary law focuses on the well-being of the community, rather than the rights of the individual. In practice this means that customary legal decisions tend to be compromises rather than clear decisions for one party against another. Anyone making a claim to land in a customary legal system will be making it in the context of the relationships that construct the social system of their community” (p. 41). The persistence of informal, communal norms can therefore be understood as a way of maintaining male power but also social harmony in concrete, village level contexts.

## 7. Social norms and discrimination against women

Institutionally, discrimination against women occurs through a number of mechanisms internal to informal land tenure systems that place women's land rights in the context of communal as well as family relations, where the husband's family relations constitute a potentially threatening backdrop to a wife's tenure security. Resistance to change among husbands and their relatives therefore in many cases prevent wives from exercising their legal rights, even in the case of Rwanda, where such rights have received the strongest political backing.

Verma (2001), with reference to Kenya, argues that a woman's tenure security depends on the perception of her character and reputation, and as such a woman is subject to the moral scrutiny of the community. Henrysson and Joireman (2009:45), based on fieldwork from Kisii, Kenya, note that: "perceptions of a woman's character determine her vulnerability to land expropriation. A woman can be accused of having 'bad character' for practicing witchcraft, being sexually promiscuous, drinking too much, or being rude or stubborn, particularly toward her in-laws".

In Uganda, strong social norms dictate against women owning land. The precarious situation of widows in particular is noted by several studies (Asimwe, 2001; Bennett et al., 2006; Doss et al., 2012; Joireman, 2007), as women under customary law are not traditionally entitled to own property at all. As described by Bennett et al. (2006) "Because all property is deemed to belong to the husband's relatives, these relatives frequently steal the widow's property, all the way down to the bed sheets, evict her from her home under threat of physical beating and even death, and take away her children" (p. 460). Regional and individual variations in relation to this pattern exist, however, with Doss et al. (2012) as well as national statistics (see Table 1) showing that women do own land, even if female land ownership relative to men is limited.

The reluctance of men to accept reductions in status and power as gender relations are formally equalized is documented in the case of Rwanda, where male resistance to change takes a number of shapes. Firstly, the norm of the male-headed household is persistent and many women do not exercise their rights to land, as they do not have confidence in the legislation or are loath to face social pressure from their brothers, husbands or the broader community (Daley et al., 2010). Despite awareness raising campaigns, as noted by Bayisenge et al. (2015), "some women do not understand how they can have equal rights to their brothers or husbands and are therefore reluctant to fight for their land rights" (p. 79). Indeed, interviews with female Abunzi (land conflict mediators), show that despite the formal right to hold land, the majority of women still felt that the land, as well as all valuable property in the household belonged to their husbands. Men were reported to uphold similar views, with consequences for decision making and transparency in land transactions, with Dore-Weeks and Arnesen (2007) documenting cases of husbands refusing to let their wives farm the land and renting out land behind the backs of their wives.

Male resistance to change and social norms around marriage also prevent women from exercising their legal rights to land as well as property more generally. Bayisenge et al. (2015) describe the reluctance to register and formalise marriages as this leads to the joint registration of land (p. 84). While the law in theory provides the possibility for legally married women to leave an abusive husband and retain her right to property held under the community of property marriage regime, the social ramifications of a divorce are such that many women continue staying with their husbands (Daley et al., 2010:141). Although Kagaba (2015) notes changing attitudes towards domestic violence among both men and women, the law is failing to protect women from violence in practice. As such, violence is sometimes condoned by the family or the broader community and thus "even if a woman has a given right, exercising that right sometimes places her in fear of her life" (p. 582). Social pressures in the very localized

contexts that characterize most rural women's lives are therefore upholding discriminatory practices in customary tenure and inheritance systems, regardless of the lofty ambitions of legal reforms aimed to redress gender inequalities in land ownership.

## 8. Land adjudication processes and lacking legal literacy

While the enforcement of an informal legal praxis generally favours men, the literature also documents the discrimination against women in formal land adjudication processes. Women's possibilities of receiving a favourable outcome in land dispute cases are limited by the inaccessibility of the formal dispute resolution mechanism set up by the Land Disputes Tribunal Act of 1990, in Kenya. This is documented in detail by Henrysson and Joireman (2009) in the case of the Kisii. The cost of bringing cases to a formal land tribunal and lacking awareness of such mechanisms, means that most land disputes are resolved through informal institutions that do not have the legal right to resolve land disputes. The corruption of informal courts was one of the main reasons for formalizing the dispute resolution process in Kenya in 1990, but as shown by the authors land disputes in the study area are routinely resolved through the parties paying elders or chiefs to resolve the dispute. The outcomes of such adjudication are biased against women both by the inherent gender biases of informal land institutions dominated by men but also by their weaker possibilities of "outpaying" their opponents to win cases (p. 54).

A similar situation is described for Uganda, where land adjudication processes remain a challenge as limited legal and administrative capacity lead to a vacuum that is frequently filled by local leaders, "who may rule in favour of customary laws, rendering state law obsolete" (Doss et al., 2012). Adoko and Levine (2008) note the emergence of "hybrid" legal codes, that combine the elements of customary and statutory law, both among legal practitioners as well as the population at large, with an infringement of women's rights and livelihoods as a result. Limited access to legal advice among women affects their ability to exercise their rights: "we found that few people know their rights and when they are told by someone more powerful that they have no rights, most simply accept this. This applies particularly to women, who keep being told that they cannot own land because they are women" (p. 112). While the Land Act stipulated the creation of a variety of land management institutions, such as land tribunals, as noted by Joireman (2007), the staffing of these organisations required an estimated additional 20 000 trained administrators at a time when AIDS related deaths were taking their toll especially on the working age population. In addition, financial resources for setting up the tribunals were not earmarked by the government. In the two districts (Mbarara and Tororo) covered by Joireman's (2007) study, logistical problems related to salaries and office equipment delayed the opening of the tribunals and restricted their operations. The ambitious stipulations on female representation in land boards have fallen short in practice, with these institutions being staffed primarily by men (Doss et al., 2012). The reach of statutory law is especially limited in rural areas, where illiteracy, lack of awareness and limited administrative capacity pose challenges to law enforcement.

The consent clause requires written consent from the other spouse for the sale of "land on which is situated the ordinary residence of the family and from which the family derive sustenance" (The Land (Amendment) Act, 2004). Nonetheless, Adoko and Levine (2008), in a study of Apac District, based on fieldwork from 2004, note that they did not encounter a single woman who knew of the consent clause. Moreover, even if women are aware of their rights, Joireman (2007) and Doss et al. (2012), note that most couples opt for customary, rather than statutory marriage as such marriages are more strongly embedded in local relations and provide social status in ways that consensual unions or statutory marriages do not. For customary marriages to be given legal status – hence enabling the consent clause - the full bride price needs to have been paid, however (Joireman, 2007).

## 9. Land reforms and changing livelihoods

Limited legal awareness, informal norms and formal institutions hence constitute very real obstacles to gender equality in land ownership. Stronger commercial interests in land, growing demand for land and individualized land tenure are likely to reinforce these obstacles. Research on the gendered aspects of changing livelihoods arising from the effects of these dynamics is relatively limited and points to essentially localized patterns of livelihood changes.

Kyalo and Chiuri (2010) study the gendered effects of privatization of land in the River Njoro Watershed, in Kenya and its effects on the two communities living in the watershed: the pastoralist Masaai of Narok, and the hunting and gathering Ogiek in the Eastern Mau forest complex. Before the privatization of tenure rights, the elders of the two communities negotiated the terms on which the Masaai were permitted to move their cattle over Ogiek hunting grounds. Payment was made in kind, with goods that were used by Ogiek women for the welfare of their families. With privatization and the individualization and subdivision of communally held hunting grounds, this relationship is no longer subject to collective bargaining processes, but rather negotiated with individual (male) landholders, with payment in cash replacing in kind transfers of milk, meat and skin “denying women a major source of food (milk and meat) that was previously availed during the dry periods each year, or whenever herds came back” (p. 741).

Similar consequences are noted also for the Masaai women, as women’s and children’s access rights to communal lands disappeared with the subdivision, individualization and privatization of ranch lands. When livestock are taken to pasture in the watershed, renting land to wheat farmers has become a major source of income for the male title holder. Making the land suitable for agricultural production – and thus rentable – has, however entailed the removal of all vegetation, severely restricting women’s access to firewood in the vicinity of the homestead. Moreover, the authors note that women are losing user rights also to other resources, such as lactating cows, as all livestock leaves the land to enable renting it out for wheat farming (p. 747). For other settled communities in the watershed, such as the Agikuyu and the Kalenjin, the authors note that rising land fragmentation results in increased stall feeding of cattle, with such cattle competing for fodder with migratory livestock. In Kenya, cutting and carrying fodder is a woman’s job, whereas incomes from sale of fodder and crop residues to pastoralists mostly befalls the men (p. 743).

Gender-based contestation over land is also arising as a result of the increasing value of land – a phenomenon tied to land scarcity in general as well as more specific processes of commercialization that heighten the demand for particular types of land. Dolan (2002), studying the production of French beans in Meru, Kenya, describes the renegotiation of rights to pieces of land that were traditionally female in the wake of land registration and the introduction of contract farming agreements entered into only with male landholders. As in other parts of Kenya, tenure systems are based on patrilineal descent systems that privilege male rights to land. Importantly, however, women have since the pre-colonial era held use rights to gardens producing local vegetables on these plots, with the output from such gardens constituting a source of food for the household and crucially, a source of independent income for women. With the introduction of export production, men are increasingly pressuring their wives to grow French beans on these plots or withdrawing wives’ rights to these gardens altogether. Commercialization and the connection to global value chains are hence challenging women’s usufruct property rights and the rights to income generated from such property that “have conventionally been enshrined in cultural norms” (p. 672). As described by Dolan (2002), the “failure to compensate women for their labour and land /.../ has provided the fodder for heightened marital discord” (p. 677), with some women voicing their dissent through witchcraft.

Growing land fragmentation and high fertility rates are leading to changing livelihoods in Rwanda, with both husbands and wives

engaging in non-farm labour. Regional patterns appear to make a difference here with Kagaba (2015), reporting that female respondents in Kamonyi District were engaged in casual work on water irrigation and construction sites, breaking the traditional mould of gender segmented labour markets (p. 580). By contrast, a feminization of agriculture appeared to be occurring in Musanze District in the Northern Province as husbands increasingly sought work outside agriculture (Bayisenge et al., 2015). The context of shrinking farm sizes and increasing competition for land, may however heighten male resistance to change. Women who claim their legal rights to land risk being blamed for land fragmentation, leading to conflicts between siblings, and growing communal pressure to prevent women for exercising these rights (Daley et al., 2010:140).

In the case of Uganda, a study from Masaka District (Rutakumwa et al., 2017) documents several strategies engaged in by women to cope with rising land shortages: borrowing land in response to food shortages prompted by land constraints, cost-sharing of livestock and selling of casual labour within the village (Rutakumwa et al., 2017:46).

The literature on livelihood changes hence confirms some of the misgivings raised by critical perspectives on land reforms focused on privatization, as the rising value of land in combination with the formalization of customary rights has affected female livelihoods directly in the case of pastoral and hunting gathering communities in Kenya, as user rights have been withdrawn and exchange of resources between communities bypass women. Similarly, in the Ugandan study, land shortages were making it necessary for women to adjust their livelihoods to secure food for their families.

Gender-based conflicts around land, whether between husbands and wives (as in the case of Meru) or between siblings (as in the case of Rwanda) point to the persistence of social norms around land and how such norms are mobilized in a context of growing demand for land either as a result of commercial processes that raise its value, or because livelihood opportunities outside agriculture are limited. Tenure reforms under these conditions, therefore risks aggravating rather than redressing gender-based biases not only with respect to land rights, but also in terms of livelihood opportunities connected to such rights.

## 10. Conclusions

The literature shows the mismatch between laudable ambitions for gender equality as enshrined in formal legal code and the practices of gender discriminatory customary practices and norms on the ground. Legal pluralism, poor legal infrastructure, low awareness and limited administrative and technical capacity pose challenges to implementing statutory law which in some cases (such as Rwanda) has a strong gender-equalizing intention. In Uganda and Kenya patriarchal customary law prevails in practice, with consequences for tenure rights and access to land more generally, property rights within and upon dissolution of marriage and laws of succession. Here, however, the praxis of the customary is enabled by the lack of legal enforcement, in turn engendered by corruption and the lack of political interest at the central level. The differences in political will between the countries must therefore be acknowledged. The positive welfare consequences (despite strong male resistance) of land reforms in Rwanda, shows the difference that this political support can make for women’s property rights more broadly speaking. Still, the strength and depth of male resistance also in the case of Rwanda presents a formidable obstacle to genuinely equal rights to land, showing the embeddedness not only of customary practices around land ownership and land use, but also broader gender norms, for instance the bread-winner norm. The social and economic pressure on women to forfeit their land under conditions of rising population pressure is therefore likely to increase further, especially in national contexts where lawmakers do not in earnest strive to protect women’s property rights. Theoretically, the findings point to the limited effects of land tenure reforms in redressing gender inequality, and the poor possibilities for harnessing welfare effects from

such reforms, without a redress of broader structural and normative constraints to women's property rights. The findings also expose a fundamental tension between rural societies and land allocation processes based on lineage and efforts from the political centre and women's groups to strengthen the land rights of wives and widows in particular. This in effect may contribute to the spread of a westernized household model as affinal rights are upgraded at the expense of consanguineal rights, in the name of gender equality. As population pressure increases, this may result in conflicts over land based not only on gender, but also between different groups of women.

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