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MARGINALIZED BUT NOT DISCARDED: CUSTOMARY LAND RIGHTS IN POST-CONFLICT ACHOLILAND OF NORTHERN UGANDA

Rose Nakayi*

ABSTRACT

Customary land rights are regularly marginalized by the actions of a range of actors: from the state and powerful economic actors to the development community. This trend seeps through to the aftermath of armed conflict in Acholiland. The dynamics of marginalization play out at the level of state policies and programmes, and public discourse, amongst others. In Uganda, the dominant development narratives on the protection of land rights tend to privilege land rights embedded in tenures such as mailo, leasehold and freehold, over customary. This strategic marginalization of customary land rights although detrimental to the customary, has not yet led to complete disappearance of the customary tenure in post-conflict Acholiland. This article, therefore, analyses key features of the dynamics around customary land tenure/rights. First, it analyses the way in which this tenure has been weakened by the dynamics of violent conflict and post-conflict transformations. It then shows that law and policy initiatives have to some extent further marginalized customary tenure, instead of fully revitalizing it after the conflict-induced destabilization of the system. Finally, it discusses the reasons for the continued existence and relevance of the system in contemporary Acholi. It concludes by making a case for the need to protect customary land tenure/rights in post-conflict social formations in Acholi.

I. INTRODUCTION

Customary tenure is prevalent in Africa.[1] By corollary, it is the conduit through which majority of the population in many jurisdictions including Uganda gain access to land.[2]

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1. L.A. Wily, Customary Land Tenure in the Modern World, Rights to Resources in Crisis: Reviewing the Fate of Customary tenure in Africa, Brief 1 of 5, at 1, retrieved from http://www.rightsandresources.org/documents/files/doc_4699.pdf (accessed February 9, 2015).

2. Margaret Rugadya *et al*, Analysis of Post Conflict Land Policy and Land Administration: A Survey of IDP Return and Resettlement Issues and Lesson: Acholi and Lango Regions, 2008, available at http://www.oicrf.org/document.asp?ID=8048, (accessed 10 February 2015).

This fact among others makes management/administration and law and policy that touch customary land an arena of contestation between the powerful and the people they rule over. This article makes the argument that armed conflict and post-conflict developments in Acholi and the ambiguities surrounding land law and policy in Uganda have (among others) contributed to the marginalization of customary land law and rights, although they have not been so far-reaching to make the customary tenure and rights obsolete thus far. This is more so since they are considered relevant by the people. "Marginalization" is used to denote relegation of customary tenure and rights to the periphery, ignoring it, or treating it as less important compared to other tenures recognized in Uganda such as *mailo*, freehold and leasehold.

Customary tenure and rights in Uganda and Africa in general have been under pressure by dominant social forces during both the colonial and post-colonial periods. Access and control over land in general has been used by the respective national leaders to strengthen their grip on power, i.e., to exert their dominance over the people on or dependent on the land[3] and to fuel the entrenched networks of patronage-client relationships that sustained the colonial project or a given post-colonial regime.[4] Practices of the powerful have a tendency to marginalize customary tenure. In other words, dominant powers from colonialism onwards never really promoted customary tenure or tried to make it a dominant tenure system, but rather marginalized and neglected it to advance the officially favoured rights system: private property regimes. This was mainly through imported law.

The trend and effects of imported land law into Africa have been similar in many African countries.[5] There was tension between customary tenure and pro-capitalist forces, for the former is considered a renege on capital creation.[6] However, while this marginalization of customary tenure was de facto state policy, the system was never fully abolished and discarded, in part because it still served (and still serves) political and other functions. Scholars have highlighted a number of these. Customary tenure is imbued within social relations and networks thereby increasing the "risks and

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3. H.W. WEST, THE MAILO SYSTEM IN BUGANDA: A PRELIMINARY CASE STUDY IN AFRICAN LAND TENURE. ENTEBBE PRINTERY (1964).

4. The distribution of land in Buganda- giving the king and his royals as an indirect impetus to support the colonial project is significant among the examples.

5. P. McAuslan, *Only the name of the country changes: the diaspora of "European" land law in Commonwealth Africa*, *in* EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA (IIED, London) (Toulmin C, Quan, J. 2000) 75-96.

6. H. DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

costs of altering them or discarding them;[7] in the customary land systems is security at a low cost;[8] and the customary tenure is malleable."[9] The preceding explains the limited outright intervention, or "minimalist approach," in dealing with the customary land tenure system and the ensuing customary rights.[10] The choice to (indirectly) marginalize rather than outrightly discard customary tenure could also lend credence to state legitimacy by "protecting" people and "observing" their interests, i.e., not dispossessing them of their customary land rights or declaring their customary rights obsolete.

In Uganda's history throughout the 20th century, a number of aspects to do with the customary tenure system in terms of regulation and dispute resolution were left in the hands of the people. The outcome of the preceding was 'neglect and marginalization' of customary land tenure and therefore rights; relegating them mostly to the private domain, which is often less regulated and not adequately facilitated by the state and its structures.

Yet outright discard of customary tenure and rights (although arguably the preferred long term outcome of forces of 'modernization' of Africa) was from the colonial days to-date not an option, for a number of reasons. First, fear of backlash from majority customary land holders; second, for the purpose it serves to structure or skew the relationships between the powerful and the masses thereby presenting a situation that can be exploited by the powerful through interventions to arrest situations of land conflicts.[11] Today, the customary facilitates neoclassical and neoliberal populism, clientelism and neo-patrimonialism for the powerful, just like it aided imperialism in the colonial days.

The above context forms a background against which the specific situation of post-conflict Acholi is discussed in this article. This article specifically analyses first the way in which customary rights have been weakened by the dynamics of violent conflict and post-conflict transformations. It goes further to show how law and policy initiatives have further marginalized the customary land tenure and rights, instead of revitalizing them after the conflict-induced destabilization of the system.

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7. Benda-Beckmann, F. von, *Anthropological Approaches to Property Law and Economics*, 2 EUROPEAN JOURNAL OF LAW AND ECONOMICS (1995) 309-36.

8. WORLD BANK, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION, WASHINGTON, DC (THE WORLD BANK 2003).

9. *Id.*

10. D. Fitzpatrick, '*Best Practice' Options for the Legal Recognition of Customary Tenure* 36 (3) DEVELOPMENT AND CHANGE (2005) 449-475 at 450.

11. *See,* R. Nakayi and J. Wiegratz, *They are all my people': Museveni's neoliberal populism and the politics of land disputes in Uganda,* AFRICAN AFFAIRS (under review).

II. CUSTOMARY LAND RIGHTS/ LAW

Customary "law" is a body of (usually unwritten) rules with its legitimacy in "tradition" and should have been applied for time (usually but not always) immemorial.[12] In their pure sense, customary rules concerning land are applied in such a way that they only bestow rights to land to those that belong to a particular social grouping, in return for performance of obligations.[13] The system emphasizes more the survival of the group with their land as a resource, than the individual rights to the land. That notwithstanding, customary tenure has today evolved to accommodate both individual and group rights to land.[14]

We cannot speak of uniform customary land rights or law in Uganda, since it varies from region to region, tribe to tribe or smaller grouping such as the clan or the family to family.[15] Whether the customary norms are loosely codified[16] or somehow preserved in reports determines their nature.[17] That further determines the levels at which they are preserved for future reference.

Customary norms on land are not static; they keep evolving. Cotula has argued that changes in culture, socioeconomic circumstances and political set-up among others bring about changes in the customary norms.[18] The role of changes in population as a factor affecting the customary norms and rights to land has also been highlighted in the literature.[19] This is more so where it leads to scarcity of land and an individualistic culture where individuals assert private property rights in the place of the communal or

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12. J. COMAROFF AND S. ROBERTS, RULES AND PROCESSES – THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT UNIVERSITY OF CHICAGO PRESS (1986); CHANOCK M LAW, CUSTOM AND SOCIAL ORDER – THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA, CAMBRIDGE UNIVERSITY PRESS (1985).

13 H.W. Okoth –Ogendo, Principles of a National Land Policy Framework for Uganda (Paper prepared for Uganda Land Alliance, 2002) at 23.

14. LORENZO COTULA (ED), CHANGES IN "CUSTOMARY" LAND RIGHTS IN AFRICA. IIED (2007).

15. S. Mabikke, Escalating Land Grabbing in Post Conflict Regions of Northern Uganda: A Need for Strengthening Good Land Governance in Acholi Region (unpublished paper presented at the international conference on Global Land Grabbing 6-8 April 2008), at 8, available at <www.future-agricultures.org/papers-and-presentations/...mabikke/file>, (accessed 7 February 2015).

16. T.W. BENNETT, THE APPLICATION OF CUSTOMARY LAW IN SOUTHERN AFRICA – THE CONFLICT OF PERSONAL LAWS (1985).

17. COMAROFF & ROBERTS, *supra* note 12.

18. COTULA, *supra* note 14. See also, J.P Platteau, *Does Africa need land reform? in* EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA (TOULMIN C AND QUAN J. 2000, EDS), LONDON, DFID/IED/NRI.

19. E. BOSERUP, THE CONDITIONS OF AGRICULTURAL GROWTH – THE ECONOMICS OF AGRARIAN CHANGE UNDER POPULATION PRESSURE, (1965).

group claims to land.[20]

A. Customary tenure in Uganda

Prior to the new constitutional dispensation in Uganda ushered in by the 1995 constitution, customary tenure was among the tenures abolished by the Land Reform Decree of 1975. It is revived in the 1995 constitution by Article 237 (1) (3) and the 1998 Land Act section 3 (1) (a) - (h). It has two broad classifications: communal customary tenure predominantly in the northern and eastern parts of Uganda and individual/family/clan customary tenure prevalent in the central and western regions, and in parts of the north and south-western Uganda. In Buganda, holding a *kibanja* denotes holding land under custom, although of a kind resulting from the introduction of western property concepts.[21]

Over 75 percent of land in Uganda and 90 percent of it in northern Uganda is held under customary tenure, which is the largest tenure.[22] Customary land law is unwritten law and found in the customs and traditions of the people.[23] These then prescribe modes of access to land, and whether use is communal or exclusive to individuals.[24]

Specifically for northern Uganda, the elderly are the custodians of these customary rules and they run the system.[25] The *Rwot Kweri* (chief of hoes) or the *Won Pachu* are responsible for distributing land and validating boundaries to plots of land.[26] The clan leaders (*Rwodi Kaka*) are central in running the land dispute resolution

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20. *Id.*

21. H. Busingye, Customary Land Tenure Reform in Uganda: Lessons for South Africa (Paper presented at an International Symposium on Communal Tenure Reform Johannesburg, 12-13, August, 2002), retrieved from <http://www.mokoro.co.uk/files/13/file/lria/customary_land_tenure_reform_uganda.pdf>, (accessed 11 February 2015).

22. Rugadya et al, *supra* note 2; C.K Petracco & J. Pender, Evaluating the Impact of Land Tenure and Titling on Access to Credit in Uganda, International Food Policy Research Institute (2009), citing 99.19% as the percentage of customary land in northern Uganda and Ker Kwaro Acholi, Principles and Practices of Customary Tenure in Acholiland, (Gulu, Uganda: *Ker Kwaro* Acholi, June 2008) at 1, putting the percentage at 93 %.

23. Land Act Cap. 227, s.3 (1) (a).

24. J.W. Bruce, African tenure models at the turn of the century: Individual property models and common property models (Paper prepared for a Conference on Land Tenure Models for Twenty-first-Century Africa, 8-10 September, 1999, The Hague, Netherlands), at 459.

25. Mabikke, *supra* note 15, at 10-13.

26. *Id.,* at 11.

system.[27] Just like in other African customary spaces, land has to be held in a way that maintains the chain linkage between those that hold it, their successors and predecessors.[28] Customary land is for the core continuity of a social grouping. It facilitates identity, class and social relationships among people on land.[29] The preceding might be considered antithetical to market oriented approaches to regulation of control on use and access to land motivated by capital production imperatives.

III. MARGINALIZATION OF CUSTOMARY RIGHTS IN HISTORICAL LAWS: A ROUTE TO DISCARD THEM?

The historical making of customary land rights in Uganda helps in understanding their position in post-conflict Acholi today. Although times have changed, little change is registered in terms of attitude of elites, policy makers, foreign and domestic proponents of land-based capitalist versions of economic development, towards the customary land rights. The historical context to some extent therefore heralds the contemporary status quo, although with new dynamics embedded in current neoliberal-capitalist transformations.

Since colonialism to-date, a number of efforts at land law and policy reform have been undertaken to open up land for capitalist purposes, i.e., to vest its control in the state and promote its use for 'development projects'.[30] However, land law and policy reform is not always a guarantee of tenure reform, especially if not followed by efforts at implementation of the reforms. In as much as there were changes in the laws at various times in the 1900 to 1975 period, some of which undermined the customary norms, these did not necessarily lead to changes in the ways in which people related with each other on customary land, and the practical rules that governed these relationships. Such reforms, according to some scholars, were geared towards promoting self-interests; colonial governments were unwilling to recognize indigenous land rights as they evolved.[31] The preceding situation was further entrenched by a culture of non-implementation of laws, and state preference for commodification of land arguing that it would bring about development.[32]

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27. *Id.*
28. N.A OLLENNU, PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA (1962).
29. E. Colson, *The Impact of the Colonial Period on the Definition of Land Rights, in* COLONIALISM IN AFRICA (Lewis H. Gann eds., 1971) at 193-196.
30. See, the Land Reform Decree (LRD), 1975 Laws of Uganda.
31. Colson, *supra* note 29, at 196.
32. See LRD, *supra* note 30.

At the national level, the introduction of freehold type tenure in Uganda is important as one of the key markers for the beginning of hierarchized interests in land depending on the tenure in which those rights are embedded. In Buganda, the vernacular of *mailo land* resulting from the signing of the 1900 Buganda agreement, for example, introduced private property rights for a few, while making others tenants on those lands. In the national context, it meant that private property rights were higher in hierarchy than the customary rights to land. No wonder that law and policy during some years during the period1900-1975 tended to entrench the above as will be seen below.

The period 1900-1975 can be said to have been a period to promote capitalist development in Uganda, by using land – and the restructuring of land-related social relationships. The delicate balance that was hard to strike was between the protection of customary owners' rights to their land, and at the same time availing land to those that can use it for investment and therefore contribute to 'national development'.[33] This balance was many times tilted in favour of the latter, since the customary occupier was most likely a subsistence farmer who could not invest in his/her land to the tune expected by the bourgeoisie imperialist or the capitalist elites.[34]

In order to meet the capitalist move of easy transfer of land from those that according to official discourse cannot develop it to those that can (i.e. from peasants to 'investors'), it was important to pass a law that removed control over (customary) land from the hands of the owning/controlling entities to the state.[35] This overrode the pre-colonial situation during which communal entities owned and controlled land, and individual access and use was on the basis of being a member of such an entity.[36] Rights over land in that context were understood in a wider context for the purpose they served. That purpose was the continuity of the group entity, which was more important than the individual.[37] Introduction of the state as the controlling entity under the 1903 Crown Lands Ordinance to some extent distorts the preceding social reality.

Also important in the post-1900 legal regime is the preference for private property rights. A "class of interests" between the local and the foreign is seen in the introduction of western notions of "proprietary" interests where concepts of individual rights or private property rights are considered better than the communal rights that

33. W. NABUDERE, IMPERIALISM AND REVOLUTION IN UGANDA (1980), at 202.
34. *Id.*
35. Crown Land Ordinance 1903 and LRD, *supra* note 30.
36. Colson, *supra* note 29, at 200.
37. *Id.*

were most times disregarded.[38] No wonder that, in Uganda's case, by virtue of the1903 Crown Lands Ordinance, all land that had not been alienated and claimed by individuals by title was vested in the Crown in England.[39] Yet, individual titles issued prior to 1903 were mostly to the royalty and persons in significant social and political positions. Technically, the Crown in England by law acquired control over all customary land in the country and the 'owners' were only occupiers i.e. tenants of the Crown. This act of dispossessing customary land owners (at least by law) continued in the Public Lands Act 1962 and later in 1969. Under these, customary land became public land that was controlled by the government through the Land Commission. The customary "tenants" on public land were not evicted. They continued to live and use their land in the rural areas without lease or any license as long as it was not alienated (i.e. given out to a developer).[40] At the same time, the law did not preclude them from applying for leases from the government on the land that they occupied.[41] If the customary "tenant's" land had to be issued to someone else in leasehold or freehold by the technical "owner" (the government), the tenant's consent to such a transaction was required by law, and so was compensation to the tenant.[42]

The above legal developments show that customary tenure was unwanted, considered secondary to leasehold, freehold (and *mailo*) estates, although it was not completely discarded. The customary tenant was in law not an owner, but the law somehow gave him/her "permission" to continue legally occupying his/her land and an option to convert permission into "right" by acquiring leaseholds. The customary tenants enjoyed a limited amount of tenure security; they by law had to give consent before their land was given away as leasehold or freehold estate to a potential developer.[43] Aside from the oral evidence that customary occupiers were evicted to create Murchison Falls National Park, the author has not come across written evidence of persons that were evicted or who lost their land as a result of implementing the above laws.[44] That notwithstanding, it is clear that the spirit and letter of the above laws was to promote marginalization of the customary tenure, by removing ownership and control of land from the customary centres of authority and individuals to the state that

38. *Id.,* at 196.
39. *Id.*
40. PLA, s.24 (1).
41. PLA, s.25.
42. PLA, s.24 (2), (3) & (4).
43. PLA.
44. This information was given by various respondents during the author's field research in northern Uganda for her doctorate in 2010.

would lease it out, leaving them with only "permission" to occupy. So their minimal protection is in continued occupation and opportunity to consent to having their land leased to someone else—an investor.

Much of the above fragile protection was lost by subsequent laws such as the Land Reform Decree 1975 passed in a similar spirit of encouraging utilization of land for economic development. First, the customary land holders lost tenure security since they became "tenants at sufferance" who could be evicted any time.[45] Although they could still acquire leases on the land they occupied, customary tenants could not pass on their "tenure"; doing this was illegal, since they were not considered as having "title" to the land.[46] Further, no new customary interests would be acquired in land without state permission in writing.[47] This was meant to make it cumbersome to create new estates of a customary nature, by requiring state permission and therefore regulation. That notwithstanding, existing customary interests could be passed on by will or the law of intestate succession, although developments on the land could only be sold or given away after giving three months' notice to an Authority. In principle, the state over-limited the space for the continued survival of the customary tenure, constrained options of controlling land for the customary occupier by promoting state control and supervision over it. Technically, the customary owner needed state sanction of key decisions such as one in which s/he wanted to sell his/her customary land.

In the law of property, proprietary interests are interests in the land itself.[48] To the colonizers, these had to vest in individuals, as it was in Europe.[49] This was in disregard to the difference in the role that land played in Africa and how this differs from those roles that it played in Europe. To the European, the claimant (private proprietary) has the right to transfer his/her interest, and create lesser interests in his/her land.[50] A provision in the Land Reform Decree to the effect that customary land owners cannot transfer their land but developments on it, after acquiring consent, is confirmation that in principle, customary tenure was discarded in law, although the nomenclature (customary) was retained. Indeed, laws such as the Land Reform Decree were building on the spirit and letter of pre-colonial law that reduced the space for the survival of customary tenure.

Although there was limited implementation of laws such as the Land Reform

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45. LRD, *supra* note 30, s.3 (2).
46. LRD, *supra* note 30, s.4 (2).
47. LRD, *supra* note 30, s.5 (1).
48. K. GRAY AND S. GRAY, LAND LAW, 7TH ED, OXFORD UNIVERSITY PRESS (2011) at, 41-46.
49. Colson, *supra* note 29, at 196
50. GRAY & GRAY, *supra* note 48, at 41-46.

Decree of 1975, the period 1903-1975 can be said to be that during which customary land rights were in essence discarded in the laws of Uganda by necessary implication although not outrightly. This is more so since, as described above, the space within which the customary rights existed was over-legalized and constrained.

In essence, colonialism across Africa and in Uganda specifically led to a number of changes in custom.[51] The use of European legal norms embedded in Uganda's written law as the criteria for judgment and, as the standard litmus to test African customs, meant that much of the latter would be assessed to be of less value and thus marginalised and 'lost'.[52] This is more so since in Uganda and elsewhere customary tenure systems were responsible for setting the boundaries within which land use, access and transfer could take place.[53] Using European standards meant that the whole land holding system would be affected, i.e., western conceived notions rather than the local custom would be applied to determine entitlement to land.

The above indicates that even outside of formal armed conflict periods, customary tenure in Acholi had been under pressure at various stages of the political and economic transformations in Uganda's history to date. Yet, the entrenchment of the customary within social parameters of custom presupposes a correlation between its survival and social stability. Armed conflict in Acholi greatly destabilized society and eroded its social fabric. A great deal of literature points to its devastating effects including displacement, lawlessness, and absence of state presence.[54] The continued survival of customary tenure in the post-conflict period is still precarious. As much as customary tenure is revived in the legal regime, the same regime promotes other aspects that might threaten customary tenure as seen in the discussion below.

1. Post-1995: *The need to protect land rights and armed conflict in Northern Uganda*—The Acholi sub-region was among those tremendously affected by the armed conflict that raged in northern Uganda for decades.[55] As much as the post-1995 years

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51. R. DAVID, (ED.), CHANGING PLACES? WOMEN, RESOURCE MANAGEMENT AND MIGRATION IN THE SAHEL, (1995).

52. *Id.*

53. COTULA, *supra* note 14.

54. E.K Baines, *The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda*, 1 THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 91-114 (2007) at 101-102; S. SVERKER FINNSTRÖM, LIVING WITH BAD SURROUNDINGS: WAR, HISTORY, AND EVERY DAY MOMENTS IN NORTHERN UGANDA (2008).

55. Finnström, *supra* note 54. R. Atkinson, *Land Issues in Acholi in the Transition from War to Peace,* THE EXAMINER, Issue 4 (2008), at 3-9, 17-25; Baines, *supra* note 54, at 101-102; HUMAN RIGHTS WATCH, UPROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA,

present the peak of the conflict in that region, it was a period of constitutional and legal reforms at the national level.[56] The questions that arise include: to what extent did the peculiar situation of northern Uganda inform the law reform processes particularly concerning land? Further, how applicable are the outcomes of these processes of land law reform to northern Uganda in light of its peculiarities associated with armed conflict?

Having come to power in 1986, the NRM government saw a political imperative to undo some of the policies of the past regimes, including those related to regulation of rights to land. Customary tenure had been scrapped in the pre-1995 era.[57] Among the vital developments in the 1995 constitution was the recognition of customary tenure as one of the tenures in Uganda, ostensibly on the same footing with others such as *mailo*, leasehold and freehold.[58] In as much as northern Uganda has been peculiar as a result of armed conflict, the legislative framework on land in Uganda has to a great extent followed a one-size-fits-all approach with limited adaptability to the peculiarities brought about by armed conflict in northern Uganda.

The Land Act 1998 (Cap 227), the Land (Amendment) Act 2010 together with the National Land Policy have provided detail on how to operationalize the reforms embedded in the constitution on customary land tenure. For instance, tenants on former public land now enjoy security, and may no longer be evicted as the case was before. This has been reinforced by enabling a tenant to acquire a certificate of customary ownership.[59] The certificate is conclusive evidence of customary rights and the interests in the land to which it refers. It does not change the nature or status of rights, but only acts as "evidence" for such rights. Although the law recognizes customary rights to land to be at the same footing with other rights sourced from the written law, it is reported that sections of society still consider them of less value.[60] The majority of Ugandans and investors seeking to purchase land have a preference for registered or privately owned land to customary land.[61] A number of reasons explain

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HUMAN RIGHTS WATCH REPORT, VOL. 17, NO. 12(A) (SEPTEMBER 2005); HUMAN RIGHTS WATCH ABDUCTED AND ABUSED: RENEWED CONFLICT IN NORTHERN UGANDA, VOL. 15, NO. 12 (A) (JULY 2003).

56. INTERNATIONAL CRISIS GROUP (ICG), NORTHERN UGANDA: SEIZING THE OPPORTUNITY FOR PEACE, AFRICA REPORT NO. 124, at 2 (26 APRIL 2007). Armed conflict had heightened by 1995 and displacement started in 1996.

57. LRD, *supra* note 30.

58. Constitution of the Republic of Uganda 1995, Article 237 (3).

59. Land Act Cap 227, s.4.

60. See, The Uganda National Land Policy 4.3 Para 38.

61. J.A. Lule, V. Kirabo & B. Kembabazi, 80% of Uganda's land unregistered – minister", THE NEW VISION, 26 NOVEMBER 2013.

this.

First, the legal and policy framework pursues a paradigm that promotes "land market for liberalized production, thereby essentially privileging private tenure and undermining customary tenure."[62] Second, it may be a result of lack of knowledge of the customary rules that govern land in a given society, which makes outsiders fear to acquire it. Third, there is a general belief that customary land is associated with insecurity of tenure. Fourth, there are restrictions to transferring it to persons outside the group, and lastly, customary land may not easily be accepted by banks as collateral.

The condescending attitudes towards the customary are not by accident, but are partly a result of over two decades of state and donor discourse against it and pro-private property rights. People's belief in the system is invaluable as an indicator of relevance, and therefore value in sustaining it. This means that legal protection of customary tenure without efforts aimed at attitude re-engineering in favour of it may not make positive strides in an effort to make it relevant. Creating confidence in the customary tenure system and a positive attitude towards it would lead to a group of persons ready to hold government accountable whenever it falls short on issues to do with the tenure. This is more so since powerful actors such as the World Bank have since changed attitude and now believe that customary tenure can be used as a conduit for development.[63]

That notwithstanding, the legal and policy regime is crafted in a framework that privileges some tenures over others; customary tenure bearing the brunt. This is also seen in the subsequent attempts at implementation of the provisions of the Constitution and the Land Act 1998 that are characterized by opportunistic tendencies to use land issues to entrench personal political power.[64] The choice of issues to prioritize is to some extent shaped by their value in terms of contribution to achievement of the above agenda. This is why land issues between the landlords and the tenants on mailo land have been more central to the debates than customary land issues.[65]

The above situation may also be explained by the central location of *mailo* land (in central Uganda); where the seat of government is, and the historical political status

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62. Anders Sjögrena, *Scrambling For The Promised Land: Land Acquisitions and the Politics of Representation in Post-War Acholi, Northern Uganda,* 12(1) AFRICAN IDENTITIES , 62-75 (2014) at 67.

63. WORLD BANK, *supra* note 8.

64. C. Medard & V. Couliard, Creating *dependency: Land and gifting practices in Uganda*, JOURNAL OF EASTERN AFRICAN STUDIES (2013) a, 555.

65. See for example: I. Okuda and F. Muzaale, *Museveni wants two weeks to fix Kayunga land wrangles*, DAILY MONITOR, July 5, 2013 at 1 & 5.

and significance of this region.[66] It was an indispensable agent in the imposition of colonial rule in Uganda and also central in efforts leading up to the establishment of the post-independent state of Uganda.[67] All this is not only of historical significance, but entrenches central Uganda's clout to influence processes and outcomes from public discourses on various aspects including land.

With the foregoing obvious privileging of tenures depending on the political /economic benefits derived from them, customary tenure in northern Uganda and elsewhere has not been central to the debates on land. The sections below discuss the position of customary land rights in Acholi. It positions it within the law, policy and other interventions. Further, it shows how the armed conflict environment and other realities have influenced the status of customary land rights in Acholi.

IV. CONFLICT AND POST-CONFLICT DYNAMICS MARGNINALIZING CUSTOMARY LAND RIGHTS

There are a number of factors in conflict and post-conflict settings of northern Uganda, specifically Acholi, that indicate marginalization and weakening of rights anchored in customary tenure. These arise from the conflict situation, the existing legal framework and other social, economic and political factors, some of which are discussed in this section of the article.

A. Armed and Post-conflict Dynamics and Customary Land Rights in Acholi

Customary tenure is highly fluid and informal, characterized by limited recordation of incidents and rights, semi-permanent boundary demarcations, legitimacy deriving from the social embrace of the rights and also existence of an old generation core responsible for ensuring their continuity. The customary system therefore survives and reproduces itself better in a settled and relatively peaceful society bound together by social ties. Among the devastating consequences of the armed conflict in northern Uganda and Acholi in particular was the disruption of the social ties by disordering society. This was majorly through internal displacements of the biggest percentage of the population from their homes into internally displaced people's camps.[68] It is estimated that the

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66. C. Johannessen, *Kingship in Uganda. The Role of Buganda kingdom in Ugandan Politics*, CMI Working Paper 8 (2006).

67. *Id.*, 2-4.

68. A. BRANCH, DISPLACING HUMAN RIGHTS: WAR AND INTERVENTION IN NORTHERN UGANDA (2011); C. DOLAN, SOCIAL TORTURE: THE CASE OF NORTHERN UGANDA, 1986-2006 (2009).

number of persons displaced and interned into camps since the first rounds of displacement in 1996 was over 1.7 million.[69] It is hard to point to a specific date as one at which displacement ended, since the process of return was more sporadic, mainly taking place after the start of the Juba Peace talks in June 2006.[70] It is also noteworthy that by 2009-10, many in the Acholi sub-region had returned home.

Displacement was an abrupt suspension of enjoyment of customary land rights (at home), and for many the situation lasted as long as displacement. A number of persons and families could not access their land for agriculture for most of the time they were in displacement.

In a number of ways, this and the whole armed conflict environment weakened customary tenure. First, it made people absentee land claimants without a close physical connection to the land, thereby distorting how the people relate with each other on the land;[71] a key aspect in tenure relations, security and governance. Second, internally displaced people burdened the land on which camps were established, limiting the ability of the owners to use it. The situation also led to post-return land conflicts between genuine owners and those that lay claim to their land including powerful individuals.[72]

Power is a key factor in the elders' ability to assert authority as enforcers of customary land rights; yet armed conflict and the resulting displacement vitiated it.[73] The disordered society during displacement meant that social hierarchies were skewed and so were social structures of land governance.

Also, during displacement, the population's ability to fend for itself was hampered and reliance was mainly on humanitarian aid for all including elders. Amidst the deplorable health and living conditions during displacement, securing the customary land tenure system could not be an urgent need during the armed conflict, but ensuring access to the basic everyday survival needs.

As mentioned earlier, the 1995 Constitution, the Land Act 1998, all made key reforms to the customary land tenure system. This was during the time that armed

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69. INTERNATIONAL CRISIS GROUP, *supra* note 56.

70. See BRANCH, *supra* note 68; Finnström, *supra* note 54.

71. H.W.O Okoth-Ogendo, Land Rights in Africa, Interrogating the Tenure Security discourse (unpublished Key note address presented to the Workshop on Land Tenure Security for Poverty Reduction in Eastern and Southern Africa, Kampala, Uganda, 27-29 June, 2006).

72. Mabikke, *supra* note 15, at 10.

73. MercyCorps, Land Disputes in Acholiland; A conflict and Market Assessment, June 2001, at 6, available at <http://www.mercycorps.org/sites/default/files/mercy_corps_acholilandconflictmarketassessment_aug_2011.pdf>, (accessed 30 September, 2014).

conflict in northern Uganda was at the peak and not much would be done to implement the changed law in that region, even if the resources were available. Technically, the customary land tenure system in northern Uganda was suspended during the period of armed conflict and displacement. The neglect of the customary tenure system at the time is both as a result of both internal and external factors.

Internally, the peoples' ability to draw benefits from it was hampered by the prevailing circumstances. The customary structures of governance and the elders were not in positions of control to assert the relevance and defend customary tenure.[74] Externally, it is obvious that the resolution of the armed conflict was a priority. Inability to enjoy and also enforce rights accruing under customary tenure during this conflict period is more by default on the part of the people. For the government, in as much as the circumstances made implementation of the land reform in the north complex, the absence of any documented attempts supports the possibility of lack of a will to do so.

Turning to the post-conflict period, it is cumbersome to point to a particular date as the beginning of this phase. The silencing of the guns, reappearance of relative calm and sporadic return of people from displacement after the collapse of the Juba Peace Talks around April through July 2008 are pertinent markers of the post-conflict phase.[75] This was expected to be the phase in which the customary land tenure system would be resuscitated. This author suggests this is not the case. Rather, the factors that are marginalizing to the customary are galore. These include the heightened disputes over land, caused by a number of factors such as blunt boundaries to land, increased economic value of land, and conflict between customary land tenure-based claims to land and those anchored in national written laws.[76] This is within an environment where the institutions that would play a role in the resolution of land disputes were greatly weakened.[77] All this is in the face of paucity of government efforts to empower the traditional authority to handle the cases, and also equip other institutions of justice to do the same, in a manner that is responsive to the post-conflict circumstances.

The situation is further exacerbated by the government's attempts to acquire

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74. *Id.,* at 6.

75. Refugee Rights News, Northern Uganda since the Collapse of the Juba Talks, , Volume 4 Issue 6, October 2008 available at http://www.refugee-rights.org/Publications/RRN/2008/October/V4.I6.NorthernUganda.html, (accessed 20 January 2015).

76. MercyCorps, *supra* note 73, at 5.

77. Mabikke, *supra* note 15.

land for post-conflict development amidst resistance by sections of the public.[78] No wonder that some provisions in the land Act about issuance of certificates of customary occupancy were seen as an attempt by the government to grab land.[79] In addition, the government's and investors' idea of land use and development in northern Uganda is to some extent seen to be at variance with that of sections of the community in the post-conflict era.[80] The divide is characterized by a capitalist driven agenda of the government in the face of heightened mistrust on the part of the people that are victims of soaring inequality at the national level that was worsened by the armed conflict. Yet also, no significant efforts are seen on the part of the government to investigate cases of attempts by private investors and powerful individuals to grab land that belongs to the local communities.[81]

The conflict and post-conflict incidents show high levels of neglect and marginalization of the customary land tenure system. This, in face of mistrust between the people and the government, thereby complicating government's urgency for any changes in the customary norms for that region. Although not directly discarded, the customary claims to land remained on foot but in a weakened state as seen below.

B. Likely Impact of Land Law and the Uganda National Land Policy on Customary Land Tenure.

Among the positive strides of the 1995 Constitution was the recognition (at least on paper) of customary tenure as one of tenures in Uganda under Article 237; going beyond previous laws such as the Land Reform Decree that had outlawed it. Technically, the tenure and ensuing rights got recognition. The protection is further entrenched in the Land Act section 3(1), stipulating its content and specifically ascribing pertinent aspects of the customary such as: (i) the value of local binding rules and local custom; (ii) personal, family, communal and traditional institutions' right to own customary land; and (iii) perpetual ownership. Communal land is an important aspect of customary tenure. The Land Act creates a framework for its management and

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78. *Hon. Ocula Michael & others v. Amuru District Land Board, Major General Oketa Julius, Christine Atimango and Amuru Sugar Works Ltd.* Hct-02-Cv-Ma- No. 126 of 2008.

79. Sjögrena, *supra* note 62, at 68.

80. *Id.*

81. R. Nakayi, *The Challenge of Proving Customary Tenure in Courts Of Law in Uganda: A Review of The Case of Hon. Ocula Michael & others v. Amuru District Land Board, Major General Oketa Julius, Christine Atimango and Amuru Sugar Works Ltd. Hct-02-Cv-Ma- No. 126 OF 2008,* 19 EAST AFRICAN JOURNAL OF PEACE AND HUMAN RIGHTS (2013).

regulation through Communal Land Associations and clarifies on aspects of common land use.[82]

In addition, the recognition of traditional authority under section 88 of the Land Act as agents of mediation of disputes over customary land is a positive stride in the recognition of customary tenure. This is recognition of the role entities such as clans and their leaders played in traditional Ugandan societies.[83] The foregoing provisions are coupled with availability of the option to certify customary rights through application and issuance of Certificates of Customary Ownership (CCOs).[84] The certificate would replace or add to the value of oral evidence in cases of proof of customary rights to land. It is argued, however, that titles are not a guaranteed mechanism of reducing land-related conflicts.[85]

The value in the above constitutional and legal provisions cannot be underestimated. Note, however, that mere provision for protections in the law without implementation is as good as no provisions at all. For a long time, there have been financial and other hindrances to the implementation of the laws.[86] The insufficiency in the efforts aimed at implementation could also cast doubt on the genuineness behind including such provisions in the law. Their inclusion could be a reflection of a populist agenda to portray the powerful as genuinely concerned about improving the situation of customary tenure systems through law reform, but at the same time leave them on paper and maintain the status quo, in which case the intrinsic and systemic deficiencies in protecting the customary tenure in Uganda offer raw material for populist politics. In such a situation, the seemingly progressive provisions of the law do not displace the assertion in this paper that the customary is marginalized.

Also worth noting is that the Land Act and the Uganda National Land Policy bear evidence of privileging of freehold land tenure systems to the detriment of the customary.[87] Customary tenure and leaseholds can be converted to freehold under the Land Act sections 9 and 28 respectively, but one cannot convert freehold or freehold to customary. Among the "unintended consequences" of the above over the years may be the disappearance of the customary when it is converted into other tenures.[88] Further

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82. Land Act Cap 227, s.15-26.
83. NABUDERE, *supra* note 33.
84. Land Act Cap 227, s.4 - 6.
85. Fitzpatrick, *supra* note 5, at 465.
86. K. Deininger and R. Castagnini, Incidence and Impact of Land Conflict in Uganda, World Bank Policy Research Working Paper 3248, (2004).
87. The Uganda National Land Policy, strategy 38.
88. D. Hunt, *Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land Act* 22 -2 DEVELOPMENT POLICY REVIEW (2004) 173-191.

evidence of the above is seen in the National Land Policy which acknowledges that despite the efforts to "formalize" customary tenure under the land Act, it continues to be "… (v) disparaged and sabotaged in preference for other forms of registered tenures, denying it the opportunity to progressively evolve."[89]

The policy statements on customary land tenure in the National Land Policy begin by reasserting assumptions that have widely been questioned in the academic literature. It states that this tenure is often associated with three problems: (a) it does not provide security of tenure for landowners, yet a World Bank report compliments the affordability of the security the customary offers;[90] (b) it impedes the advancement of land markets—there is evidence that this is not always the case;[91] and (c) it discriminates against women—research shows that women in Acholi have land rights but face huddles to enjoying them.[92]

Ascribing to the foregoing negative views about customary tenure buttresses official discourse towards marginalizing it. Indeed, other government policies and strategies follow suit. Uganda's Vision 2040 is developed with a vision to promote "..... optimal use of Uganda's land based resources…"[93] According to the Land Sector Strategic Plan II (LLSSP II), this vision may only be achieved if there is a change in the land ownership pattern towards the kind of land ownership that facilitates development.[94] The LSSP II makes provision for integration of the customary tenure into the formal system as a way to increase market performance and improve chances of access to credit by its holders.[95] The foregoing policy discourse shows that customary tenure is antithetical to the optimal use of land resources within a market context. It therefore has to be rinsed of its organic nature, formalized to make it suitable, an aspect that further marginalizes it. Among the other objectives of LLSSP II is to implement at National Program for Systematic Adjudication, Demarcation,

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89. The Uganda National Land Policy, 2014, Strategy, strategy 38 (v).

90. WORLD BANK, *supra* note 8.

91. J. Adoko & S. Levine, A Land Market for Poverty Eradication? A case study of the impact of Uganda's Land Act on Policy Hopes for Development and Poverty Eradication (2005), retrieved from <http://land-in-uganda.org/lemu/wp-content/uploads/2013/11/A-Land-Market-for-Poverty-Eradication.pdf>, (accessed 10 February 2015).

92. P. Veit, Women and Customary Land in Uganda, Focus on Land in Africa- Placing Land Rights at the heart of Development". *A brief,* April 2011 at 1.

93. See, the National Planning Authority of Uganda, *Vision 2040,* available at <http://npa.ug/wp-content/themes/npatheme/documents/vision2040.pdf>, (accessed April 28, 2015)

94. Land Sector Strategic Plan II, 2013-2023, (herein after LSSP- II) Ministry of Lands, Housing and Urban Development (December 20, 2013) at 38.

95. *Id.,* at 34.

Survey and Certification or Registration of land, following which freehold titles are issued; phasing out customary tenure. All this in the name of "… integrating customary lands into the formal property and land market systems."[96]

In line with the above, but also in order to facilitate the evolution and development of customary tenure, the National Land Policy strategizes to among others: start a registry for customary land; issue CCOs, equivalent to those issued under freehold; promote conversion into freehold; document customary land rules; and promote demarcation of customary land.[97] Further, the policy strategizes to recognize customary institutions that make rules, resolve disputes in addition to recognizing and supporting their decision making processes.[98] Some of the above are not necessarily new, but a reiteration of key provisions in the Land Act. Embedding them in a policy theoretically puts them on the government's 'to do list,' especially if followed by steps towards implementation. Mere policy pronouncements without the will to implement them would not salvage and strengthen customary land rights. It could only be an indication of the fact that there is no more reticence about customary land rights on the part of the government, but does not necessarily undo the likely obstructions to the survival of the customary that are entrenched in the capitalist society and the operations of its class and power structures.

In some cases, some of the strategies suggested in the policy will have an effect of modifying the customary, using state crafted tools that are not necessarily conceived from within the customary spaces. Examples of these include strategy 41, in an effort to

> …facilitate the design and evolution of a legislative framework for customary tenure, the government shall....... (iii) modify the rules of transmission of land rights under customary tenure to guarantee gender equality and equity; (iv) make provision for joint ownership of family land by spouses.

Similarly, with an aim of strengthening the traditional land management and administration institutions, strategy 42 (iv) provides that the government will "Develop guidelines and procedures under customary land law for the allocation and distribution of land complying with the principles of equity and natural justice." Customary norms

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96. *Id.,* at 55.
97. Uganda National Land Policy, *supra* note 87, Strategy 40 (i) - (vi).
98. *Id.,* 41 (v) & 42.

or rules generally gain legitimacy from acceptance by society and repeated usage.[99] They, however, evolve and change accordingly in response to their environment.

Modification of these rules by the government to promote "gender equality and equity" and to promote co-ownership of family customary land is commendable in the reign of human rights. But it is questionable whether top-down new norms introduced by the government and deposited into the customary spaces will become "customary," acquire legitimacy and operate effectively. The combination and application of what is locally customary and that crafted and deposited by the government will not be customary per se; but a new form that is neither purely local nor purely foreign (government or donor community-driven). It is important to borrow a leaf from what is stated in the LLSP-II on the need for a decentralized and highly participatory approach in all processes of formalization of customary tenure to ensure accommodation of the needs of all groups including women and other vulnerable groups.[100]

Government- or donor-driven initiatives with little or no participation from the community would naturally face resistance when implemented. The same argument applies to the distribution guidelines that comply with natural justice principles.

On the whole, this is not to say that efforts to accustom the customary rules to gender equity and natural justice are irrelevant. It is to push forward a point that they might trump some customary norms on land and introduce others leading to modifying or vanishing of the old. There would also be issues to do with legitimacy; thus, care has to be taken to involve the communities in negotiating the new pro-gender equality and natural justice notions of customary land law. The new strategies will partly undermine some customary practices that some regard as undesirable but may still deepen the problem by unleashing new problems like introducing new norms not envisaged as customary. They may not tackle the bigger problems arising from customary land law which is state neglect and marginalization and the entrenched stereotypes amongst sections of the population especially the elites. At the same time, corruption in the land management and administration bodies may not be tackled by these efforts;[101] in the end it will only be a scratch on the surface that leaves the customary on a steady decline.

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99. P.D. Alexander, *Customary and indigenous law in transitional post conflict states: A South Sudanese case study,* 30 MONASH UNIVERSITY LAW REVIEW (2004) at 203.

100. LSSP II, *supra* note 94, at 34.

101. Sarah Kulata Basangwa, Commissioner Land Registration Before Anti-corruption Court, retrieved from <http://www.igg.go.ug/updates/news/sarah-kulata-basangwa-commissioner-land-registration-before-anticorruption-court/>, (accessed 26 May 2014).

C. *Other Weakening Factors in the Customary Practices and Beyond*

There are aspects of the customary tenure system that have an effect of weakening it. First, the world in which it is situated is increasingly becoming capitalistic, promoting land holding and transfer systems that are in tune with capital accumulation. Barrow and Roth have argued:

> …individualized tenure, typically defined as demarcation and registration of freehold title is viewed as superior because owners are given incentives to use land most efficiently and thereby maximize agriculture's contribution to social well-being.[102]

Traditional/customary conceptions of land use and holding systems for the most part do not fit within the above paradigm of capital production. This puts them on a collision course with the dominant entrenched capitalist configurations that in the end work against the customary system. For instance, the Land Act and Land Policy promote conversion of customary land into other forms such as freehold and privatization of land.[103] On the other hand, the local rules governing land, which have been written down as the *Principles and Practices of Customary Tenure in Acholiland*,[104] are organically presented in such a way that limits adaptation to the world around the customary; more towards land exchange modes for economic development.[105] Section 1(a) and (b) of the Principles and Practices of Customary Tenure in Acholiland[106] provide that land vests in a clan, individual or household and that it is not to be sold. The weakening factor in this lies in the fact that the customary can be condemned for being anti-capital and not 'modern'. The irony, however, is in the fact that this provision has a preserving effect on the customary; protecting it from mutating to the forms acceptable to the capitalistic world around it.

Further, the contemporary world is moving towards greater protection of equal

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102. R. Barrows and M. Roth, *Land tenure and Investment in African Agriculture: Theory and Evidence*, 28, 2 265-297 JOURNAL OF MODERN AFRICAN STUDIES (1990), at 265.

103. Land Act Cap 227, s.9 and Land Policy Strategy 40 (iii).

104. *Ker Kwaro Acholi, supra* note 22.

105. Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them. CSOPNU, December 2004.

106. *Ker Kwaro Acholi*, *supra* note 22.

rights for all including women.[107] There are a number of customary practices that are contrary to this. Women have in some instances been discriminated against in the customary spaces of Acholiland,[108] more so since they do not in most cases, directly "own" land but do so through their male counterparts (husbands, brothers or fathers).[109] This means that their rights are traditionally only enforceable through indirect interventions of those rights holders, the men. Loss of connection to those male "agents" dissipates the women's rights to land.

Section 2(c) of the principles and practices of customary tenure in Acholiland provides that land rights are lost by death or divorce. If a wife claimed rights through a husband, divorce or death of a husband renders extinct the woman's right to land. Such discriminating practices are contrary to Article 33 in favour of equality between men and women and also for "affirmative action to get rid of asymmetries brought about by among others tradition or custom" in order to achieve equality between men and women. The discrepancy between the ideal on protection of women and what is actually happening on the ground puts the customary out of line with dominant expectations on gender equality and thereby its castigation as bad. The gender imbalances can therefore be used to delegitimize it leading to its marginalization.

In addition to the above, there is evidence that after conflict, the imperative for survival and the need to "catch-up with life" brought about desperation and the desire to do anything to achieve that goal even if in total disregard of what was considered 'customary' or normal.[110] Examples of the above include the rise in incidence of unlawful land sales,[111] and individuals claiming exclusive rights to

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107. Convention on the 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.

108. M. Kane *et al,* Reassessing Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor (Paper presented at the World Bank Conference in Arusha Tanzania, New Frontiers of Social Policy, 12-15 December, 2005).

109. M. Kimani, Women struggle to secure land rights; Hard fight for access and decision-making power (2008), retrieved from <http://www.un.org/africarenewal/magazine/april-2008/women-struggle-secure-land-rights>, (accessed 11 February 2015).

110. For example, see M. Oosterom, A matter of 'catching up'? Public Authority in post-conflict northern Uganda (unpublished paper presented at the Human Security: Humanitarian Perspectives and Responses Conference, Istanbul, 24-27 October, 2013).

111. P. Hetz *et al,* Land Matters in Northern Uganda Anything Grows; Anything goes Post-Conflict "Conflicts" lie in Land, Research report written for USAID (Nov 2006 and April 2007), available at <http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Land_Matters_in_Northern_Uganda_Report.pdf>, (accessed 7 February 2015).

family/clan/community land, etc.[112]

Some of the above factors within the customary space make customary tenure enigmatic, not attractive to outsiders, and also not in line with contemporary capital oriented functions of land in society. This makes it subject to marginalization by society and state.

D. Marginalized but still strong

Customary tenure in Acholi and the rights that ensue from it has persisted for a long time despite its overall marginalization from various sections of society and the government and its development allies. Through the legal and policy regime, the state tries to regularize and increase its grip on customary land, a thing that could lead to changes in its form if not its disappearance over time.

The system of land allocation and land transactions is important in determining equity, land administration and dispute resolution mechanisms in the customary tenure.[113] A number of factors offer an explanation as to the continued relevance of the customary in Uganda generally and in Acholiland, despite the marginalization.

First, there has been preoccupation with certification of the customary, and provision of options to convert it into freehold as seen in the Land Act.[114] The customary is not given space to evolve. Yet, some scholars have opined that the best would be to free customary tenure to evolve without interference.[115] Options at certification and conversion are promoted to among others secure ownership rights and make the customary competitive in this era of capital. Competitiveness in this case is also seen in comparison to other private property systems. The private property systems, alternatives offered by the state/development establishments to inform changes in the customary tenure are, however, not perfect.

The registered land system, for example, has for long been associated with corruption, forgeries and land thefts.[116] This is not to say that there is no corruption associated with the customary tenure; research conducted in Acholi revealed that there is some level of corruption in handling cases of customary land.[117] The absence of proven better alternatives to the customary system arguably creates a situation in which

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112. *Id.*
113. Busingye, *supra* note 21.
114. See, s.9.
115. Barrows and Roth, *supra* note 102.
116. See *supra* note 101.
117. MercyCorps, *supra* note 73, at 7.

persons claiming rights under the customary hold on to it. After all there are more controversies and imperfections in other tenure systems. More so, the major social systems which are the basis of customary tenure are after all not as bad, however much they were damaged by the impact of armed conflict. The social systems and structures are within the communities and therefore more accessible and less bureaucratic. This is as opposed to the highly legalistic and bureaucratic changes introduced by the law, such as in cases of communal land associations where constitutions have to guide all processes.[118]

Secondly, the recognition of customary tenure by the law as one of the land tenure systems in Uganda has played a part in its continued value. The 1995 constitution of the Republic of Uganda for the very first time ever recognizes customary tenure as one of the land tenure systems in Uganda.[119] The detail of this is elaborated in the Land Act 1998, thereby recognizing customary land holders as landowners with valid rights to land defensible in law. Note, however, that mere recognition without efforts to change the general condescending attitude toward the institutional power of the customary, or ensuring translation of law into reality, may lead to discard the customary or to leave it in the marginalized state.

In addition to the above, the simplicity and accessibility of dispute resolution mechanisms in the customary space means it is open to the majority poor. There is in Acholi an elaborate structure in which disputes are handled at various levels: in a family, by the family head; between or among families, by the *Rwot Kweri,* with appeals going to the clan elders or to a higher clan chief, the *Rwot Moo*.[120] These structures are within the communities and therefore accessible to those willing to receive their services.[121]

The existence of the above structures alongside other statutory institutions such as Local Council Courts, and courts of judicature such as magistrate courts, however, presents a challenge to the traditional structures. Personnel in these traditional structures mediate in land cases, yet the magistrate courts issue enforceable judgments that make them more appealing to those who can afford their services. Theoretically, the traditional institutions that deal with land cases did not have the legal recognition prior to 1998. Technically, in the absence of the legal legitimacy, the other protected institutions were way above the customary and could unfavourably outcompete them. In the circumstances, one can argue that the recognition of the role of traditional

118. Land Act Cap 227, s.15-17.
119. Article 237 (4) (a).
120. Mabikke, *supra* note 15, at 12.
121. *Id*., at 10-12.

authorities in land administration and dispute resolution structures of the Land Act 1998, as mediators alongside the formal land tribunal system (s.89), is a step in the right direction. If the law is implemented and some support given to these institutions, their strength and legitimacy can be buttressed to better handle the conflicts that arise on customary land. Other than that, the pre-1998 situation highlighted above would be maintained.

E. Political Significance and Continued Relevance of Customary Tenure

As alluded to earlier in this article, customary tenure is the largest in Uganda. By corollary, the majority of Ugandans claim rights to land under customary tenure. Therefore, the ability to control it is significant for political reasons. When the state wields power over land, it does so over people as well.[122] Weakening of the customary system of land holding through state controls and intervening in the various conflicts and emergencies that the weakened system produces makes political sense. Therefore, nurturing the customary system to such a level that it will require less state control is to some extent to remove the basis on which the state would exercise power over customary land and the people.

Customary land denotes social identities of the people that subscribe to it. Social and cultural rules are used to determine entitlement, inclusion or exclusion. Leaving this unit or community with no state control could result into reproduction of rules and processes that might not auger well within the state context. It is argued that "social transformation has a tendency to shape bases of authority".[123] Such bases could be shaped in an exclusionary manner against the state, in the interest of localized centres of power and authority. So, if the customary is left to evolve as a consequence of inevitable social changes (without state interventions), the state could lose out if the consequence of such social change makes the elders or customary rules and institutions the dominant regulators of the customary spaces on land matters.

It has further been argued that exerting control over land is very significant in controlling or taking charge of the dynamic processes of social, economic, and political processes in a given country.[124] The customary land tenure system in Acholi remains significant in availing the state a platform for exercising such political power. It has been stated that "… (in turn), the salience of localized identities, whether regional or

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122. P. Peters, *Conflicts over land and threats to Customary Tenure in Africa*, Center for International Development at Harvard University (CID), working Paper No. 247 Sept. (2012) at 8.

123. *Id.*, at 16.

124. *Id*., at 15-17.

ethnic or linguistic, has been intensified as parties vie for the support of the traditional authorities in bringing in the vote."[125] In that regard, mere neglect or marginalization of the customary tenure system is a better vice than total discard. The latter yields little benefit to the state than the former, by which the customary is preserved although in a weakened state for the political end it may serve—the vote.

Closely related to the above are the linkages between control over customary tenure in Acholi and the wider constitutionally important notion of citizenship, which makes the customary system still relevant for that and other purposes. Any legal and policy reforms around it therefore have connotations for citizenship.[126] Citizenship bestows belonging and entitlement to rights from the state; in other words, it makes the state a duty bearer to actualize rights for people. This paradigm of duty bearers and entitlement to rights between state and citizens respectively creates a state-society relationship that is so pertinent for the continuance of state legitimacy. It means there is value in the continued existence of claimants to customary rights in Acholi who require state protection for those rights and the process of offering that protection, state authority, is entrenched.

V. CONCLUSION

Customary land tenure and rights are regularly marginalized by a wide spectrum of actors including the state. Strands of marginalization play out at the level of state policies, programmes, public discourse, and in the context of (international) relations about land tenure reform with players such as development partners. The consequences of such marginalization become worse in the post-conflict situation of Acholi in northern Uganda, as shown in this article.

The customary is embedded in a highly informal and fluid social setting, greatly dependent on traditional norms and institutions of elders as custodians of customary land law and also as agents in mediating land cases.[127] This article has made the analysis within the milieu of armed conflict that ravaged northern Uganda for over two decades.[128] The resulting displacement of the people in Acholi is among the greatest shapers of the nature of transformation that surfaced; shaping society and dynamics of capital and land as a source of the latter. Such transformations have far reaching

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125. *Id.,* at 8.

126. C. Boon, *Property and Constitutional order: Land tenure reform and the future of the African State*, AFRICAN AFFAIRS 106 (425): (2007) 557-586.

127. Mabikke, *supra* note 15.

128. DOLAN, *supra* note 68.

consequences such as questioning existing institutions or persons exercising power over land issues or even entrenching legitimacy of new power wielders on matters of customary land.

This article has shown that some trends in the law and policy, although presented as those with strengthening value, will in the long run have a marginalizing effect on customary tenure and rights in Acholi. Among these are: section 89 of the Land Act which recognizes traditional Authority as mediators without facilitation or technical support (at the time of writing; and since the passing of the land act in 1998); populist approaches to matters of customary tenure which lead to short termism in dealing with the myriad of post conflict customary land conflicts; and contestations at the inter-, intra-personal and community levels. The manner in which the imperative for post-conflict reconstruction, development and capital creation has been handled depicts the levels of marginalization of the customary in higher-level conflicts among customary land rights claimants on the one hand and investors such as the Madhvani Group and government.[129]

It is important to understand the social relationship and vocabulary of customary land tenure/ rights and how this conditions legitimacy of the customary within some social classes. Such logics of social power and relationships and their outcomes ought to inform law and policy aimed at customary land reform. In the absence of this, the ridge between the realities in the customary spaces of Acholi and the national legal, policy and other processes and realities is wide. With the culture of non-implementation of laws, the dynamics reproduced as a result of the social and cultural on-the-ground realities are entrenched. This makes the national processes relatively out of touch with those realities on the ground, thereby marginalizing the customary tenure systems in post-conflict Acholiland.

Marginalization of the customary system goes back to the colonial era and through the formation of the post-colonial capitalist state and only exacerbated in contemporary legal and other regimes. The new post-1995 era heralds a distinct pattern of subtle marginalization since the law and policy to a great extent attempt to "streamline" customary tenure. However, the limited levels of enforcement and implementation of the laws and policies unveils the de facto political priorities of the state and those that exert state power on the matter. They provide skin-deep protection that does not offer ultimate protection to the customary system and claimants of rights in it. Instead, it is saved in a relatively weak form, for that form makes it raw material for populist politics. In as much as that is the case, the marginalization of the customary

129. See *supra* note 78; also see Nakayi, *supra* note 81; Sjögrena, *supra* note 62.

system has not led to its total irrelevance to the communities in Acholi; it serves a number of valid social and other functions for which it is embraced. Although marginalized, in principle, it is not yet discarded. It is therefore imperative to facilitate and strengthen customary tenure instead of marginalizing it.

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