



**THE DANISH
INSTITUTE FOR
HUMAN RIGHTS**

RE-ENVISIONING
GENDER JUSTICE IN
ACCESS AND USE
OF LAND THROUGH
TRADITIONAL
INSTITUTIONS

A CASE FOR CUSTOMARY TENURE
OF LAND OWNERSHIP IN ACHOLI
SUB-REGION, NORTHERN UGANDA

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RESEARCH PARTNERSHIP
PROGRAMME
DANISH INSTITUTE FOR HUMAN
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For 2011-2013 the programme operates under the thematic focus of “Informal Justice Systems” (IJS), including the opportunities for access to justice where state systems lack outreach and forums in which a diversity of cultures and values can be respected as well as challenges and weaknesses in respect

of compliance with human rights standards concerning participation and accountability, fairness of procedures (including the protection of the vulnerable) and substantive outcomes.

During her stay at DIHR, Irene Anying's research work was supervised by Senior Researcher Stéphanie Lagoutte.

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ABSTRACT

This research paper explores the extent to which the use of traditional institutions in land dispute resolution creates an opportunity for the protection of women's rights to access and use land held under customary tenure in the Acholi Sub Region, Northern Uganda. The role of traditional institutions in dispute resolutions presents weakness and challenges, but also strengths and windows of opportunity. This can be used to marry the strengths arising from traditional institutions with the middle ground attempts of the state to introduce human rights principles aimed at protecting women's right to land. This paper recommends the utilization of the "windows of opportunity" presented by the traditional institutions, through understanding the variation of custom.

” One should be less concerned about romanticizing Africa’s past than about accepting whole sale other regions past and romanticising imported western legal institutions. However the main concern should be which system provides the most appropriate solutions in what types of cases, and how each systems comparative advantages can be enhanced and disadvantages minimised rather than whether a predilection for things old or new, borrowed or home grown, can be exposed.”¹

CHAPTER 1

INTRODUCTION

” It is preferable to go to the traditional leaders because they are within reach, just a few minutes’ walk away from our homes, they live with us in the same village, understand and appreciate the history of our land including the boundaries and ownership, no much cost is involved and they resolve disputes within a shorter time. They do not bring division between and among us...”²

These were the voices of men and women at a focus group discussion at Orom sub-county, Lamwo District. The sincere impression of these participants is indeed powerful evidence of the importance, uniqueness and beauty of traditional dispute resolution systems, a fact which a number of scholars have also pointed over the years: They praise customary dispute resolution systems for their accessibility, local knowledge, low cost, and speed when contrasted with national court systems and public law.³ The formal land justice institution in Uganda has indeed been characterised by a backlog and delay of cases in addition to

being extremely expensive in terms of court fees, legal representation and transport, and being beyond reach of the vast majority of the population. Within the Gulu Magisterial area (Acholi Sub Region), for example, the percentage of outstanding civil land suits was at 81% while land civil appeals stood at 90% for the period January 2010 to September 2011.⁴

However, there is also a lot of scepticism surrounding the continued use of customary institutions under which the traditional institutions in Uganda fall. They have been viewed in negative terms, and have often been described as archaic and backward with rigid practices that are not amenable to modernization, undemocratic or lacking democratic accountability mechanisms, and lacking legal legitimacy, authority and enforceability. In addition they have been pronounced incompatible with economic, social and civil rights as well as discriminatory against the marginalised groups:⁵ Women are for example excluded from the dispute resolution process – the panel of adjudicators, being composed exclusively of old men.⁶

Despite all of these negative perceptions, these systems continue to be popular.⁷ Within Acholi Sub Region, where massive land disputes have characterised the return process,⁸ studies have indicated that in these situations, a significant number of people within the community still prefer and continue to use traditional leaders to resolve their land disputes.⁹ Moreover, it has been noted that women in particular, face many challenges in accessing and using land. When returning home after the displacement due to the war, women are being denied re-access to land by their in-laws and surviving male relatives.¹⁰

This paper therefore wants to revisit the dynamism of traditional institutions and explore the following question: Is it possible to identify and use 'windows of opportunity' under traditional institutions' dispute resolution mechanisms to enable women to access justice in disputes on land held under customary tenure in Acholi Sub Region, Northern Uganda?

After presenting its research methodology, the section 2 of the paper proceeds with looking at the regulatory framework for the operation of traditional institutions. Section 3 discusses the customary norms regarding land access and -use in Acholi sub-region by women, since it is these norms that the traditional institutions apply in resolving land disputes. Section 4 presents an in-depth discussion of the traditional institutions, particularly their composition, the procedures they adopt,

the enforcement of their decisions and the principles they apply in dispute resolution. Finally, Section 5 draws some conclusions and recommendations by discussing the challenges and windows of opportunity that have been identified.

1.1 RESEARCH METHODOLOGY

This paper utilises and draws on analysis of both primary and secondary data. The primary data is comprised of qualitative data gathered from districts within the Acholi Sub Region, as well as first hand field experiences.

A total of 13 **focus group discussions** (hereinafter referred to as FGD) were held in four sub-counties of Agoro, Madi-Opei, Lokung and Orom in Lamwo and Kitgum Districts in the months of April and May 2012. In each sub-county, four FGD's were held. Three general FGD's were held with groups that included women, men, traditional leaders, and directly elected and appointed leaders at the sub-county level. The fourth FGD in each of the sub-counties was comprised solely of women. Each group constituted 20 to 30 participants. The selection was based on age and marital status of the women, in order to include the unmarried, married, separated, divorced and widowed.

Further I draw on **first hand field experiences**. As Head of Human Rights Protection Department at an NGO, Human Rights Focus (HURIFO)¹¹, I have for the last three years

specifically worked on a project focusing on women's property rights. This project has enabled me to work very closely with both the formal justice sector and the traditional institutions. A few real life case scenarios that I have been involved in will be used, although fictional names are used in order to protect the privacy of the clients. Reference numbers from record books of HURIFO will however be provided.

Besides the case studies, **two key informant interviews** were held with traditional leaders in the spring of 2012, and at the lower levels, interviews were also held with disputing parties and witnesses including clan leaders and elders sitting as mediators.

Aside from the field research, a lot of information has been acquired through desk review of both primary and secondary sources. The former includes a thorough review of relevant government legislation such as the Land Act, project and policy reports. The secondary literature particularly includes text books on customary land and rights of women, written reports and documents published by donor agencies, research reports of NGO, and other consultants, and policy documents.

Northern Uganda has been a focus of substantial research. A lot of research has been undertaken on conflict. In addition, a number of studies have been done on customary land tenure. Many of the studies have focused

on critiques of customary tenure vis-à-vis the rights of women to land ownership, on customary tenure and development, land dispute and on conflict resolution.¹² There has however, not been much focus on exploring traditional institutions as an avenue for land justice. The issue of dispute resolution with regard to property rights has also been largely neglected in academic literature.

1.2 A SHORT NOTE ON LIMITATIONS

As stated above, the focus group discussions were only held in two districts out of the total of eight districts that comprise Acholi Sub Region.¹³ However, I also worked in the 6 other districts, holding dialogues by nature of my work, and also took on cases and held a number of interactive trainings with the traditional leaders and women's groups across those districts. There is a resemblance in the situation in the districts across Acholi Sub Region; however, it should be noted that there are some peculiarities that differ from one clan to another within the same tribe.

CHAPTER 2

REGULATORY FRAMEWORK FOR THE OPERATION OF TRADITIONAL INSTITUTIONS

It is useful to identify a normative apparatus that can serve as a foundation for making conclusions, on whether or not there are opportunities as well as a platform for recommending further action regarding the use of traditional institutions.

The question of whether international human rights norms are universal and have, or should have, a universal application continues to attract divided opinion around the world.¹⁴ Abdullahi Ahmed An-Na'im and other scholars have nevertheless demonstrated that the view that human rights are simply a product of the West is no longer tenable.¹⁵ In dealing with questions of universalism and cultural relativism focus is increasingly being placed on the relationship between individual rights and collective cultural rights and the issues arising from the 'translation' of abstract, general standards and principles of rights into concrete contexts where culture, power relations, resources, legal systems and relations all play a role.¹⁶

In the case of Uganda specifically, the 1995 Constitution is largely based on the universal

application of human rights. Thus, the suggestion that customary practices should be held accountable to human rights standard is not new. Uganda's 1995 Constitution prohibits "laws, cultures, customs or traditions which are against the dignity, welfare or interest of women, or which undermine their status".¹⁷

It is against this background that the following paragraphs will draw standards from international human rights law but also national law. The section will start by analysing the legal regulatory approaches adopted by Uganda (2.1), and thereafter analyse the international regulatory standards (2.2).

2.1 LEGAL CONTEXT / APPROACHES TO TRADITIONAL INSTITUTIONS IN UGANDA

The 1995 Constitution of Uganda recognises the institution of traditional or cultural leaders in any area of Uganda in accordance with the culture, customs and traditions of the people to whom it applies.¹⁸ It is in line with this constitutional provision that **Ker Kwaro**, the Acholi cultural institution is recognised.

Section 88 (1) of the Land Act¹⁹ stipulates that, traditional authorities may determine disputes over customary tenure, or act as a mediator between persons who are in dispute over any matters arising out of customary tenure. From this description, it is clear that legal recognition is extended to customary law in this respect. Accordingly, the traditional institution applies customary rules and norms in order to resolve land disputes. The structural, procedural and normative structure of this institution is not dictated by the state.²⁰ The structure of the Acholi cultural/traditional institution has evolved following Acholi people's practice of their traditions and culture over time.²¹

Further, inasmuch as the Land Act allows the institution through its authorities to determine disputes, it does not make it part of a formal state justice structure. There is no direct linkage between the traditional institutions and the formal land justice sector. The Local Council's two courts are taken as courts of first instance in relation to customary tenure from where an appeal moves to the Local Council Court three and subsequently to the Magistrates courts.²²

A number of criticisms have arisen from the lack of clear links that exist between the traditional institutions and the formal state land justice system. It has been noted that the lack of systemisation has created duplicity in roles, hierarchy and jurisdiction.²³ Instances do occur for example, where similar land matters are concurrently filed before different institutions,

with either system not knowing what is happening before the other.²⁴

None the less, unofficial linkages do occur between the traditional institutions and the formal land justice institutions. The Local Council courts do in some cases refer land disputes back to the traditional authorities and in some cases they invite the elders to attend their court hearings not only as witnesses but also to provide advice and opinions.²⁵ The Magistrate Courts also with consent and request of the applicants in some cases do the same. In the case of **Bongomin Geoffrey v Anek Anna**²⁶, for example, the plaintiff sued in his representative capacity as an administrator of the estates of his late father. He alleged that the defendant, his paternal aunt, went against custom and sold off family land without knowledge and consent of the family members. The Chief Magistrate's Court, with the willingness of the parties, referred the case back home. The Clan Leader convened a meeting; A resolution was passed and filed with the court registry. In the case of **Olweny Samuel and another v. Arach Albina**²⁷, the respondent went against custom by allocating herself 4 acres of land, without the consent of the applicant and the elders from Patiko. This led to friction between the families. The parties to the case expressed a desire to settle the matter by mediation, and the Chief Magistrate referred them to the **Rwot/Clan chief** of Patiko. The case was settled by the Patiko **Rwot** together with the Local Authority of the area

and their resolutions were forwarded to the Chief Magistrate.

It is pertinent to point out that according to the Judicature Act, the application of any customary rule is subject to that rule not being repugnant to natural justice, equity, and good conscience, or being incompatible either directly or indirectly with any written law.²⁸ Section 27 of the Land Act expressly renders void any customary rule or practice that denies women, children and disabled persons access to ownership and use or occupation of land. Most importantly, the constitution declares that it is the supreme law of the land, and it prohibits the application of any custom that is inconsistent with any of its provisions.²⁹

In conclusion, Uganda adopts both the non-incorporation and a limited incorporation or co-existence approach in dealing with traditional institutions.³⁰ Uganda legally recognises traditional institutions and grants them jurisdiction to apply and follow their local values, norms and customs in determining disputes in respect of customary tenure of land ownership. It allows the traditional institutions to co-exist with the formal court system and operate independently, i.e. they are not incorporated into the formal land justice sector. At the same time, the Ugandan Constitution and laws, mandates the traditional institutions to comply with constitutional provisions. This creates some accountability given the fact that even if traditional institutions are a given

a flexibility to apply customary norms, any decisions taken by them must comply with the human rights standards embodied in the constitution.

2.2 INTERNATIONAL REGULATORY FRAMEWORK

For the purposes of clarity, the international standards will be divided into, three main categories namely, substantive norms and standards of human rights relating to land rights of women (2.2.1.), structurally related issues of accountability of, and participation in justice forums (2.2.2.) and issues of procedure such as fairness, independence, impartiality and enforcement (2.2.3.). The latter two subsections are merely outlines while the first subsection will give a more detailed discussion on the question of protection of access to and rights to land.

2.2.1 SUBSTANTIVE NORMS AND STANDARDS OF HUMAN RIGHTS RELATING TO LAND RIGHTS OF WOMEN

No international right to land is explicit in the international legal framework. However, review of the international human rights framework as it stands makes it clear that while not wholly defined, land rights are invoked in a number of key areas. Among the few areas where explicit rights to land have been developed include the rights of women and indigenous people.

2.2.1.1 Right to own land

Article 17 of the Universal Declaration of Human Rights, hereinafter referred to as UDHR,³¹ provides everyone with the right to own property alone as well as in association with others and stipulates that no one shall be arbitrarily deprived of his property. This is expressed in the same way in the 1995 Constitution of the Republic of Uganda in article 26.

The language of Article 17 of the UDHR is broad and comprehensive. It applies to both individual and collective forms of property ownership. In interpreting article 17 of UDHR, the words “in association with” others has been noted to cover any group ownership and use of property irrespective of the numbers in a given group.³² This means that the right to property follows the individual into the association and remains with each individual member of the association.

The nature of customary tenure within Acholi Sub Region will be discussed more in depth in Section 3. However, it should briefly be noted here, that within customary land tenure in Acholi Sub Region, the language of access and use is more appropriate than the language of ownership.³³ This does not however place it outside the scope of article 17 of the UDHR.

2.2.1.2 Non-discrimination and equality of women to access and use land

The principle of non-discrimination is a cornerstone of human rights principles. It is proclaimed in Article 2 of the UDHR. Discrimination based on sex is among the forms of discrimination prohibited. The commitment to non-discrimination was clearly reiterated by the international community in the common Article 2 of the two International Covenants - on Civil and Political Rights and on Economic, Social and Cultural Rights.

As far as land rights are concerned, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) requires that State Parties “shall ensure women the right to (...) equal treatment in land and agrarian reform as well as in land resettlement schemes (...)” CEDAW also provides that both spouses must enjoy “[t]he same rights (...) in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property” in marriage.³⁴ The Convention defines discrimination as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field.”³⁵

On the African continent, a Protocol to the African Charter on Human and Peoples Rights, on the rights of women was adopted in 2003: the Maputo Protocol.³⁶ It provides for equality between women and men and outlaws discrimination against women in a number of areas, including the right to property.³⁷ The Protocol illustrates the demand for sensitivity to differences in situations and needs: It explicitly covers different groups of women: Married women (Art. 6 and 7), widows (Art. 20 and 21), women in armed conflict (Art. 11), women in economic activities and the informal sector (Art. 13e and f), elderly women (Art. 22), women with disabilities (Art. 23), and women in distress (Art. 24).

The implications of the above non-discrimination provisions is that where customary law has been recognized as part of the state's legal system, it should not discriminate against women: Decisions passed by the traditional institutions should be in line with human rights obligations.

2.2.2 PARTICIPATION

There is a wide range of human right provisions addressing women's right to participation

Article 7 of CEDAW obliges State parties to eliminate discrimination against women in the political and public life of the country. At the regional level, Article 9 of the Maputo Protocol deals with equal right to participation, including through affirmative action. Thus, Article

9.2 provides that state parties shall ensure increased and effective representation and participation of women at all levels of decision making.

According to CEDAW General Recommendation No. 23, the obligations specified under Article 7 extend to all areas of political and public life and go beyond those areas specified in Paragraphs (a) to (c) of the Article. For example, the concept of political and public life refers to the exercise of political power in executive, legislative and judicial spheres.³⁸

Accordingly, this recommendation places anybody exercising public authority or power in the position of a public authority or institution. This would therefore bring the traditional institutions that according to the Land Act are given powers to determine disputes relating to customary land tenure under this ambit. It is thus important in this regard to assess the participation of women either as adjudicators or even mediators within these institutions. Attention must be paid to issues like mechanisms for nomination and clarity on quotas for female representation, among others.

2.2.3 PROCEDURAL FAIRNESS AND DUE PROCESS

International human rights law imposes obligations of process, not only of results. Human rights standards call for a fair trial

before an independent and impartial court, as well as for the equality of all persons before such courts or tribunals. These principles have been enunciated under Article 10 of the UDHR, Article 14 of the ICCPR and Article 7 of the African Charter on Human and Peoples Rights.

The Human Rights Committee has elaborated further on these principles in its general comment No 32. It has interpreted the requirement of independence to include **inter alia**: procedure and qualifications for appointment of judges, guarantees relating to their security of tenure, and independence from the executive or judiciary. International human rights law therefore obliges states to set up clear procedures and objective criteria for appointment, suspension and dismissal of judges. In addition, the element of impartiality has been interpreted to include the obligation for judges not to allow their decisions to be influenced by personal bias or prejudice or act in ways that improperly promote interest of one party against the other.³⁹

Moreover the Human Rights Committee has specifically pointed out that Article 14 is also relevant where a state recognizes courts based on customary law and entrusts them with judicial tasks. The Committee states that it must be ensured that such courts meet the basic requirements of fair trial and other relevant guarantees set out in the covenant.⁴⁰ In addition, the Principles and guidelines to a fair trial and legal assistance in Africa 2003

under section q(c), enjoins traditional courts to comply with international human rights standards on the right to a fair trial. Section (1) defines traditional courts as a body which in a particular locality has power to resolve dispute in accordance with local customs, cultural or ethnic values, religious norms or traditions.⁴¹

Accordingly therefore, the traditional institutions are obliged to comply with the international standards of procedure and due process.

CHAPTER 3

CUSTOMARY TENURE IN ACHOLI SUB-REGION⁴²

Customary tenure within the Acholi Sub Region falls under the clan tenure which in Uganda was common in the Nilotic, Nilo Hamitic and Bakiga communities.⁴³ The clan (**kaka**) is in this regard viewed as a corporate legal entity with perpetual succession,⁴⁴ holding land on behalf of its people. A clan usually has a clearly defined area of land, the boundaries of which can be demarcated by a river, small hills or a delimiting of the gardens. Within the clan land, communal practices often co-exist with notions of individual or household's rights creating a complex system of rights holding.⁴⁵

Rwot (Chief) Picho, describing his own clan as a Clan Chief, stated that within the boundaries of the Clan land, land is allocated for exclusive use to a family (**dogola/paco**) and to the household (**ot**). Such pieces of land, once allocated, are never taken back. The rights exist in perpetuity. There are also communal lands such as grazing lands, hunting grounds, etc. which clan members communally enjoy access to. Rwot Picho however, noted that the clan is endowed with rights, roles and responsibilities to set the rules by which land is accessed, and

the social context within which the rights are claimed.⁴⁶

The following paragraphs will thus start by looking at a few conceptual or definitional issues for purposes of clarity (3.1). Thereafter they will consider in-depth, the customary norms regarding how land rights are accessed. Particular attention will be paid to women, i.e. whether they do have a right under the customary norms, to access and use land (3.2).

3.1 DEFINITIONS: LAND OWNERSHIP, LAND RIGHTS AND LAND TENURE

3.1.2 CUSTOMARY LAND TENURE

Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. It has also been defined as an institution, i.e. rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to the right to use, control, and transfer land, as well as associated responsibilities and restraints. In

simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.⁴⁷ Customary land tenure therefore refers to a system that most rural African communities operate to express and order ownership, possession, and access, and to regulate use and transfer. Unlike introduced land-holding regimes, the norms of customary tenure derive from and are sustained by the community itself, rather than from the state or state law. Although the rules which a particular community follows are known as customary law, they are rarely binding beyond the community.⁴⁸

The 1998 Land Act defines customary tenure as follows: “(...) a form of tenure applicable to a specific area of land and a specific description or class of persons, governed by rules generally accepted as binding and authoritative by a class of persons to which it applies, characterized by local customary regulations and management to individual and household ownership and at the same time providing for communal ownership and use of land”.

3.1.2 LAND “OWNERSHIP” AND “LAND BELONGS TO”

The Constitution of the Republic of Uganda makes a provision for customary tenure, as well as freeholds and leaseholds, to be claimed on the basis of ownership.⁴⁹ As seen in the description made by Rwot Picho above, land ownership in Acholi culture can be defined as a collective clan or family affair that ensures

access and enjoyment of rights to all members of the clan, the family, or the household; It excludes non-members or strangers. Land apportioned to the use of the household or family is exclusive to them, and they have a right to exclude others. Accordingly, there are land managers at all levels (from the clan to the household) who are bestowed with the responsibility of administering the land; This is done to ensure that every member is given rights to the land, and a right to say who can sell the land, as every member has a responsibility to protect land for all the clan and to make sure that the next generation will also be able to enjoy the land.⁵⁰ The land managers are stewards rather than owners. As seen from the description, the land belongs to the family within the clan, but the rights are shared in a complex way.

Accordingly, the phrase that ‘land belongs to the Clan’ does not in any way imply ownership of the same to the Clan. The sense to belong here is much closer to the idea of sovereignty. The analogical reference here is that Acholi societies, like human societies everywhere, have territorial structuring. The clans, in varying magnitudes, make claims regarding the land they occupy: It is their land and it distinguishes their relationship thereto from that of strangers or guests. It is on this basis that they set the rules by which owners say the household or family owns land, and define the social contexts within which the rights are claimed. Adoko and Levine compare this to the government’s claim

to limit the sale of land to foreigners or to set limits on what may be done on land: It is not a claim that the government owns land on which a private citizen may hold title.⁵¹ At the same time to use or infer the concept of ownership could also be misleading since future generations are also considered in possession of rights.⁵² People are thus **custodians** rather than **owners** of land. Accordingly, for purposes of our discussion here, land ownership will not be referred to. This paper will refer to land rights which include: right to access land, right to use land and right to access protection to access and use land.

3.1.3 LAND RIGHTS

We can best define this by making a distinction between land ownership and the various categories of rights, that is the rights to access and use of land. The rights to access and use according to the description of land ownership above can be defined as rights belonging to members of a land owning group such as members of a family or house hold, or even to a clan. On the other hand, ownership can be distinguished as vested in the land managers on behalf of their groups.

Generally, land rights within customary tenure are derived through membership to the clan, and membership to the clan is achieved by birth into the clan, marriage into the clan by a woman, or movement into a clan area by a non-clan member, who after a period of time living in the area is accepted and considered part of

the clan.⁵³ Land apportionment is, however, done along family and clan lines, with sons apportioned land when they become of age, i.e. when they bring a wife into the clan.⁵⁴

3.2 RIGHTS OF WOMEN UNDER CUSTOMARY TENURE

Under customary tenure, women's land access and usage rights depend primarily on their dual identities as sisters in their families of origin and wives in their families by marriage.⁵⁵ Accordingly the preceding paragraphs will describe whether or not women have rights to access and use land prior to marriage, during marriage, at widowhood, and divorce or separation.

3.2.1. PRIOR TO MARRIAGE

In the Acholi culture, prior to marriage, a woman is entitled to access and use land at her homestead or family land, as long as she remains unmarried. However, unlike the boys who are allocated a piece of land upon marriage, the girls are not. The rationale here is that all girls will eventually get married, an issue which has been pointed out as presenting a vulnerability to the unmarried girls.⁵⁶

A discussion with an elder in Orom elaborated this point further.⁵⁷ He noted that an unmarried girl has no children to feed, unlike the boy who upon marriage assumes social responsibility. However, in case a girl begot children but never leaves the fathers compound, she will be allocated land to feed her children or she

will continue to live with her mother and feed the children off her mother's land. In case her parents pass away, she can take over the land, i.e. "inherit" the land.

A case that illustrates this point further is the case of **Abur Santa Oyugi** (case scenario No.1).⁵⁸

The complainant (Santa), an unmarried woman with two children, claimed that she had lived with her parents all her life, though she sometime worked away from home. Her complaint before the Clan Head was that her cousin brothers were claiming rights of access over the same piece of land. She pointed out that during the meeting organized by the Clan Head, the Clan brothers were advised not to disturb her and her children. They however did not comply and she filed a case before the Local Council Court, which ruled in her favour. Her cousin brothers similarly defied the Local Council Court ruling. Ms Santa has now filed a case before the formal court of law to have her rights enforced.

This case illustrates three points:

1. Women can and do inherit customary land in Acholi Sub Region;
2. In adverse situation they do make use of both the informal justice mechanisms and the formal justice mechanisms;
3. The problem is not necessarily that the culture discriminates against the women, it is more that of the enforcement of the decision of the traditional institution.⁵⁹ Even in the Local Council Court Judgment, the Chair Person of the Court stated that that piece of land in dispute belonged to Santa's father and accordingly she had the right to it.⁶⁰

3.2.2 UPON MARRIAGE

Upon marriage, a woman normally enters into the clan of her husband, thereby gaining rights not only to access but also to use the clan land and to protection from any sort of deprivation.

During the Focus Group Discussion with the women's group in Orom, one of the participants expressed herself, when prompted on this issue: "I do not have any voice on land at my father's home, because I am already part of another clan by virtue of marriage and it is the responsibility of this clan to show me where I can feed their children".⁶¹

This expression illustrates that marriage is an important basis for women's claims to land access and use. It importantly also denotes the fact that it is from the husband's kin group that wives get land and it is this kin group that may in some circumstances protect her claims. It was for example noted by one elderly man that

when a woman marries into a clan, she does not only gain land rights through marriage to her husband, but also through joining extended family networks. She may in some cases be able to enforce these rights by recourse to the husband's lineage even if the husband himself is unwilling to provide land.⁶²

At all the Focus Group Discussions, the women however expressed that even if they do access the land, their husbands, as heads of the family, still have greater control over the use and apportionment of the land than they do.⁶³ At the Focus Group Discussion with the women's group in Lokung,⁶⁴ the women described the situation as being even more precarious for those in polygamous marriages, where more land is given to the favourite wife; In some instances, the more sons you have, the more you are apportioned. At the Orom Focus Group Discussion, the women leader of the group specifically stated that "as much as we have rights to access, the use of the land is still greatly controlled by the men as family heads which places women at a disadvantage."⁶⁵

3.2.3 WIDOWS

A widow, whether with or without children, takes over from her late husband all the rights and responsibilities, which he had over their family's land.

One widow in the Focus Group Discussion noted that before her husband's death, a wife already had a right to access and use the

land, although the husband, being the head of the household, held the responsibility for subdividing and safeguarding the boundaries of the land. According to her, this responsibility is assumed by the widow upon the death of her husband. She noted that in the past, the clan would appoint for the widow a protector, whose role was to defend the rights of the widow and her children; He would also in some instances inherit her as a wife. The protector however did not have any claim on the land.⁶⁶ In all the Focus Group Discussions, it was noted that wife inheritance is not a common practice because of the HIV/AIDS scourge, although in some instances a protector is still appointed, he does not inherit the widow as a wife.⁶⁷

3.2.4 SEPARATED/DIVORCED WOMEN

Separated and/or divorced women loose rights to access and use land in their husband's clan, and are accordingly expected to move back to their maiden home. This creates a situation of vulnerability for women. When women marry out of the family and attain the status of a wife, the land at her father's household is left vulnerable to acquisition by other family members.⁶⁸ In many families, the land has become scarce, and has been divided up among the brothers, who also have big families.⁶⁹ Therefore, the maiden's brothers are less willing to apportion any portion of land to the divorced and separated woman who returns back to her maiden household. In the past, there was reserved land, which was yet unallocated: Such women would no doubt

benefit from that, noted an elder.⁷⁰ It is however worth noting that only few women are aware of the right to return to their maiden home upon divorce or separation.

The case of **Margaret Acayo** (Case Scenario No. 2)⁷¹ illustrates the point that woman also retain residual land claims in their own kin groups.

Margaret Acayo approached Human Rights Focus,⁷² with a complaint against her father. Her allegation was that her father sold off all the customary land measuring approximately 50 acres without her consent, although he claimed to have obtained consent from her brothers. She stated that her concern was what would happen to her in case her relationship with her husband ended. She also raised concern about two of her siblings still below the age of 15. When Human Rights Focus scheduled a mediation which involved her father and the alleged purchaser, Margaret Acayo suggested that her father's clan should be involved. During the mediation, at Human Rights Focus offices, the Clan Head noted that since there was no dispute as to the sale, HURIFO, should allow them to sit as a clan and make a decision. He however, noted that Margaret Acayo had a valid claim and her father had no right to ignore her and her young siblings.

At the clan meeting it was accordingly decided that since the elder brothers had consented to their interests being disposed off, 5 to 8 eight acres should be apportioned for the exclusive benefit of Margaret and her 2 siblings, it was specifically noted that Margaret's father will continue to use the piece of land and upon his demise Margaret or her 2 young siblings will take over the same.

All in all, customary law within the Acholi Sub Region does give women considerable rights of both access and use of land. The norms of access to land do not discriminate against women. Women, like men, access land through social relations, and it is on the basis of the social relation as daughters, sisters, wives, widows, divorced and separated women, that women can claim their rights to access and use land.

The above discussion shows that this situation does not give women secondary rights as often asserted. Neither are their claims weaker, as seen in the cases of **Santa Abur** and **Acayo Margaret** respectively. In other words, land access for both men and women being socially embedded, claims arise out of relationships with people rather than out of property relations.

Section 3 shows that under the Acholi customs, land is owned by families, not individuals. Therefore the assertion that women do not own land, or that it is the men who own the land, is wrong. Rather, it is true to say that men do have **greater control over** land than women. Men and women have user rights – however, men do have, and exercise, greater control over land use. This is accentuated by the fact that male gender plays a central role as the primary organizing order for land access, the land being accessed through the male relations.

Section 3 also shows that the mode of land access however creates a number of vulnerabilities for women especially for widows, separated or divorced women.

CHAPTER 4

TRADITIONAL INSTITUTIONS IN ACHOLI LAND

This section takes a fairly in-depth look at traditional institutions and their role in land dispute resolution. First, the section provides a brief description of the overall structure of the traditional institution, and thereafter looks at the dispute resolution structure, particularly its composition and appointment, the principles applied in dispute resolution, procedures adopted, participation and the role of women in dispute resolution, and enforcement of the decisions.

The traditional institution is comprised of a number of chiefdoms. These chiefdoms are made up of various Clans (**Kaka**)⁷³ which are further subdivided into Hamlets (**Paco or Dogola**)⁷⁴ and further into Households (**Ot**).⁷⁵ The chiefdoms are made up of at least one royal/aristocratic clan (equivalent to a village) and several commoner clans (villages). Royal clans are headed by **Rwot Moo** (plural **Rwodi**) translated loosely in English to mean Clan Chief. It is the **Rwot Moo**/Chief who also rules the chiefdom. The commoner clans/villages are each headed by **Ladit Kaka** (plural **Ludito Kaka**) translated in English as Clan Head.

Accordingly the Clan Chief governs through these **Ludito Kaka**/Clan Heads who are referred to as the Council of elders. They are representatives of each clan/village, and each of these clans enjoys their autonomy. The **Rwot Moo**/Chief rules more by consensus.

The land dispute resolution structure emanates and is juxtaposed with the socio-political structure described before. This hierarchical structure stretches from the household level to the level of the clan:

- At the hamlet level: the **Won Ot**/Head of Household, the **Won Paco**/Head of Family and **Rwot Kweri**/Chief of the Hoe
- At the clan level: the **Atekere**, **Lawang Rwot** (Representative of the Chief), the **Ladit Kaka** (Clan Head) and the **Rwot Moo** (Chief).

NB. Diagrams illustrating the socio-political structure and the dispute resolution structure are attached to this paper as Annex 1 and 2 respectively.

4.1 COMPOSITION AND APPOINTMENT

There is no uniform description of the composition and hierarchy of this structure in Acholi Sub Region.⁷⁶ During the focus group discussions, participants from different locations and clans gave different descriptions. Accordingly, variations occur as one changes location, lineage or clan involved in a particular location. The common feature across all is that the structure stretches from the household level (**ot**) to the Clan (**kaka**) level, as noted above.

4.1.1 HOUSEHOLD AND HAMLET

A hamlet generally consists of a number of households, while a household is regarded as the smallest social unit, typically a husband, wife (or wives), and children. The difference between the hamlet and the household is that the hamlet already includes people of different agnatic descent while the household has only people of the same agnatic descent. The hamlet is basically an extended family, which could include sons of one man or of several brothers.⁷⁷ When the sons marry, they set up their own households in close proximity and close to their parents. The people within one hamlet share the same compound or fire place. The hamlets differ greatly in size, and to a less extent structure.⁷⁸

For purposes of land dispute resolution, the two most utilized leaders at this level are the Head of Family (**Won Paco/Gang/Ladit dogola**) and the Chief of the Hoe (**Rwot Kweri**). The role

of the Head of the household (**Won Ot**) is very ignorable.⁷⁹

4.1.1.1 Head of Family/ Won Paco/Gang/Ladit dogola

The Head of the Family (**Won Paco**) is the head of a hamlet (**Paco/ Dogola**). He is usually the eldest of the male heads of the households forming the Hamlet. He is chosen either by the clan, the family, or through succession.⁸⁰ As a land manager, he is tasked with, *inter alia*, the role of resolving land disputes within his jurisdiction. He usually works and consults with a number of elders within his jurisdiction. The number is not definite; It varies from hamlet to hamlet. The majority of people within the focus group discussions were adamant as to whether women were part of this composition.⁸¹ They however noted that female elders are often consulted.

4.1.1.2 Chief of the Hoe (Rwot Kweri)

The Chief of the Hoe (**Rwot Kweri**) may serve several hamlets, ranging from 2 onwards. The number of households under the Chief of the Hoe varies from village to village. The Chiefs have been described as the most appropriate authority for solving land related disputes within the communities.⁸²

The Chief of the Hoe is an elective position, and the electorates are comprised of the village assembly.⁸³ There is however, no limitation as regards the duration of time that one can serve once elected. Most of the Chiefs of the Hoe

who participated in the Focus Group Discussion had all served for over 8 years.⁸⁴ One elder observed “a new **Rwot Kweri** is elected where one can no longer serve by reason of either age, sickness, or one personally chooses to opt out”.⁸⁵

Some of the criteria for being elected to this position include high moral standard and character within the community. As one elderly lady stated during the Focus Group Discussion: “(...) if you are always involved in land wrangles with people, no one can trust you (...)”⁸⁶ Further, during one of the key informant interviews, it was pointed out that, in the past, one had to be about 50 years of age and above, although currently those younger than that are being elected.⁸⁷

When participants at the Focus Group Discussion in Lokung were prompted as to gender, they quickly pointed out that the **Rwot Kweri** has always been male, since there was also a **Rwot Okoro** (name comes from shells of a dead snail which is used for weeding), a position held by a woman.⁸⁸ Throughout the fieldwork however, the researcher only came across one **Rwot Okoro**.⁸⁹ It is also unclear what position they hold in the land dispute resolution structure. In the key informant interviews, it was pointed out that the **Rwot Okoro** is involved in the mediations as an elder and her opinions is seriously taken into account.⁹⁰ The **Rwot Okoro** at Lokung pointed out that, during a land dispute, she is helpful to women

as a key witness, because she knows the land boundaries by virtue of her position.

The Chief of the Hoe (**Rwot Kweri**) works with a committee of about 3 to 7 people, varying from place to place. The committee generally consists of at least one elder. Out of the 10 Chiefs of the Hoe (Rwodi Kweri) who participated in the Focus Group Discussion, only two had women in their committees.

4.1.2 CLAN LEVEL

A Clan generally consists of hamlets. It provides an internal environment in which households and hamlets develop.⁹¹ At the clan level, we have the **Atekere**, the **Ladit Kaka** (Clan Head), the **Lawang Rwot** (Representative of the Chief), and the **Rwot Moo** (Clan Chief).

4.1.2.1 Atekere

The **Atekere** is an elective position. The holder is elected by elders of the community. This is a colonial imposition and is dominantly a male position. The **Atekere** receives cases referred to him by the Chief of the Hoe (**Rwot Kweri**); He also handles disputes related to land use within the households.⁹² In addition to handling the land disputes, he also handles cases of domestic violence.⁹³ The **Atekere** can lead up to two clans (villages).

4.1.2.2 Clan Head (Ladit Kaka) and the Clan Chief (Rwot Moo)

The Clan Head (**Ladit Kaka**) is also an elective position. The electorates are comprised of Clan

members. The position is predominantly for males of about 45 years and above.⁹⁴ They also work with a number of elders, both male and female. During the Focus Group Discussions, there was not much mentioning of the roles of the **Ladit Kaka** in land dispute settlement.⁹⁵ Two of the **Ludito Kaka** (Clan Heads) who participated in the discussions pointed out that although they also settle land disputes between and among people within their clans, they mainly coordinate their people to the **Rwot Kweri**, the **Atekere** or the **Lawang Rwot** (representative of the Chief) in case of land disputes.⁹⁶ From the Focus Group Discussion, it appeared that their roles have been more associated with protection of clan land and hence participation in disputes between his clan and other clans.

4.1.2.3 Lawang Rwot /Representative of the Chief

It was clear from the Focus Group Discussions, that the **Lawang Rwot** is also an elective position, the holder being elected by elders within the community. In some places, it was noted that not anybody can get elected into the position: the position can be preserved for a particular clan that provides **Lawang Rwot**. In some places, the person must come from a particular household. The position is that of a 'diviner'. The **Lawang Rwot** handles disputes referred to him by the **Atekere** as well as general land disputes that have ritual implications i.e. land disputes that have been associated with matters involving death/

grievous bodily harm, and where some ritual must be performed in order to restore peace in the community.⁹⁷

4.1.2.4 Rwot Moo/Chief

The **Rwot Moo** (Clan chief) is a hereditary position. The **Rwot Moo** heads the chiefdom, and he is from a royal or aristocratic clan within the chiefdom. Nothing much was mentioned about his role in land dispute resolution between and among individuals during the Focus Group Discussions. The **Rwot Moo** works mainly through the Clan Heads, also known as council of elders, to ensure protection of the chiefdom land.

It can be noted from the above discussions that some of the positions within the land dispute resolution structure are elective though with certain restrictions varying from one position to another. The terms and conditions of service are however not clear: Once elected, one can serve for life as seen in the case of the **Rwodi Kweri** (Chiefs of the Hoe) who had each served for over a period of 8 years. Although there are no restrictions as regards gender in positions such as **Rwot Kweri**, there are no female **Rwot Kweri**. However, a number of women sit in the committees that help the **Rwot Kweri**. Women are also being consulted elders.

4.2 HANDLING OF THE DISPUTES

The paragraphs examined the composition of the land dispute resolution structure and how the leaders are appointed. The following

paragraphs present an in-depth analysis of how disputes are handled by the traditional structures, i.e. reporting of a complaint, principles adopted, procedures, enforceability of decisions, questions of impartiality, etc.

4.2.1 CHOOSING OF A DISPUTE RESOLUTION ACTOR WITHIN THE LAND DISPUTE RESOLUTION STRUCTURE

As noted from the description of the structure above, there is quite a strict hierarchical structure, in which each traditional authority or leader has a different level of authority, jurisdiction and responsibility. During the fieldwork however, the majority of the respondents noted that their choice of a traditional leader was determined by the accessibility of the traditional mechanism in terms of distance, fairness, and comfort.⁹⁸ This is in line with what scholars have praised customary dispute resolution systems for.⁹⁹

Accordingly, the forum to which a plaintiff makes a first instance call varies depending on the accessibility factors mentioned previously. At the Focus Group Discussion with the women group at Orom, the participants noted that they would go to the person who they are most comfortable with, and that they would choose a person who respects them.¹⁰⁰ Those that preferred to consult the Family Head (**Won Paco**) did so in order not to wash their dirty linen in public.

The case of **Mary Ayoo Lakot** (case scenario 3)¹⁰¹, a widow belonging to the Atura Kaka in Omiya Anyima sub-county, Kitgum District is illustrative of this choice.

Mary Ayoo Lakot approached HURIFO office¹⁰² with an allegation that her brother in-law was threatening to dispose of land that she inherited from her late husband. She however noted that she reported the case to the elders within the Hamlet (Dogola/Paco) who never agreed with her brother in law. Because of his defiance, the case was referred to the Clan Head (Ladit Kaka), who happened to be a first cousin to her late husband. She also stated that her fear was that the Clan Head (Ladit Kaka) would not help her, as he had an interest in the matter. The purported purchaser being his nephew. When prompted as to why she did not forward the case to the Rwot Kweri or the Local Council, Mary Ayoo stated that she wanted the issue settled at family level. Her request was that HURIFO should help her file the case before the court because the Clan Head (Ladit Kaka) including his other brothers were already biased.

As shown in the **Mary Ayoo** case, questions of impartiality can become very apparent. During the Focus Group Discussion, some **Rwodi**

Kweri stated that in situations where they had a personal interest involved, they disqualified themselves from mediating over the dispute.¹⁰³

4.2.2 ACCOUNTABILITY AND APPEAL STRUCTURE

Cases are not only transferred back and forth among the leaders in the hierarchy, the traditional leaders also view themselves as having complementary roles, hence they do not necessarily see themselves as playing an oversight role.

The **Rwodi Kweri** (Chiefs of the Hoe) and the **Won Paco** (heads of households) who attended the Focus Group Discussion stated that they refer the cases to the **Atekere** when they feel they cannot manage them, especially in instances where the parties completely fail to agree, or perceive them as biased. The **Atekere** on the other hand noted that where the complaint is taken straight to him, he does not refer it back. During the mediation, he requests the **Rwot Kweri** (Chief of the Hoe) and the **Won Paco** (Head of households) to attend. The **Rwot Kweri**, the **Won Paco** and the **Atekere** pointed out that where the cases involve ritual implications, they refer it to the **Lawang Rwot** (Representative of the Chief).¹⁰⁴

4.2.3 PRINCIPLES APPLIED IN DISPUTE RESOLUTIONS: SEARCH FOR HARMONY

In handling land disputes, the overriding principle is to reach a win-win agreement based on equity (fairness), restoring relationships of

the conflicting parties and promoting harmony in the family, clan and community.¹⁰⁵ Quite a number of authors have noted that this works to the advantage of very close knit societies.¹⁰⁶ The rationale is that the dispute resolutions do not take an adversarial approach by avoiding the identification of a right- and a wrongdoer or a winner or loser. This minimizes tensions and keeps in place the moral cohesion within the families, clans and community at large.¹⁰⁷

The **Akello case** (case scenario 4) is relevant here as the plaintiff accepted a compromise to leave to her uncles, two out of the five pieces of land that they had trespassed upon.¹⁰⁸

One Akello is an orphaned girl, separated, and mother of one child. When she returned to her maiden home after displacement, she found that two of her uncles had trespassed on five plots of land that originally belonged to her late father. The case was referred to the **Rwot Kaka** (Clan Head) for mediation. During the mediation the **Rwot Kaka** and most of the elders noted that, the people involved were all relatives. They noted that Akello's uncles had many sons and that the land had become too scarce to accommodate all of them. In his ruling, the **Rwot Kaka** and the elders present implored One Akello to give up 2 of the 5 gardens to her uncles. The **Rwot Kaka** noted that the persons involved in

the case would always need each other and that there was therefore no point in creating more tension. Akello accepted this ruling. She stated that she was appreciative to all the clan members and elders who stood and protected them first as mere women, but also as orphans. She also noted that these were her uncles and she will still need their help in the future, as well as that of her cousin brothers.



This case illustrates a number of issues. First, the focus on the well-being of the community does not necessarily result in clear decisions for one party against the other, since there is more focus on reconciliation than on finding a winner and a loser. Second, it raises the question of whether the focus on community reconciliation is devoid completely of consideration for the rights of the individual and, in this case, the rights of the woman. Henrysson and Joireman note that since claims are made in the context of the relationship that constructs the social system, the vitality of that social system may take precedent over individual rights.¹⁰⁹

Second, visible from Akello's statement of acceptance "**first as mere women, but also as orphans**", her vulnerability could have played a role in her accepting the compromised position. This accordingly corresponds to the assertions that the goal of harmony can be used to force

weaker parties to accept agreements and local norms, which in turn can result in discrimination against women.¹¹⁰ As Sally Engle Merry stated, by and large popular justice tends to reinforce and entrench relations of power rather than to transform them.¹¹¹ Nevertheless, it could also point to the fact that in analysing such situations, attention should be placed on whether or not the women do understand and appreciate the choices they have, such as recourse to the formal courts of law.

Third, scholars have pointed out that an advantage which arises in pluralistic frameworks is the possibility for claimants to strategically pick and choose from both formal law and positive customary elements that benefit them.¹¹² Indeed the cases presented above¹¹³ show that differences in knowledge and power relations play a very critical role in enabling women to exercise their options. In the **Mary Ayoo Lakot** case (case scenario 3) the plaintiff realised that keeping the matter within the family would not render her justice: She utilised her knowledge of the existing option to file a case before the formal court of law. The challenges are of course greater for those who do not have knowledge of existing options, as in the case of One Akello (case scenario 4), or those that feel too powerless even to make use of the traditional institutions.

Finally, the **Akello** case (case scenario 4) underlines the ability of the traditional institutions to protect interests that the formal

courts would perhaps disregard. In the present case, one of the plots of land was actually attributed for the benefit of an illegitimate male child whose father prior to death had sold off plots of land that he could have inherited. Legally speaking, these uncles who had trespassed on Akello's pieces of land had no legal obligation towards this boy, who in the end got a plot of land from One Akello.¹¹⁴ The same scenario can be projected on the case of cohabitants who lose their partners. Under the Succession Act, in case a husband dies intestate, 15% of his property goes to his widow or widows.¹¹⁵ As women gain access to customary land through marriage,¹¹⁶ a woman who cohabits and loses her partner prior to marriage stands without property unless her partner dies testate and leaves property for her in his will. In such a case, the property left to the woman cannot include his right to use customary land. Women in this situation may have the possibility of returning to their paternal homes.¹¹⁷

A Clan Head in Orom noted that in such cases, he would look at the welfare of the children and would allow such a woman to stay and look after her children. In instances, where the woman has no children, her fate would depend on whether she can remarry within the clan, in another clan or return to her paternal home.¹¹⁸

4.2.4 PARTICIPATION, ROLE AND POSITION OF WOMEN IN THE DISPUTE RESOLUTION STRUCTURE

As noted in 4.2.1 above, most of the leaders that are concerned with land dispute resolution are predominantly male.¹¹⁹ However, there seems to be more openness in having women as committee members in the capacity of an elder or even vice-chair person. Of the ten **Rwodi Kweri** (Chiefs of the Hoe) present during the Focus Group Discussions, two had women on their committees and the majority stated that they invite the women elders most of the time, though not as part of the committee. A recent research by Burke also indicates that approximately one third of the members in the traditional courts are women.¹²⁰

It is worth noting that the limited number of women in these traditional structures has not prevented their access to these structures. A point of concern however is their participation during the proceedings, which is still very low. The middle-aged women were assertive but the elderly only spoke when consulted.¹²¹

The importance of the visibility of women in these positions cannot be underrated. It is important for women to be able to give meaningful inputs into the affairs of the institution that plays a key role in shaping and enforcing customary norms. It is however, also pertinent to take the concern beyond mere absence from visible positions of leadership, and to look at the perception of

women's membership status in the traditional institution.¹²²

As noted earlier in Section 3, land acquisition and usage is based on clan membership, which is largely patrilineal, with women acquiring land through their male relations either as daughters, sisters or wives. As one elder noted, women are considered as visitors: before marriage they belong to the father's clan, after marriage to the husband's clan, and after separation or divorce they go back to the father's clan.¹²³ The elderly women who are consulted are more permanent members of their community, and have gained legitimacy and authority over time, compared to, for example, a newly married young woman. Accordingly, the challenge is not so much to prove that women are part of the decision-making processes, but rather to place **all** women in a situation where their competence counts and their authority is acceptable and legitimate.

4.2.5 PROCEDURE

There is no written procedure before the traditional institutions: The procedure is generally flexible and varies from place to place. In general, whenever a complaint is lodged, a letter is written to the person against who the complaint is made, pointing out a time, date, and place for mediation. Participation during the mediation is voluntary and public; both parties usually come with their witnesses. At all the Focus Group Discussions, it was

unanimously appreciated that both parties have an equal right to be heard, call witnesses and present evidence.¹²⁴ Generally, the mediation process is based on mediation and conciliation. One Chief of the Hoe (**Rwot Kweri**) at Agoro describing the process stated that "whenever we have listened to both the complainants and the respondents, including their witnesses, and have heard general views and advice from the elders and some members of the general public present we do come to a decision, yet it is up to the parties to accept it or not. We also inform them of the option to go to the Local Council or the court, in case they are not satisfied with the outcome of the mediation".¹²⁵

This description is indicative of some form of light arbitration being utilised by virtue of the decision made: However it is left to the discretion of the parties to accept or reject the decision. The cases are usually resolved within days or sometimes weeks.¹²⁶ However, the voluntariness should be weighed against factors such as the affordability to take a case to court or even the high risk of standing up against the authority of a traditional authority.

Finally, the recording of the procedure varies. According to a study done by Burke, 84% claimed that an agreement signed by both parties and witnessed by people present during the mediation, is written down, while the remainder verbally inform the parties of the conclusion.¹²⁷

4.2.6 ENFORCEMENT OF THE DECISIONS

There is no provision in the law that stipulates how the decisions of the traditional institutions are to be enforced. Accordingly, as the outcome of the traditional procedures is most often mediation, it is not binding on any of the parties. During the Focus Group Discussions it was pointed out that the parties are under a moral obligation to respect the decisions.¹²⁸ Thus social pressure plays a powerful role in achieving compliance. Disobeying a final ruling is tantamount to disobeying the entire community and may attract social ostracism.¹²⁹

Generally however, whenever the decisions of the traditional leaders are not respected, the affected party who cannot enforce the decision files a case with either the Local Council Court or with the Magistrates Court.¹³⁰ In this situation, the case is taken as a fresh suit, and the mediation results may be used as evidence in proceedings before the court. However the court can come out with a judgment that differs markedly from the mediation reached by the traditional institution.

All in all, in dealing with disputes, it is notable from the forgoing discussions, that despite the strict hierarchy in the dispute resolution structure, the complainants still 'forum shop' within the tiers in the hierarchy. Accordingly, there is no such thing as appeals or even supervision roles by those higher in the hierarchy. The traditional leaders or actors consider their roles as complimentary and thus

not as a checks and balance role: Cases are forwarded or referred based on failure by one traditional leader to enable or persuade the parties to reach a compromise.

Further, participation of women both as members of the dispute resolution structure, and generally during the mediations, which are open to any member of the public, is still quite low compared to the participation of their male counterparts. In addition, as seen in the case of **Akello**, the overall goal of harmony might, in some cases, work to the disadvantage of the weaker parties. Finally the above discussions have also presented a challenge as concerns the enforcement of the decision, which is highly based on social pressure.

CHAPTER 5

STRENGTHS, CHALLENGES, OPPORTUNITIES AND RECOMMENDATIONS

The question that this research paper sought to answer is: Is it possible to identify and use windows of opportunity under traditional institutions dispute resolution mechanisms, to enable women to access justice in disputes on land held under customary tenure in Acholi Sub Region? The discussions in the previous Sections have presented clear strengths, but also a significant number of weaknesses as well as a number of challenges, and windows of opportunity. These concluding remarks recap by way of outline, a few of those strengths, weaknesses, challenges and opportunities. It also suggests areas in which opportunities present themselves, a nexus of common principles or constitutionally enshrined legal safeguards to protect women. It will thus begin by recapping the strengths, weaknesses, challenges, opportunities. Recommendations will be dealt with concurrently.

5.1 STRENGTHS

The strengths that have been identified in the discussions above include legitimacy, flexibility - both in terms of distance, cost and finding solutions - and the speediness of the

mediations. The following paragraphs will briefly discuss these advantages.

5.1.1 ARE WE ROMANTICISING THE PAST: QUESTION OF LEGITIMACY AND LOCAL AUTHORITY?

Legitimacy denotes the acceptance of the authority of an institution i.e. suggests that such an institution has authority in the community to perform its functions. It has been noted that legitimacy does not flow from external factors like legal recognition, but from the society, for instance, the community's recognition that the institution has the ability and authority to amicably resolve disputes.¹³¹

A study conducted by the World Bank in Northern Uganda indicates that quite a number of people still consult the traditional leaders to resolve their land disputes, though in varying degrees at the different times during and after displacement.¹³²

Further, it has been noted that despite the traditional authorities having been weakened by not only internal displacements but also by

the colonial and successive governments, the majority of the community members still retain considerable respect for them.¹³³ Accordingly, traditional institutions are still in most instances the courts of first instance and are supported by the Local Councils that rely heavily on their structures and services.¹³⁴ This is in line with what most participants during the Focus Group Discussions noted: They prefer to take their disputes before traditional leaders. Another related factor in this regard is the ability of these traditional leaders to restore harmonious relations. During the Focus Group discussions, the majority of the respondents noted that their preference for a traditional leader was based on the ability of these leaders to restore harmony between and among the disputants (see Section 1 and subsection 4.2.3), most of whom live within the same locality and have social relations between and among them (see Section 3).

5.1.2 ACCESSIBILITY IN TERMS OF DISTANCE, COST, FLEXIBILITY AND SPEEDINESS

The discussions show that traditional institutions are very accessible in terms of distance. As seen in Section 4, traditional institutions are situated and based right from the household level which is the smallest unit within the society. This is - in addition to being a speedy way of solving disputes - also, less costly and informal. The discussions have shown that cases are resolved in weeks and sometimes even in days (4.2.5). The case of **Akello** (case scenario No. 4) and that of

Margaret **Acayo** (case scenario No. 2) were both resolved within three weeks. This element is very important in a context where the majority of the population relies on land as a source of livelihood.

The flexibility both in procedure and in the way in which the traditional leaders deal with cases proved to be a great strength. The actors forge solutions and provide remedies socially tailored to the context of each case (case of **Akello**, case scenario No. 4). This flexibility provides an opportunity to bring about reform at the local level. As shown in 4.2.4, there is already a positive attitude towards allowing women to sit on the committees of land dispute resolution structures, besides consulting them as elders.

5.2 CHALLENGES, OPPORTUNITIES AND RECOMMENDATIONS

This subsection will highlight the challenges, weaknesses and opportunities which have emerged from the preceding discussions; at the same time, it will make some recommendations. The first part deals with weaknesses and challenges identified from lack of linkages between the two systems (5.2.1), while the second part looks at challenges but also opportunities, such as those identified in norms applied in the resolution of disputes, participation of women, procedure, due process and accountability (5.2.2). The final paragraph will look at the enabling provisions of the law, which also provides an opportunity (5.2.3).

5.2.1 LACK OF LINKAGES BETWEEN TRADITIONAL INSTITUTIONS AND THE FORMAL INSTITUTION

As noted in Section 1, there is no official linkage between the two systems: they operate in parallel to each other, and as such do not complement each other. They indeed work as two distinct and separate systems. This has led to forum shopping with the weakest individuals losing out, as the stronger party always has the upper hand in choosing the forum that will determine the outcome.¹³⁵ Several propositions have been made in this regard, such as a 'systemisation' of the dispute systems.¹³⁶ It has been suggested that 'systemisation' can take the form of establishing a single judicial pathway, meaning that all cases concerning customary tenure are first heard by the traditional institutions, and can then be appealed to the formal courts.¹³⁷ This would in addition to dealing with the problem of forum shopping, also enable the decisions of the traditional institutions to be enforced through the formal courts. Besides, it would also create an opportunity for the decisions of the traditional institutions to be surveyed by the state courts.

On the other hand, other studies have pointed out that linking the two systems tends to undermine the positive attributes of the informal system. According to Penal Reform International, this includes "the voluntary nature of the process being undermined by the presence of state coercion. As a result they

no longer rely on social sanctions, and public participation loses its primary importance. At the same time, decisions which do not conform to procedural requirements or which deviate from the strict law in the interest of reconciliation, may be reviewed and overturned on appeal to higher courts. Procedural requirements invariably become greater, and public participation is curtailed."¹³⁸ Besides, the delays associated with formal adjudication will infect the informal justice processes. In fact, it has been described elsewhere that the mixture of the two systems is like a marriage of inconvenience which does not augur well for the realisation of the objectives behind the use of informal processes.¹³⁹

Accordingly, I would argue that the two systems can still be officially linked and aligned without necessarily incorporating the traditional institution into the formal justice system. I propose that principles and guidelines could be passed, establishing a clear communication line, for example by encouraging people to make use of the traditional institutions as a first instance forum; Where they do not agree with the mediation results, they can then file a case before the Local Council courts as courts of first instance. Once the Local Council courts take on a case, the traditional institutions should not continue handling the case, unless both parties consent to the case being transferred back to the traditional institutions. In my opinion, this would still allow people to 'shop for justice' and reap the advantages that may arise from

the system they consider appropriate. At the same time, it would minimize the exploitation that comes with forum shopping to the disadvantage of the vulnerable. In addition, it will also preserve the voluntary nature of attendance before the traditional institutions.

It is paramount that attendance before traditional institutions should remain entirely voluntary and their decisions non-binding. The disputants should be free to approach the formal courts if they are dissatisfied. As we have seen in the cases of **Ayo** and **Abur** (Case scenarios 1 and 2)¹⁴⁰ people do make use of these options. This would of course mean making the formal justice more accessible: Legal education could be one means, whereby community awareness programs could be designed to unpack the formal justice system, conveying its authority and its scope of jurisdiction.

5.2.2 BUILDING ON THE EXISTING POSITIVE ASPECTS

As noted in the introduction, the discussions in the following paragraphs identify weaknesses, but also positive aspects and accordingly make recommendations based on the windows of opportunity, which have been identified.

5.2.2.1 Customary norms regarding women's access and use of land under customary tenure

As seen in Section 4, the norms regarding customary tenure have provisions for protecting women's access and use of land during

marriage, in the event of the husband's death, the separation of the spouses or even when the women do not get married. Both men and women do not own land, but both access lands through their social relations. The distinction is that whereas the men **access** land as sons the women access land based on their male relations (as daughters or wives). Accordingly, if the traditional institutions treat the cases on the basis of the claim (as sons, wives, sisters, daughters), both men and women have access to land on the basis of their social relations.

However, as much as both men and women have a right to use the land, the power relations within the family still pose a great challenge to issues of **control and land use**. As seen in Section 5, the head of the household is male save for the case of widows. The research has shown that a woman's right to use the land at household level is often subjected to the authority of her husband, and before marriage to that of her father or brother (4.2.2). This places women in an unequal position vis-à-vis men. The CEDAW makes it clear that both sexes should have the same rights in respect of not only acquisition but also management, administration and disposal of the land: This raises a clear human rights issue.

The other challenge that arises in respect of these norms is that they remain largely undocumented, hence resulting in a number of misunderstandings and misconceptions.¹⁴¹ A number of observations have been made to

the effect that different people have different understandings of the customs. It has also been noted that the elders that know the customs are dying out, hence leading to a distortion for personal gain.¹⁴² Efforts have however been made to document these norms into what has been called Acholi Practices, Principles, Rights and Responsibilities (PPRR).¹⁴³ This is a recommendable effort and a step forward. However, it has also been subject to criticism: The consultation process was not deemed broad enough, as only 38% of the traditional leaders knew of the existence of the PPRR across the region.¹⁴⁴

I do recommend documentation of these norms because of the consistency, public awareness, and knowledge as well as the potential advantage of demystifying the myth in these customs. Nevertheless, It is my considered opinion that a lot of caution should be taken as to the status of the document, i.e. whether the norms should be codified into a legal document hence making it a binding document, or not. Customary norms are by nature constantly evolving. Making them into a legal document may rigidify them; negate their flexibility, making them unable to adapt to changing conditions and community needs.

5.2.2.2 Participation of women

The findings mentioned in Section 4 reveal that only about one third of the people that sit on the dispute resolution mechanisms are women. Positions such as the **Atekere**, **Lawang Rwot**

(Representative of the Chief), and **Ladit Kaka** (Clan Head) are preserved predominantly for men, although they do consult with the elderly women. It should be noted that even though women participation is still low, there is indeed some willingness and positive attitude towards having women on these committees (4.2.4). Besides, CEDAW and the Maputo Protocol lay down no hard and fast rule as to which positions women should occupy. The emphasis is more on the fact that gender should not be a restriction when it comes to whether one participates in a leadership position or not. Regarding a position such as Clan Head (**Ladit Kaka**), which is an elective one, it would be discriminatory to prevent women from being elected on the basis of their gender. In case of a dispute regarding the eligibility of women to occupy these positions, a court could render a decision in favour of women. This decision would in turn be difficult to implement, as the authority of traditional institutions relies greatly on social legitimacy and adherence by the community.

My recommendation is therefore, that the existing opportunities should first be usurped as a starting point of focus: as there is a positive attitude of accepting women as part of the committees, more women should be empowered, and encouraged to become part of these committees.

In addition, a more pragmatic step could be taken to introduce quotas as a way to increase

women's participation. Quotas may help shift the power balance in favour of women, and give them a stronger voice where local norms need to be articulated and access to resources negotiated.¹⁴⁵

5.2.2.3 Procedure and due process

Section 5 pointed out that some positions in the traditional institutions are elective. The discussions also showed that most of the leaders, once elected, stay on for life, because there is no clear set of procedures pertaining to the terms and conditions of their tenure (4.1.1.2).

Since there is already a possibility of, and local support for some of the positions to be elective, I propose that these procedures be laid down in writing, e.g. in form of a regulation that carefully specifies the terms and conditions of tenure. This would ensure downward accountability to the end users. It must be noted that this is impossible when it comes to the positions that are purely hereditary.

On the same note, work could also be done at the grassroots level by empowering the weak and marginalized groups to demand a better quality of justice from the traditional leaders. This could promote a downward accountability.

In addition, the capacity of the actors within the dispute resolution structure of the traditional institutions could be built on issues of procedural fair standard requirements such as independence and impartiality.

5.2.3 ENABLING PROVISIONS OF THE CONSTITUTION

The provisions of the Constitution and the Land Act provide an enabling environment for challenging practices and customs that are not in line with human rights principles. As explained earlier in Section 1 and 2, they provide checks and balances to the customary norms and practices of traditional institutions. They subject cultures, customs and practices of traditional institutions to the constitutional provisions of equality and dignity for all. This opportunity for human rights to be used as a yard stick to measure the traditional institutions, should be taken beyond paper, and put into practice.

First and foremost this can be done through the use of the judiciary, as it is possible for individuals to challenge decisions or even practices of traditional institutions before the courts of law. The case of **Bruno Kiwuwa v. Ivan Serunkuma & Juliet Namazzi**¹⁴⁶ particularly sheds light on the courts' willingness towards assessing the compatibility of custom with human rights principles enshrined in the bill of rights. In this case, the court upheld custom on the grounds that the custom was consistent with the bill of rights.

In this case, the plaintiff (i.e. the father of the bride) instituted a suit to prevent celebration of a Christian marriage of the first and second defendants (groom and bride respectively). The plaintiff's argument was that the bride and

groom were Baganda by tribe, and belonged to the same Ndiga (sheep) clan, and were therefore prevented by an established custom from marrying. The plaintiff further argued that articles 37 of the Constitution, and sections 14 and 15 of the Judicature Act mandate the court to enforce the custom enjoyed by the Baganda tribe. The defendants argued that the custom did not apply to them as they intended to contract a marriage under the Marriage Act and not a customary marriage to which the custom would apply. The issue before the court was whether the defendants could lawfully contract a marriage under the Marriage Act.

The court found that the custom in question related to the institution of marriage among the Baganda and that it protected the family which is a basic unit of any human society. The court held that the custom was not incompatible with any written law, especially the Marriage Act, and was not repugnant to natural justice, equity, and good conscience.

A number of critical comments and observations could be made concerning this case, among which, is whether a civil law marriage under the Marriage Act has to comply with custom. However, what is relevant for the purpose of our discussion here is the court's argument. The court observes that it is duty bound to promote the application and observance of customary laws that enhance the dignity and wellbeing of Ugandans. In coming to a conclusion, the court gives

great consideration to the right to marry and found a family. It states in particular, that the observance of the custom in question does not violate the right to marry and found a family. Accordingly, the court declares the defendants' marriage illegal, null and void by reason of the custom enjoyed by the Baganda tribe.

In this case, it appears that one may petition courts for enforcement of custom considered as custom that must be protected. Based on the reasoning of the court, it must therefore also be possible to challenge **negative** customary practices before courts on a case-by-case basis.¹⁴⁷ Hence the court, in return, is given an opportunity to reconcile and align aspects of custom with human rights standards.

An active role may also be played by the Uganda Human Rights Commission in monitoring the compliance of the practices of traditional institutions with human rights standards. The Commission which was established under the 1995 Ugandan Constitution has the mandate to **inter alia** monitor the on-going human rights situation in the country, conduct human rights education, and monitor the government's compliance with international human rights treaties. Uganda is a signatory to most of the international treaties including CEDAW, ICCPR, AfCHPR, and Maputo Protocol. As noted in Section 2, all these conventions oblige the government to take positive steps to eliminate discriminatory practices on grounds of, among others, gender.

Accordingly, based on the Constitution's requirement for the traditional institutions to comply with human rights standards, the Commission can play a monitoring role here. Besides, the Commission could also take pragmatic steps, under its mandate, to conduct human rights education in order to raise awareness among the leaders in the traditional institutions on basic human rights principles. Engaging with them would grant the Commission an opportunity to meaningfully dialogue with the leaders of this institution.

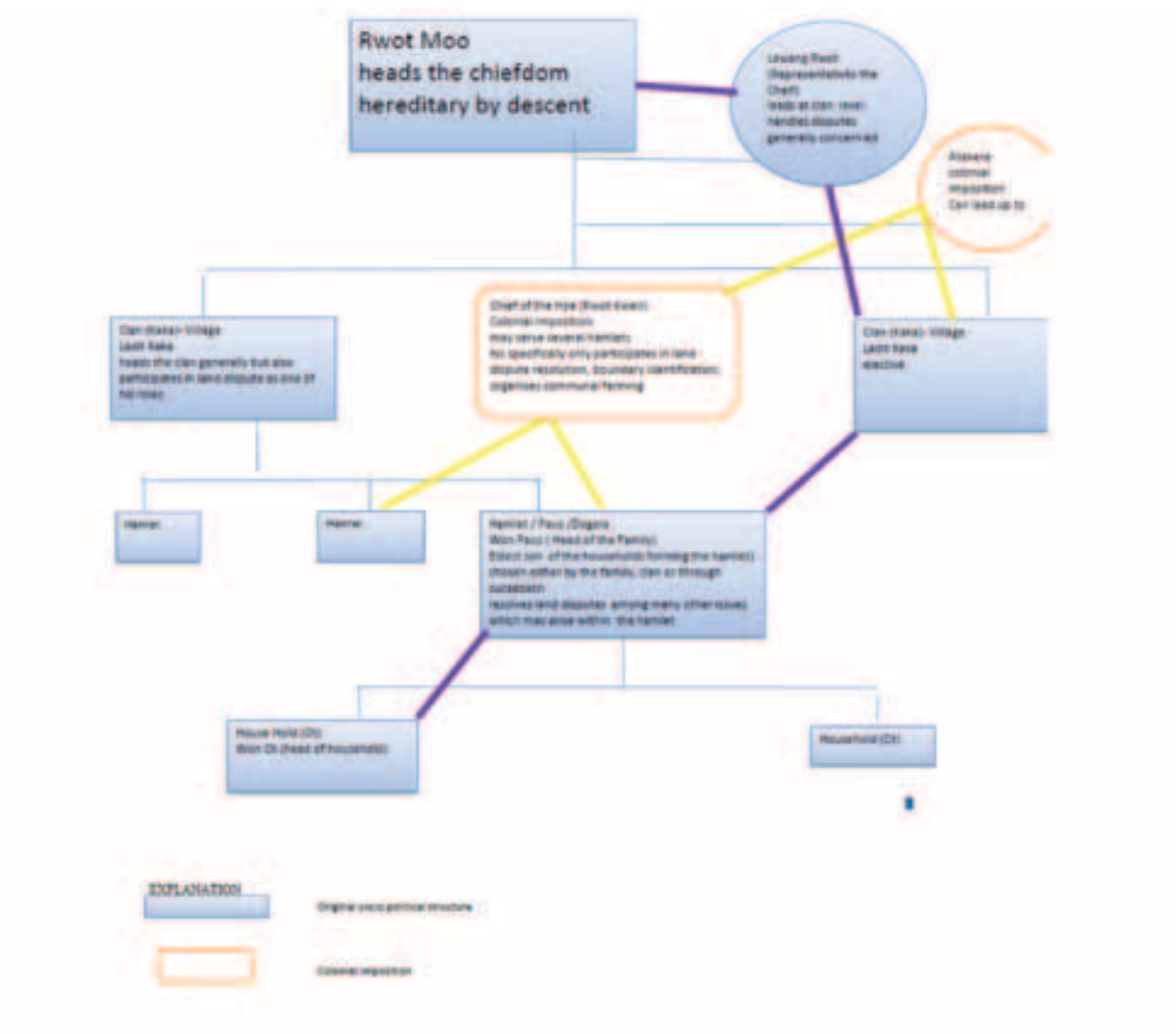
All in all, the research has identified windows of opportunity under the traditional institutions' dispute resolution mechanism, to enable women to access justice in disputes over land held under customary tenure in Acholi Sub Region, Northern Uganda. The windows of opportunity identified include:

- positive norms that protect women's rights to access and use land;
- willingness and positive attitudes towards having women participate as members of committees in the dispute resolution structure;
- electiveness of some of the positions within the dispute resolution structure;
- enabling provisions of the Constitution and the law.

These windows of opportunity do present a great opportunity for engagement with the traditional institutions, without eroding the benefits that draw people to them, and yet at the same time bringing them in line with human rights principles. They can indeed be utilized to enable and strengthen women's access to justice.

ANNEXES

TRADITIONAL STRUCTURE AND CONFLICT RESOLUTION OF LAND DISPUTES



NOTES

1 Penal Reform International: "Access To Justice In Sub-Saharan Africa: The Role Of Traditional And Informal Justice Systems", London: Astron Printers, November 2000, p. 5.

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2 Focused Group Discussion in Orom Sub County, Lamwo District on 11/05/2012 at the Sub County Head Quarters.

3 See for example: Connolly, Brynna: "Non-State Justice Systems and the State: Proposals for a Recognition Typology", Connecticut Law Rev. vol.38, 2005, p. 239.

4 Burke, Christopher; Omiat Egaru, Emmanuel: **Identification of Good Practices in Land Conflict Resolution in Acholi**, United Nations Peace building Program, Kampala, November 2011, p. 9.

5 Chirayath, Leila; Sage, Caroline; Woolcock, Michael: "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems", background paper for the World Development Report 2006: Equity and Development, July 2005, p. 4.

6 Wehrmann, Babette: **Land Conflicts: A practical guide to dealing with land disputes**, Eschborn, 2008.

7 See, for example: Penal Reform International: op cit (note 1).

8 Vaughan, Jenny; Stewart, Tim: **Land Disputes in Acholiland, A Conflict and Market Assessment**, Mercy Corps, 2011, p.

4. They estimate that between 33% to 55% of the Acholi have experienced land related conflicts since 2006.

9 Burke, Christopher & Omiat Egaru, Emmanuel: op cit (note 4), p. 19.

10 Hetz, P.E. et al: **Land Matters in Northern Uganda: Anything Grows; Anything Goes** Post-conflict "conflicts" lie in Land, Lessons Learned: Property Rights and Natural Resources Management (Global Land Tenure II) Task Order USAID, 2007 at <http://usaidlandtenure.net/uganda/land-matters-in-northern-uganda>.

11 Human Rights Focus is a human rights organisation with a countrywide mandate of promoting human rights HURIFO's head office is located in Gulu District in Northern Uganda. Web page: www.hurifo.org, www.

humanrightsuganda.org, Email: hurifo@hurifo.org

- 12 See for example, World Bank, Uganda: **Post-Conflict Land Policy and Administration Options: the Case of Northern Uganda**, May 2009, report No. 46110-UG; Coldham, Simon: "Land Reform and Customary Rights: The Case of Uganda", *Journal of African Law*, Vol. 44, Issue 1, 2000, pp. 65-77; Tindifa, Sam. B.: **Land Rights and Peace-building in Gulu District, Northern Uganda: Towards an Holistic Approach**, HUR�PEC Working Paper No.7, May 2007; IOM, UNDP & NRC: **Land or Else : Land based Conflict, Vulnerability, and Disintegration in Northern Uganda study**, October 2010; Birabwa-Nsubuga, Christine: "A Critical Look at the Property Rights of Customarily Married Women in Uganda" – Based upon Cases from the Uganda Human Rights Commission, in: Lagoutte, Stéphanie; Svaneberg, Nina (eds): **Women and Children's Rights: African Views**, Paris: Karthala, 2011, pp. 251-291.
- 13 Acholi Sub Region is composed of the districts of Gulu, Amuru, Nwoya, Kitgum, Lamwo, Pader, Agago and Omoro.

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- 14 On cultural relativism, see for example: An-Na'im, Abdullahi Ahmed: "Problems of Universal Cultural Legitimacy for Human Rights", in An-Na'im, A. A.; Deng, F. (eds.): *Human Rights in Africa: Cross cultural Perspectives*, Washington, DC: The Brookings Institution, 1990, pp. 331-367; Karin Mickelson: "How Universal is the Universal Declaration?", *University of New Brunswick Law Journal* No. 47, 1998, pp. 26- 36; An-Na'im, A. A.: **Islam and Human Rights: Beyond the Universality Debate: Religion and the Universality of Human Rights**, *Proceedings of the 94th Annual Meeting of the American Association of International Law*, 94 ASIL PROC 214, 2000, p. 95-101.
- 15 An-Na'im, A. A.: *Ibid.*
- 16 UNDP, UN WOMEN & UNICEF: **Informal Justice Systems, Charting a Course for Human Rights Based Engagement**, UN Publication, 2012 p. 32; Merry, S. E.: "Legal Pluralism and Transnational Culture: The Ka Ho'okolokonui Kanaka maolo Tribunal, Hawaii 1993", in Wilson, R. A. (ed.): **Human Rights, Culture and Context: Anthropological Perspectives**, London: Pluto Press, 1997, p. 29. She notes that beyond, criticising the discourse of human rights as Western liberal legalist ideas, the concept of human rights could be interpreted and transformed in a two-way process of incorporation of local understanding and the addition of global discourse. She refers to this process as 'globalisation of human rights'.
- 17 Uganda Constitution, Article 33(6).
- 18 Uganda 1995 Constitution, Article 246(1).
- 19 Land Act, Cap 227, Laws of Uganda, 2000.
- 20 Focus Group Discussions held at Orom sub-county, Agoro sub-county, Lokung

sub-county, and Madi Opei sub-county respectively, in the period April and May 2012.

21 Ibid.

22 Local Council Court Act, 2006, third schedule mandates the Local Council courts to deal with disputes on land held under customary tenure.

23 Rugadya, Margaret A.; Nsamba-Gayiiya, Eddie; Kamusiime, Herbert: **Northern Uganda Land Study, Analysis Of Post Conflict Land Policy And Land Administration: A Survey Of IDP Return And Resettlement Issues And Lesson, Acholi And Lango Regions**. Study for the World Bank, to input into Northern Uganda Peace, Recovery and Development Plan (PRDP) and the Draft National Land Policy, February 2008, p. 16.

24 Focus Group Discussion (note 20).

25 Focus Group Discussion (note 20).

26 Misc. Application 269 of 2009.

27 Civil Suit No. 33 of 2003.

28 Section 13, Judicature Act (1996), Cap 13, Laws of Uganda.

29 Uganda 1995 Constitution, Article 2.

30 For more in-depth discussions on the different approaches of engaging with non-state justice systems, see: Connolly, B.: *op cit* (note 3).

31 Universal Declaration of Human Rights 1948 adopted by the General Assembly of the United Nations on December 10th, 1948.

32 Morsink, Johannes: **The Universal Declaration Of Human Rights: Origins,**

Drafting And Intent, Pennsylvania Studies in Human Rights, University of Pennsylvania Press, 1999, p. 147.

33 This land tenure system is not necessarily private nor it is purely communal: Much of the land is held by the family, clan, sub-clan vested in the heads of families and clans. See below Section 3.

34 Article 14 of the Convention on Elimination of All Forms of Discrimination against Women Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19. Uganda ratified the CEDAW on July 22nd, 1985.

35 CEDAW, Article 1.

36 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the African Union on July 11, 2003 in Maputo, Mozambique (herein after "The Maputo Protocol"). Uganda became the 28th country to ratify the Protocol on July 23, 2010. On the Maputo Protocol, see for example: Karugonjo-Segawa, Roselyn: "How African Law Protects Women: The Maputo Protocol", in Lagoutte, Stéphanie; Svaneberg, Nina (eds.): *Women and Children's Rights: African Views*, Paris: Karthala, 2011, pp. 27-60.

37 Articles 6 and 7 of the Maputo Protocol.

38 U.N. Committee on the Elimination of Discrimination against Women, General Recommendation No. 23, Para. 5, 16th

Session, 1997 (UN Doc A/52/38/Rev. 1).

39 Human Rights Committee, General Comment No. 32, August 2007(CCPR/C/GC/32 23), particularly paragraphs 8, 16, 19 and 21.

40 Ibid. paragraph 24.

41 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission at its 33rd Session in Niamey, Niger on the 29 May 2003 (DOC/OS(XXX)247).

CUSTOMARY TENURE IN ACHOLI SUB-REGION

42 This analysis of customary tenure in Acholi sub-region is based on pre-existing literature on Acholi traditional practices as well as on fieldwork carried out through Focus Group Discussions held at Orom sub-county, Agoro sub-county, Lokung sub-county, and Madi Opei sub-county respectively, in the period April and May 2012.

43 Mutagambwa, J.T.: Source book of Uganda's land law, Kampala: Fountain Pub Ltd, p. 66.

44 Ibid. p. 27.

45 Focus group Discussion (note 20).

46 Key Informant Interview with Rwot Picho on July 11, 2012. See also: The Acholi Religious Leaders Peace Initiative (ARLPI): **Resolving Land Conflict in Acholiland: A Guide for Community Based Stakeholders**, June 2010, at pt. 8; Ker Kwaro Acholi: Principles and Practices of Customary Tenure in

Acholiland, Gulu, Uganda: Ker Kwaro Acholi, June 2008 (English and Acholi versions).

47 FAO Corporate Document Repository available at:
www.fao.org/docrep/005/Y4307E/y4307e05.htm

48 Alden Wily, Liz: **Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa**, Brief No. 1 of 5, Rights and Resources Initiatives Publication, available at:

http://www.rightsandresources.org/documents/files/doc_4699.pdf.

49 Uganda Constitution, Article 237.

50 Focus Group Discussion (note 20)

51 Adoko, Judy; Levine, Simon: "Falling Between Two Stools. How Women's Land Rights are Lost Between State and Customary Law, Apac District, Northern Uganda", in: Englert, Birgit and Daley, Elizabeth (eds): **Women's Land Rights and Privatization in Eastern Africa**, Oxford: James Currey, Nairobi: EAEP; Kampala: Fountain Publishers, 2008, p. 107.

52 Ker Kwaro Acholi: **Principles and Practices of Customary Tenure in Acholiland** (note 46), p. 16.

53 Interview with Rwot Picho (note 46).

54 Ibid.

55 Cotula, Lorenzo (ed.): **Changes in "Customary" Land Tenure Systems in Africa**, LSP Working Paper No. 38, International Institute for Environment and Development (IIED), 2006, p. 55.

- 56 Adoko, Judy; Akin, Jeremy; Knight, Rachael: **Understanding and Strengthening Women's Land Rights Under Customary Tenure in Uganda**, LEMU Publication (Land and Equity Movement in Uganda), 2011, pp. 3-4.
- 57 Focus Group Discussion, Orom sub-county on 11th of May 2012.
- 58 Case initially settled at a clan level, later filed before Local Council Court 11, and subsequently 111, and now before Kitgum Magistrates Court.
- 59 The enforceability of the decisions of traditional institutions will be elaborated on further in the next section on traditional institutions (section 4).
- 60 Ordinarily she should have been filing for execution of the judgment of the Local Council Court. However, the judgement in the case of Rubaramira Ruranga v. Electoral Commission and the Attorney General Constitutional Petition No. 21 of 2006 have had the effect that Local Council Courts have been considered to operate illegally.
- 61 Focus Group Discussion with the women's group (Anga Konya) in Orom sub-county, 12th of May 2012.
- 62 Focus Group Discussion (note 20).
- 63 Ibid.
- 64 Focus Group Discussion Lokung sub-county (note 20).
- 65 Focus Group Discussion with 'Anga Konya Women group' in Orom sub-county, Kitgum District, 12th of May 2012.
- 66 Focus Group Discussion with the women's

group (St. Joseph's Women and Youth Forum for Micro Support and Development) in Agoro sub-county, Lamwo District, 24th of April 2012.

- 67 Focus Group Discussion (note 20).
- 68 Cotula, Lorenzo: op cit (note 55), p. 55.
- 69 Focus Group Discussion (note 20).
- 70 Focus Group Discussion (note 20). See also Adoko, Judy: "Vulnerability of Land Rights in Customary Land Tenure in Acholiland", The Examiner: Quarterly Publication of Human Rights Focus, Issue No. 3, 2005.
- 71 Human Rights Focus, ref. HRF/175/ 2012.
- 72 Human Rights Focus (HURIFO) is an indigenous NGO that among others offers legal aid services to indigent poor (note 11).

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- 73 An extended family comprises of a generational line including grandfather, fathers, sons and immediate next of kin.
- 74 A hamlet (paco or dogola) consists of a few households typically grouped together in a circle around a common compound (dye-ka).
- 75 The smallest family unit consisting of a man, wife or wives and their children.
- 76 **Integration of customary and statutory land administration : A Case Study of Structures and Functions from Northern Uganda**, CHAFORD (Uganda), March 2012, p.31 available at: www.chaford.org.ug.

- 77 Girling, F.K.: **The Acholi of Uganda**. London: Her Majesty Stationeries Office, 1960.
- 78 Ibid.
- 79 Focus Group Discussion (note 20).
- 80 Ker Kwaro Acholi: **Principles and Practices of Customary Tenure in Acholiland** (note 46).
- 81 Focus group discussions (note 20).
- 82 Burke, Christopher & Omiat Egaru, Emmanuel: op cit (note 4), p. 19.
- 83 Focus group discussions (note 20). See also, Rugadya, Margaret et al: op cit (note 23), p.74.
- 84 Burke, Christopher & Omiat Egaru, Emmanuel: op cit (note 4), p. 19. The report states that most Rwodi Kweri had served for about 10 years.
- 85 FGD in Agoro on 23rd of April 2012 (note 20).
- 86 Ibid.
- 87 Key Informant Interview with Rwot Picho (note 46). See also Rugadya, Margaret et al.: op cit (note 23), p. 74.
- 88 The World Bank Report however points out that Rwot Kweri can either be male or Female, see Rugadya, Margaret et al: op cit (note 23), p. 74.
- 89 Focus group discussions (note 20) in Lokung subcounty on 26 of April 2012.
- 90 Key Informant Interview with Rwot Picho (note 46)
- 91 Girling, F. K.: op cit (note 77), p. 8
- 92 Focus group discussions (note 20).
- 93 Rugadya, Margaret et al: op cit (note 23), p. 74.
- 94 Focus group discussions (note 20).
- 95 See also Burke, Christopher & Omiat Egaru, Emmanuel:op cit (note 4), p. 25. The report findings indicate that in some parts of Acholi Sub Region, the majority of the people believed that there was no role for the Rwot Kaka in land dispute resolution.
- 96 Focus group discussions (note 20)..
- 97 Ibid.
- 98 Focus group discussions (note 20).
- 99 Henrysson, Elin; Joireman, Sandra F: "On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya", *Law & Society Review*, 43(1), 2009, p. 41.
- 100 Focus group discussions (note 20), Orom 11th of May 2012
- 101 See HURIFO ref. (HRF/ GEN/KITGUM).
- 102 HURIFO (note 11).
- 103 Focus group discussions (note 20).
- 104 Ibid.
- 105 Ibid.
- 106 Penal Reform International: op. cit. (note 1), p. 33. See also Wehrmann, Babette: op. cit. (note 6).
- 107 Focus group discussions (note 20).
- 108 See HURIFO ref. (HRF/108/2012).
- 109 Henrysson, Elin; Joireman, Sandra: op cit (note 99), p. 41.
- 110 Wojkowska, Ewa: **How Informal Justice Systems can contribute**, Oslo: United Nations Development Programme, Oslo, 2006, p. 21.
- 111 Merry, Sally Engle: "Sorting out Popular Justice"" in Merry, Sally Engle; Milner, Neal (eds): *The Possibility of Popular Justice*, Ann Arbor: University of Michigan Press, 1993.

- 112 Nyamu-Musembe, Celestine: "Are Local Norms and Practices, Fences or Pathways? The Example of Women's Property Rights", in An-Na'im, Abdullahi A.: *Cultural Transformation and Human Rights in Africa*, London: Zed Books, 2002, p. 138.
- 113 See above: Case of Akello (case scenario 4) as well as case scenario 2 (Margaret Acayo) and 3 (Mary Ayoo Lakot).
- 114 See supra note 108.
- 115 See section 27, Succession Act, Laws of Uganda.
- 116 As noted earlier in Section 3 of this paper.
- 117 An elaborate discussion of this has been made in Section 3 above.
- 118 Henrysson, Elin; Joireman, Sandra: op cit (note 97), p. 44. The authors discuss how the issue of children affects women's vulnerability to property rights insecurity.
- 119 Burke, Christopher; Omiat Egaru, Emmanuel: op cit (note 4), p. 19. The authors mention one female Clan Head in Puranga sub-county, Pader District.
- 120 Ibid. p. 26.
- 121 Observation during mediations in the Akello Case (Case scenario 4) at Abura Amwonye Village, Lakwana Sub County, Gulu District, 12 June 2012.
- 122 Nyamu-Musembe, Celestine: op cit (note 113), p. 141.
- 123 Focus group discussions (note 20).
- 124 Ibid.
- 125 Ibid.
- 126 Ibid.
- 127 Burke, Christopher; Omiat Egaru, Emmanuel: op cit (note 4), p. 20.
- 128 Focus group discussions (note 20), Orom sub-county.
- 129 Penal Reform International: op cit (note 1), p. 33.
- 130 See the case of Santa Abur (case Scenario 1).
- STRENGTHS, CHALLENGES,
OPPORTUNITIES AND RECOMMENDATIONS
- 131 See e.g.: Nkonya, Ephraim: **Looking Beyond the Obvious: Uncovering the Features of Natural Resource Conflicts in Uganda**, Collective Action and Property Rights (CAPRI) Working Paper No. 95, December 2009, p. 10.
- 132 Rugadya, Margaret et al.: op cit (note 23), p. 15.
- 133 Burke, Christopher; Omiat Egaru, Emmanuel: op cit (note 4), p. 24; Baines, Erin: **Roco Wat I Acoli. Restoring Relationships in Acholiland: Traditional Approaches to Justice and Reintegration**, Liu Institute for Global Issues, Gulu District NGO Forum of Ker Kwaro Acholi, September 2005, pp. 21-24.
- 134 Rugadya, Margaret et al.: op cit (note 23), p. iv.
- 135 Adoko, Judy; Akin, Jeremy; Knight, Rachael: op cit (note 56). The authors analyse how the most vulnerable individuals, weak such as women, always loose from the existence of the parallel systems, both of which are supposed to offer them protection.

- 136 See for example Rugadya, Margaret et al.: op cit (note 23), p. 13.
- 137 Adoko, Judy; Levine, Simon: "How can we turn legal anarchy into harmonious pluralism? Why integration is the key to legal pluralism in Northern Uganda", in Conference Packet, Customary Justice And Legal Pluralism In Post Conflict And Fragile Societies, hosted by the United States Institute Of Peace George Washington University, World Bank, November 17-18, 2009, published in 2010, p. 80.
- 138 Penal Reform International: op cit (note 1), p. 133. It points out that when customary courts in Botswana were co-opted, public participation, public control, mediation and reconciliation were no longer key words for adjudication in the courts.
- 139 Ibid. p. 135.
- 140 Case scenarios 1 and 2.
- 141 Burke, Christopher; Omiat Egaru, Emmanuel: op cit (note 4), p. 23.
- 142 Adoko, Judy; Levine; Simon: **Land Matters in Displacement: The Importance of Land Rights in Acholiland and what Threatens them**, A study conducted for Civil Society Organizations for Peace in Northern Uganda (CSOPNU), December 2004, p. xi.
- 143 Ibid.
- 144 Burke, Christopher; Omiat Egaru, Emmanuel: op cit (note 4), p. 23.
- 145 Ikdahl, Ingunn: "Go Home and Clear the Conflict: Human Rights Perspectives on Gender and Land in Tanzania", in: Englert, Birgit; Daley, Elizabeth (eds.): *Women's Land Rights and Privatization*, Oxford, 2008, p. 43.
- 146 High Court Civil Suit No. 52 of 2006.
- 147 1995 Constitution of Uganda, Article 50 (1): "Any person who feels his or her right has been violated may seek legal redress which includes compensation". The Constitution also provides for public interest litigation: "Any person or organisation may bring an action against the violation of another person's or group's human rights", Article 50(2).

