

proposition is supported by scholars like Kwok who state that some of the most fundamental issues for women in Africa are 'survival and economic justice'.⁹⁵ This is one of the strongest reasons for dealing with the intricacies in customs and cultures. Like men, women need to have reliable sources of sustenance through secured land rights to survive and enjoy their right to life in Uganda.

Additionally, women need to unrelentingly raise their voices against negative cultures. It is argued that owing to the negativity about Africa and the relegation of her people, 'African women have felt under pressure to keep silent about their oppression'.⁹⁶ This oppression must be uncovered so that women can speak and advocate for heightened justice.⁹⁷ There is need for respectful proactive engagement by women within the communities and families to advocate for their land rights.

Furthermore, upon deeper interrogation, there may be opportunities for states to amplify positive customary law through advocacy while promoting positive culture that safeguards women's land rights. According to Woodman, the state can retain customary law and recognise it through 'abstention from the suppression of customary law, observance, through the enforcement of customary norms by state agencies...degrees of autonomy for customary-law groups'⁹⁸ and upholding rights. When the positive is amplified, the negative can be defused through denouncement of bad culture or customs without immense resistance.

More still, by acknowledging that culture is constantly evolving, negative paradoxical culture and customs can be shed off. This proposition is advanced by Oduyoye who argues that 'culture is not static and is constantly open to transformation'.⁹⁹ The opportunity to neutralise negative customs and culture lies in embracing the new redefined and positive culture which includes safeguarding women's land rights.

⁹⁵ Kwok (n 21 above) 11.

⁹⁶ Kwok (n 21 above) 16.

⁹⁷ As above.

⁹⁸ GR Woodman 'Legal pluralism and the search for justice' (1996) 40 *Journal of African Law* 166.

⁹⁹ Kwok (n 21 above) 17.

Relatedly, another dimension of neutralising culture is through embracing positive folktale. It is argued that there is need for ‘courage to discard some of the folktale that is harmful and no longer relevant and to continue to develop a new tapestry of meanings for women’.¹⁰⁰ Kwok proposes for “two-winged” theology, which would include the voices of both women and men’...¹⁰¹ This is the assertion of this thesis – all parties are treated equally before customs and culture especially on issues that impact on one’s right to life.

To mitigate the negative effect of some customs and culture, Nagarajan and MacDermott make proposals for ‘incorporation of customary land-owning groups’ under the incorporation legislation,¹⁰² trusts¹⁰³ and community companies.¹⁰⁴ How this would apply in Uganda is through the communal land ownership. This would entail purchasing of land collectively for women to hold land for their livelihoods. If at the local level, women usually congregate for saving groups and arts and crafts interventions. It would be good if women congregate to collectively purchase land so that they can own land in areas where the individual purchase is challenged or undermined for women.¹⁰⁵ This would enable them to have alternatives especially when hard pressed without land for sustenance.

The judiciary is important in mitigating negative culture and customs. Inspiration for women and land rights can be drawn from Botswana in the case of *Molefi Silabo Ramantele v Edith Modipane Mmusi & 3 Others*.¹⁰⁶ In this case the High Court had held that the last born male could inherit an estate to the exclusion of his female

¹⁰⁰ As above.

¹⁰¹ Kwok (n 21 above) 20.

¹⁰² Nagarajan & MacDermott (n 66 above) 486.

¹⁰³ Nagarajan & MacDermott (n 66 above) 487-488 the trusts are established under a legal arrangement so that the interests of vulnerable groups are upheld. In Australia, Aboriginal rights were safeguarded using trusts.

¹⁰⁴ Nagarajan & MacDermott (n 66 above) 489 this is done by registering a corporate form of not-for profit entities.

¹⁰⁵ SEEP et al ‘Women’ empowerment and savings groups: What do we know’ (2018) 2 Globally, Women constitute 80% of savings group members; see also ‘Savings groups keep young women and girls cushioned through the COVID-19 lockdown’ <https://uganda.unfpa.org/en/news/savings-groups-keep-young-women-and-girls-cushioned-through-covid-19-lockdown> (accessed 5 September 2023) women saving groups provided economic empowerment to women in 2020 through funding from the Government of Denmark/DANIDA coordinated by UNPA Uganda. These economic interventions could extent to collective land purchase over a period.

¹⁰⁶ *Molefi Silabo Ramantele v Edith Modipane Mmusi & 3 Others (Molefi case) Botswana Court of Appeal No 104 of 2012.*

siblings.¹⁰⁷ On appeal, the Court of Appeal addressed legal pluralism excellently when it granted orders that the culture of females not inheriting is not part of the Ngwaketse culture.¹⁰⁸ The court also ordered that the parties refer to the clan ‘elders and uncles’ for resolution on the person to take care of the property.¹⁰⁹ Though this decision promotes the good in culture while ensuring that during the administration of culture, women are included in a clan discussion, it revealed that the court’s biased gendered statements excludes women from participating in managing land and property because most clan meetings are male dominated in participation and decision-making.

The Tanzanian case of *Ephraim v Pastory* relates to women’s struggle for land rights.¹¹⁰ The case illuminates how customs and cultures intersect with the law. In this case a woman had inherited clan land through her father’s binding will. She subsequently sold the land and Ephraim filed a suit on the grounds that since she was a woman, she had no ‘powers to sell clan land’. The clan to which she belonged had a codified provision that she could not sell land but enjoy usufruct rights.¹¹¹ The court observed that it is not often their place to dictate over customary law.¹¹² Any alterations must be done within the community of origin.¹¹³ The court held that discrimination against women is criminal and for the country to make advancements, ‘it is essential that our women live in terms of full equality with their fellow citizens who are men’.¹¹⁴ The court upheld that the sale was valid and the land could only be redeemed if the appellant bought the land within a six months period to redeem clan land. This decision clearly safeguarded women’s land rights and adjusted negative culture which was being proposed by clan members. This intersection of law whilst respecting culture and weeding out the chaff is essential for positive development in customary law relating to women and will advance the land rights agenda for women in Uganda.

The women movement remains vigilant in challenging the validity of suspect cultures and customs before courts of law. The *MIFUMI and 12 others v Attorney*

¹⁰⁷ *Molefi* case (n 106 above) 2.

¹⁰⁸ *Molefi* case (n 106 above) 67.

¹⁰⁹ As above.

¹¹⁰ *Ephraim v Pastory* TzHC Civil Appeal No 70 of 1989 (*Pastory* case).

¹¹¹ *Pastory* case (n 110 above) 2.

¹¹² As above.

¹¹³ *Pastory* case (n 110 above) 3.

¹¹⁴ *Pastory* case (n 110 above) 4.

General and Kenneth Kakuru (MIFUMI case), the appellant contended that the requirement to pay bride price and refund it at the dissolution of a customary marriage was unconstitutional.¹¹⁵ In weeding out the negative aspects of culture from the positive, the Constitutional Court held that the 'voluntary exchange of gifts' is not unconstitutional but the demand for bride price as a preliminary to marriage is unconstitutional with certain provisions of the Constitution.¹¹⁶

Similarly, the Kenyan case of *Kamau v Attorney General and others (Kamau case)* entirely neutralised negative culture.¹¹⁷ In the *Kamau* case, a medical doctor contested the Prohibition of Female Genital Mutilation Act and the Board duly established under the law.¹¹⁸ One of the issues for resolution was whether the prohibition of an adult female from electing to be circumcised is constitutional.¹¹⁹ Relying on the evidence adduced, the court held that the female genital mutilation has 'immediate, short term and long term physical and psychological adverse effects' to one's life.¹²⁰ The Constitutional Court among others held that '[c]ulture is dynamic and not static and will continue to grow responding to new factors. It is also fluid and changes from time to time'.¹²¹

Relatedly, the South African case of *Rahube v Rahube* also addressed concerns raised by patriarchy.¹²² In expunging negative culture which prohibited Mary Rahube from enjoying property rights which have a direct correlation with land rights, the Constitutional Court of South Africa held against cultures that promote the negative effects of culture. The Court held that:¹²³

It is important to recognise that the pervasive effect of patriarchy meant that women were often excluded even from seemingly gender-neutral spaces. The perception of women as the lesser gender was, and may still be, a widely-held

¹¹⁵ *MIFUMI and 12 others v Attorney General and Kenneth Kakuru* Constitutional Appeal No 2 of 2010 (*MIFUMI* case).

¹¹⁶ As above.

¹¹⁷ *Kamau v Attorney General and others* Constitutional Petition 244 of 2019 (*Kamau* case).

¹¹⁸ *Kamau* case (n 117 above) para 1.

¹¹⁹ *Kamau* case (n 117 above) para 6.

¹²⁰ *Kamau* case (n 117 above) para 145.

¹²¹ *Kamau* case (n 117 above) para 207.

¹²² *Matshabelle Mary Rahube v Hendsrine Rahube & Others* 2018 (17) SA 319 (CC) (*Rahube* case) 42.

¹²³ *Rahube* case (n 122 above) 13 para 23.

societal view that meant that even where legislation did not demand the subjugation of women, the practices of officials and family members were still tainted by a bias towards men. The prioritisation of men is particularly prevalent in spheres of life that are seen as stereotypically masculine, such as labour, property, and legal affairs.

Additionally, the Court held that:¹²⁴

Twenty-four years into democracy, a piece of legislation that reifies the factual position created by a racist and sexist apartheid Act cannot pass constitution muster. The Upgrading Act, in its attempt to redress one injustice, exacerbated another. When enacting remedial legislation, Parliament must be aware of the historic omnipresence of patriarchy which will otherwise undermine even the noblest of legislative endeavours. In conclusion, section 2(2) of the Upgrading Act is constitutionally invalid insofar as it solidifies the position created by apartheid legislation which excluded African women from the property system and resulted in discrimination on the basis of sex and gender in terms of section 9 of the Constitution.

The *Rahube v Rahube* case places emphasis on the role of parliament to ensure that enactments address the gaps created by centuries of patriarchy. This decision relates to Uganda and provides good explicit jurisprudence to Uganda's judiciary and parliament to specifically strengthen land governance in the various spheres of women's lives to safeguard their land rights through the erosion of negative customs and cultures.

This subsection has unearthed the various paradoxical contexts of culture and customs. It has shown that though culture and customs may be complex, there are mechanisms to neutralise for the benefit of all persons including women in Uganda.

¹²⁴ *Rahube* case (n 122 above) para 42.

4.4. Conceptualising legal pluralism and its influence on women's land rights

Legal pluralism is defined as 'the co-existence *de jure* or *de facto* of different normative legal orders within the same geographical and temporal space'.¹²⁵ The connection 'between these multiple normative orders is susceptible to a range of permutations that escape precise limitations'.¹²⁶

The presence of several legal systems indicates that many entities perceive legal rights in diverse ways. Such legal pluralism is indicative of 'long-established theories of post-colonial legality'.¹²⁷ The rise in acknowledgment of legal plurality and plurality of legal rights is 'an external reflection of the growing penetration of the transnational legal system, which is expressed through the fact that, both within and across national boundaries, human rights form a dominant source of legal communication and validity, fluidly producing new rights in response to new social demands'.¹²⁸

According to Merry who expounds on the foundations of legal pluralism in Africa, legal pluralism existed before European influence on African customs and culture during 'conquests and migrations for centuries'.¹²⁹ Further, Merry notes that African customs and cultures have diverse legal arrangements which are uncodified and limited in structure for adjudication.¹³⁰ Hence, emergence of legal pluralism in Africa is not entirely attributed to colonial influence.

¹²⁵ H Quane 'Legal pluralism and international human rights law: Inherently incompatible, mutually reinforcing, or something in between?' (2013) 33 *Oxford Journal of Legal Studies* 676; see also Woodman (n 98 above) 157 who defines legal pluralism: 'Legal pluralism in general may be defined as the state of affairs in which a category of social relations is within the fields of operation of two or more bodies of legal norms;' see also J Griffiths, 'What is legal pluralism?' (1986) 18 *Journal of Legal Pluralism and Unofficial Law* 39, according to Griffiths, legal pluralism is 'one in which law and legal institutions are not all subsumable within one 'system'. Quane (n 125 above).

¹²⁶

¹²⁷ C Thornhill *et al* 'Legal Pluralism? Indigenous rights as a legal construct' (2018) 68 *University of Toronto Law Journal* 441.

¹²⁸ Thornhill (n 127 above) 493.

¹²⁹ SE Merry 'Legal pluralism' (1988) 22 *Law & Society Review* 870; see also B House-Midamba 'Legal pluralism and attendant internal conflicts in marital and inheritance laws in Kenya' (1994) 49 *Africa* 377 customary law existed before colonialism and endured through oral tradition which was could easily be broadcasted.

¹³⁰ Merry (n 129 above) 874.

After colonialism, African legal systems fluctuated between the previous and present dynamics.¹³¹ For example in customary and Islamic marriage structures, the payment of bride price legitimises the marriage while Hindu and Christian laws do not have such requirements.¹³² Customarily neither a man nor woman would divorce their wife or husband respectively. Instead, the man would cater for his former wife as a dependent person¹³³ which is different from most statutory laws. Another example is that the preparation of wills under civil law requires one to appoint an individual as opposed to the family in customary law.¹³⁴

Furthermore, the nature of legal pluralism can be 'complex and multifaceted'.¹³⁵ Nonetheless, legal pluralism is acceptable especially in the context of Africa and Uganda where several customs and cultures exist.¹³⁶ Evidently, there is limited backing for the notion that legal pluralism is not acceptable.¹³⁷ Hence, it is indicative of its wide recognition and application in the legal practice and interpretation of rights. Consequently, legal pluralism needs to be implemented in ways that ensure compatibility with the broader legislation.¹³⁸ This is notwithstanding the fact that the intersection between formal and informal legislation is intricate with the varying forms of legal pluralism.¹³⁹

According to Quane who engages with legal pluralism through international human rights lenses, international human rights law creates the drive and at the same time limitations for legal pluralism.¹⁴⁰ Therefore, international human rights law creates opportunities for harnessing both concepts. Customary law and international human rights have differences which may seem discriminatory but when scrutinised, both concepts hold water.¹⁴¹ This is because the acceptance of indigenous customary law

¹³¹ House-Midamba (n 129 above) 379.

¹³² House-Midamba (n 129 above) 386.

¹³³ House-Midamba (n 129 above) 389.

¹³⁴ House-Midamba (n 129 above) 387 severally customary law has deprived women from 'owning and inheriting land' despite some gradual progress in some places.

¹³⁵ Quane (n 125 above) 677.

¹³⁶ Quane (n 125 above) 701.

¹³⁷ As above.

¹³⁸ Quane (n 125 above) 701-702.

¹³⁹ Quane (n 125 above) 681-682 it is imperative to note that there is need for state culpability while deliberating the harmonisation of legal pluralism and international human rights law is futile – however this is not the deepest concern of this thesis.

¹⁴⁰ Quane (n 125 above) 677

¹⁴¹ Quane (n 125 above) 701.

is indispensable for the safeguard of rights pertaining to indigenous peoples.¹⁴² Additionally Quane observes that instead of utilising robotic methods to legal diversity, international human rights entities seek to engage with all parties to ensure that human rights principles abide.¹⁴³ This thesis draws inspiration from such literature and advocates that at the national level, enforcement of legal pluralism pays homage to human rights based principles for the effective implementation of women's land rights.

Additionally and in relation to the African Charter on Human and Peoples' Rights (African Charter) and legal pluralism, the intersection is within the context of religious legislation within national legal structures.¹⁴⁴ Further, the interpretation of customary and holy laws is seldom identical or definite.¹⁴⁵ In fact, it must be noted that personal laws like religion are often pluralised and sometimes causes clashes in enforcement and alignment of rights with the constitution. It is necessary to interrogate beyond employing a 'mechanical audit' of religious and customary laws.¹⁴⁶ This thesis specifically addresses divorce, succession and inheritance, marriage and the refugee status of women within the context of Uganda.

Another perspective about legal pluralism is its durability and evolution overtime. Notwithstanding the various challenges and though it may feel that 'African customary law is under strain',¹⁴⁷ customary law has always been in existence and is never stagnant.¹⁴⁸ Customary law keeps metamorphosing because the need for change has increased.¹⁴⁹ The quest for justice necessitates an analysis of existing customary law within the various African societies.¹⁵⁰ The relationship between formal and customary laws commenced in 'a conflict of claims to legitimacy'.¹⁵¹ Adjustments in state and customary law foster 'greater mutual accommodation'¹⁵² and will serve to strengthen among others women's land rights at grassroots.

¹⁴² As above.

¹⁴³ Quane (n 125 above) 702.

¹⁴⁴ Quane (n 125 above) 690.

¹⁴⁵ Quane (n 125 above) 695.

¹⁴⁶ As above.

¹⁴⁷ Woodman (n 98 above) 156.

¹⁴⁸ As above.

¹⁴⁹ Woodman (n 98 above) 156-157.

¹⁵⁰ Woodman (n 98 above) 157.

¹⁵¹ As above.

¹⁵² As above.

Delving deeper into legal pluralism, it is evident that there are several instances where customary law clashes with statutory law and leads to violation of rights. This situation is best explained by Gärber who notes that persistent violation of rights provided under both customary and state law contribute to gender inequality.¹⁵³ It has also been argued that plurality is positive or negative depending on whether a customary system abides by patriarchy or discrimination against women.¹⁵⁴ Subsequently, it is imperative to understand peculiar cultures and customs to scrutinise them against codified laws and ascertain the likely conflicts for alignment. Despite the periodic standoff between culture and customs and statutory laws, most statutory law recognises customary law that does not infringe on the guaranteed rights in statutory laws.¹⁵⁵ Consequently, in intersecting customs, culture and formal laws, it is important to systematically unpack negative aspects of cultures and customs so that legal pluralism can thrive and promote positive culture that safeguards rights including women's land rights.

While Scalise and Giovarelli suggest that there is limited reliable information on the direct influence of formal and customary personal law on property rights including the right to land,¹⁵⁶ they also submit that the influence of customary law on women's land rights possibly supersedes formal laws.¹⁵⁷ Without sufficient information on the extent of the influence of formal laws on customary law in relation to land right and vice versa, it is difficult to ascertain the magnitude of its impact, the need and possible ways of intervening.

Additionally, Thornhill argues that in some local communities, women face evictions from their ancestral land which puts their very existence in jeopardy.¹⁵⁸ This is because some governments have not given customary land rights the respect and

¹⁵³ B Gärber 'Women's Land Rights and Tenure Security in Uganda: Experiences from Mbale, Apac and Ntungamo' (2012) https://stichproben.univie.ac.at/fileadmin/user_upload/p_stichproben/Artikel/Nummer24/24_Gaerber.pdf (accessed 2 March 2020).

¹⁵⁴ World Bank & Trust Law Connect (n 42 above) 3.

¹⁵⁵ Budlender & Alma (n 57 above) 29.

¹⁵⁶ E Scalise & R Giovarelli 'Promoting equity in economic rights' in J Heymann & A Cassola (eds) *Making equal rights real* (2012) 140.

¹⁵⁷ Scalise & Giovarelli (n 156 above) 131.

importance it deserves,¹⁵⁹ several suits are filed in court on the application of customary law and legal personality local communities.¹⁶⁰ Therefore, the marinade of statutory laws and customary law need to be handled diligently to eliminate all forms of prejudice against people from land rights including women.

The critical question to ask is whether legal pluralism can be blamed for the negative customs and cultures persisting. The answer rests with Higgins and Fenrich's analysis. According to them, legal pluralism is not responsible for the deprivation of women's land rights. They propound that:¹⁶¹

...Legal pluralism itself is not the problem in terms of women's land access. Rather, it complicates a system that lacks transparency, a system of recording, consistency in definition, clear choice of law rules, and jurisdictional boundaries for the resolution of disputes. All this complexity and information asymmetry benefits the powerful, most of who are not women...

In summary, it is important for cultural institutions and state entities to clean house and create robust systems to safeguard women's land rights as opposed to hiding behind legal pluralism. Legal pluralism does not operate in a vacuum. It operates within statutory law, customs and cultural spaces. These spaces within which it operates should respect the rights of women so that when they intersect there is a consolidation of rights for the wellbeing of society.

4.5. Spheres of influence, customs, culture and women's land rights

The goal of analysing the daily experiences of women in their respective circumstances is to ascertain the extent to which customs and culture deliver on women's land rights in Uganda. It commences with contextualising the heterogeneity of women and spheres of influence and finally ends with dissecting the spheres of influence.

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ T Higgins & J Fenrich 'Legal pluralism, gender, and access to land in Ghana' (2012) 23 *Fordham Environmental Law Review* 20.

4.5.1. Contextualising the heterogeneity of women and spheres of influence

There are 56 recognised indigenous communities in Uganda.¹⁶² Each indigenous community has its own diverse cultures with unique interpretations of women's land rights. Aside from ethnic identity, women are diverse in many ways. The diversity includes the various types of marriages, divorce experiences, inheritance and succession, refugee statuses and land for refugee women.

The next subsection deals with specific social spheres through which cultures and customs manifests to influence women's land rights. The parameters for discussion are marriage, divorce, succession, and refugee women's land rights.

4.5.2. Dissecting spheres of influence and women's land rights

4.5.2.1. Marriage

Under the laws of Uganda, there are five types of marriages. They comprise; church marriages and civil marriages both under the Marriage Act,¹⁶³ customary marriages as provided in the Customary Marriage (Registration) Act,¹⁶⁴ Hindu marriages governed by the Hindu Marriage and Divorce Act¹⁶⁵ and the Islamic marriages administered by the Marriage and Divorce of Mohammedans Act.¹⁶⁶

Church marriages are governed by the Marriage Act. Solemnisation must be done by a recognised minister in a licenced place of worship.¹⁶⁷ Upon completion of the marriages, the ministers are obliged to submit returns to the registrar of

¹⁶² The Constitution of the Republic of Uganda 1995 as amended (Uganda Constitution) the Third schedule as stipulated in article 10 (a) which grants citizenship to all persons born in Uganda with parents or grandparents belonging to any of the indigenous communities mentioned in the Third Schedule. The Third Schedule of the Uganda Constitution lists Uganda's 56 indigenous communities as of 1 February 1926; Acholi, Alur, Baamba, Babukusu, Babwisi, Bafumbira, Baganda, Bagisu, Bagungu, Bagwe, Bagwere, Bahehe, Bahororo, Bakenyi, Bakiga, Bakonzo, Banyabindi, Banyankore, Banyara, Banyarwanda, Banyole, Banyoro, Baruli, Basamia, Basoga, Basongora, Batagwenda, Batoro, Batuku, Batwa, Chope, Dodoth, Ethur, Ik (Teuso), Iteso, Jie, Jonam, Jopadhola, Kakwa, Karimojong, Kebu (Okebu), Kuku, Kumam, Langi, Lendu, Lugbara, Madi, Mening, Mvuba, Napore, Nubi, Nyangia, Pokot, Sabiny, So (Tepeth) and Vonoma.

¹⁶³ Marriage Act, Cap. 146.

¹⁶⁴ Customary Marriage (Registration) Act, Cap. 143.

¹⁶⁵ Hindu Marriage and Divorce Act, Cap. 145.

¹⁶⁶ Marriage and Divorce of Mohammedans Act, Cap. 147.

¹⁶⁷ Marriage Act (n 163 above) section 20; see also Marriage Act (n 163 above) section 21 without a license to wed, a minister in a place of worship cannot officiate a marriage; see also marriage Act (n 163 above) section 5 marriage act.

marriages.¹⁶⁸ There has been some laxity in the submission of these returns to the registrar of marriages which eventually works against some women when there's a separation or when the marriage ends through death or divorce.¹⁶⁹ This type of marriage is monogamous in nature and provides a platform for equality. Generally, there is no contention during the commencement of a marriage and while it survives. Intending parties to a marriage seldom contact lawyers for prenuptial agreements which may be necessary to address emerging concerns.¹⁷⁰ Civil marriages are the same as church marriages though they are conducted directly by the State and not solemnised in church.¹⁷¹

As regards customary marriages, though the Uganda Constitution provides for among others 'equal rights' in and during marriage,¹⁷² the interpretation of equality varies across the various types of marriages and is most peculiar with customary marriages which are potentially polygamous. From inception, the fact that a man can marry additional wives already creates an inequality from the onset of the relationship. The actual addition of a wife or wives may distort the understanding of equality and often the implications are dire for women especially during succession or divorce as will be discussed subsequently. There is no legislative resolution as to the definition of a matrimonial home in polygamous customary marriages. It may be problematic to expect two or more women to share the same matrimonial home with their one husband and define that as equality. There is need for the law to address this issue so that women in polygamous marriages which are recognised by law are safeguarded.

¹⁶⁸ Marriage Act (n 163 above) section 24 information on the marriage should be filled in a book; see also Marriage Act (n 163 above) section 25 the duplicate copy should be delivered to the registrar of marriages in that district within seven days.

¹⁶⁹ 'Churches not filing marriage certificates with Gov't' *New Vision* 11 May 2015 <https://www.newvision.co.ug/news/1325818/churches-filing-marriage-certificates-gov> (accessed 12 April 2023) several churches and mosques were not filing marriage returns for weddings officiated on behalf of the State.

¹⁷⁰ This is except for a few cases that indicate prenuptial agreements were made including *Hough v Hough* High Court Divorce Cause 1 of 2006.

¹⁷¹ Marriage Act (n 163 above) section 2 various marriage districts are established by the line Minister; Marriage Act (n 163 above) section 3&4 registrars are appointed by the Minister; Marriage Act (n 163 above) section 26 provides for details of marriage in the registrar's offices.

¹⁷² Uganda Constitution (n 162 above) article 31(1).

Still on customary marriages and their polygamous nature, scholars like Kwok do not outrightly condemn polygamy and suggest that it arises sometimes out of difficult financial circumstances.¹⁷³ Evidently, following the recent COVID-19 pandemic, several economic measures must be taken within families and lifestyles adjusted to survive. Further, Kwok argues that when affinity in marriages takes root, polygamy will reduce.¹⁷⁴ Additionally and in relation to polygamy, it is proposed that there is need to extend 'hospitality' as African ethics since we are diverse in race, faith and circumstances.¹⁷⁵

Hindu marriages are celebrated in accordance with Hindu customs. There is a dearth of information on Hindu marriages in Uganda but the general rule as established by the Land Act is that all family homes are secure from sale without spousal consent.¹⁷⁶ Such protections extend to Hindu marriages.

Islamic marriages are governed by the Marriage and Divorce of Mohammedans Act. According to Shahaar, Sharia law is practiced in contrast to other laws.¹⁷⁷ Owing to the fact that the practice of Islamic marriages comprises a fusion of religious customs and cultures as against formal laws, implementation of Muslim women's land rights is sometimes at crossroads. To illustrate this, the definition of a marital home to a Muslim woman may remain unclear especially in instances where a man is unable to establish several homes for his wives. Other instances may arise where Muslim wives establish their own homes and the husband visits which renders them matrimonial homes. Such instances can become detrimental to the wives during divorce and inheritance, especially for children, since the husband can claim several matrimonial homes.

Most recently, The Marriage Bill (Bill) was tabled by a private member and the first reading was on 3 October 2024.¹⁷⁸ The Bill seeks to among others change and

¹⁷³ Kwok (n 21 above) 20.

¹⁷⁴ As above.

¹⁷⁵ Kwok (n 21 above) 22.

¹⁷⁶ The Land Act, Cap. 236 section 39.

¹⁷⁷ I Shahaar 'Legal pluralism and the study of Shari'a Courts' (2008) 15 *Islamic Law and Society* 116; Khadi courts are provided for in the Uganda Constitution but no enabling legislation exists for enforcement.

¹⁷⁸ The Marriage Bill, No. 73, 2024.

revoke all legislation on marriage in Uganda, provide for marital rights and property rights. Clause 45 seeks to expand the definition of matrimonial property to include the matrimonial home; household property in the matrimonial home; property obtained before or during marriage decided as matrimonial property through an agreement; property where there is a contribution; and initial donations for commencement of a business.¹⁷⁹ The Bill proposes that matrimonial property is held in common.¹⁸⁰ It states that every spouse has the right to own individual property.¹⁸¹ Notably, the right to equal access to matrimonial property is guaranteed.¹⁸² However, while some of these proposals are good, they do not absolutely guarantee these safeguards. In addition to the lengthy time taken to enact legislation, there are concerns with some provisions in the Bill which may limit its enactment.

4.5.2.2. Divorce

In Uganda, family legal challenges are predominant justice concerns.¹⁸³ About 62% women reported that family challenges were their most serious problem in comparison to men at 38%.¹⁸⁴ The vulnerability of 'poor, uneducated and rural' women and children are exacerbated when families disintegrate.¹⁸⁵ In order to obtain knowledge on divorce and separation, most Ugandans use their social networks with limited consultation from lawyers.¹⁸⁶ This raises concerns on the quality of advice rendered particularly with regard to recognising and ensuring that the legal entitlements for women are safeguarded and implemented.

The law on divorce is codified in the Divorce Act.¹⁸⁷ The law provides for dissolution of marriages,¹⁸⁸ nullity of marriage,¹⁸⁹ judicial separation and protection

¹⁷⁹ Marriage Bill (n 178 above) Clause 45(a)-(e).

¹⁸⁰ Marriage Bill (n 178 above) Clause 46.

¹⁸¹ Marriage Bill (n 178 above) Clause 48.

¹⁸² Marriage Bill (n 178 above) Clause 49.

¹⁸³ Hague Institute for Innovation of Law (HiiL) 'Deep dive on divorce and separation in Uganda' (2020) 24-25 the most common legal family problem is divorce or separation at 39%, disputes over child support 27%, concerns of maintenance in marriage 12%, inheritance and wills 8%, concerns of maintenance from a former partner 6%, parental custody rights 5% and forced marriages at 3%.

¹⁸⁴ HiiL (n 183 above) 26.

¹⁸⁵ As above.

¹⁸⁶ HiiL (n 183 above) 36-35 for divorce matters, the categories of people consulted starts with family members at 45%, 18% friends, 8% neighbours, 7% Local Council Courts, 6% religious leaders, 6% police, 5% community leaders, 2% colleagues and 1% lawyers.

¹⁸⁷ Divorce Act, Cap. 144.

¹⁸⁸ Divorce Act (n 187 above) section 4-10.

¹⁸⁹ Divorce Act (n 187 above) section 11-13.

orders¹⁹⁰ and general provisions.¹⁹¹ The interpretation of divorce in Uganda and its implication on women's land rights has mutated over the years. This is notwithstanding the fact that the Uganda Constitution constantly guarantees the right to equality at the dissolution of a marriage.¹⁹²

The first case documenting this transformative levelling of rights for both men and women during the dissolution of marriage is *Uganda Association of Women Lawyers & 5 others v The Attorney General*.¹⁹³ The petitioners sued on grounds that certain provisions of the Divorce Act relating to alimony, settlement arrangements, costs against a co-respondent and compensation for adultery were discriminative on the grounds of sex. The court declared the provisions unconstitutional and declared that either party can benefit. Currently, the enforcement of land rights for women and men cuts across. Notwithstanding the fact that the Constitutional Court declared certain provisions of the Divorce Act as unconstitutional, parliament has taken over 20 years to amend the legislation and provide safeguards and clear parameter on divorce and property law which includes land rights. This has raised immense tension, acrimony, aggression and weakening of the family because of the fluidity in distributing property – including land – after the dissolution of a marriage.

The acrimonious nature of divorce in relation to property and land rights is highlighted in the case of *Julius Rwabinumi v Hope Bahimbisomwe*.¹⁹⁴ The parties were wed in 2003¹⁹⁵ and their marriage irretrievably broke down leading to the divorce petition before the High Court in 2005.¹⁹⁶ Bahimbisomwe sought for the following; a divorce order, maintenance order, the share in property contributed to, return of all cultural gifts in the giveaway ceremony and costs of the petition.¹⁹⁷ All properties of Rwabinumi were to be equally shared and the matter was appealed to the Court of Appeal. The Justices of Appeal held that all properties individually obtained before a

¹⁹⁰ Divorce Act (n 187 above) section 14-19.

¹⁹¹ Divorce Act (n 187 above) section 21-42.

¹⁹² Uganda Constitution (n 162 above) article 31(1).

¹⁹³ *Uganda Association of Women Lawyers and 5 others v The Attorney General* Constitutional Petition 2 of 2003 (*FIDA* case).

¹⁹⁴ *Julius Rwabinumi v Hope Bahimbisomwe* Supreme Court Civil Appeal 10 of 2009 (*Rwabinumi* case).

¹⁹⁵ *Rwabinumi* case (n 194 above) 1.

¹⁹⁶ *Rwabinumi* case (n 194 above) 2.

¹⁹⁷ As above.

marriage became joint property when they married.¹⁹⁸ Counsel for the appellant contend that courts had no authority to convey propriety rights of one spouse to another at divorce hence the appeal.¹⁹⁹ At the Supreme Court, some of the grounds of appeal related to whether property acquired solely became matrimonial property on marriage and secondly what amounts to contribution to obtain a share in property. The court held that:²⁰⁰

The statement on the effect of marriage vows and the marriage ceremony on a spouse's individual property rights and the legal conclusion he drew therefrom have no legal basis and cannot therefore be left to stand...in my view, it was not only legally wrong but also very dangerous for court to hold that propriety rights can pass from one party to a marriage to another, based purely on religious marriage vows taken in accordance with one's religious beliefs or denomination, in the absence of specific legislation providing that such parties' property rights shall be determined according to their religious beliefs and practices...Another important point to note is that the respondent...never based her claims to a share of the property registered in the appellant's name on the marital vows...the respondent's claim for a share in the property were purely based on her direct cash contributions and not the mere fact that she had been married to the appellant.

The court further held that:²⁰¹

The learned Justice of Appeal mixed up the constitutional requirement of equality in the treatment of men and women "during marriage and at its dissolution" with what he perceived to be equality of sexes prescribed by the Bible. The learned Justice of Appeal not only wrongly articulated the law as to what constitutes matrimonial property, but also how and when individually held property of a person acquired before or during marriage becomes matrimonial property.

¹⁹⁸ *Rwabinumi* case (n 194 above) 7.

¹⁹⁹ *Rwabinumi* case (n 194 above) 9.

²⁰⁰ *Rwabinumi* case (n 194 above) 12.

²⁰¹ *Rwabinumi* case (n 194 above) 14.

The Supreme Court also decided that in fulfilling the right to equality in marriage, the Uganda Constitution does not prohibit a person from owning property individually or jointly.²⁰² The implication of this decision is that women's contribution in homes was now fully recognised. The individuality of a woman within a marriage was amplified which provides a basis for safeguarding her land rights in her individual capacity. However, it poses a threat to women who may not be financially sound owing to the difficult balance of working and childcare, stay at home mothers and women whose husbands put all properties in their names notwithstanding their wives' contribution. Furthermore, the Supreme Court requested parliament to legislate on what amounts to matrimonial property to guide courts in adjudication.²⁰³ Though the Succession (Amendment) Act of 2022 protects matrimonial homes, the broader protection of matrimonial property extending to those in monogamous and polygamous unions is yet to be determined and leaves a lot at stake especially for women who may easily be discriminated against, especially in cultural settings.

Most recently on 15 November 2022, the Court of Appeal made a ground breaking decision on the management of matrimonial property at the dissolution of a marriage in the case of *Ambayo Joseph Waigo v Aserua Jackline*.²⁰⁴ The five grounds of appeal related to erring in law by considering the appellant's property as matrimonial property, granting the respondent the appellant's property, directing that the appellant's property is sold and divided between the two and disregarding the appellant's evidence on acquisition of his personal property. Justice Kibeedi in his judgment held that 'spousal contribution is a question of fact'.²⁰⁵ In this instance, the Supreme Court awarded the respondent, Aseru Jackline 20% share of the matrimonial property – matrimonial home – as opposed to 50% which was granted by the court of Appeal. The court opined that visits to a building site do not amount to a contribution and considering the fact that the respondent was studying two house helps had been procured to do house chores.²⁰⁶ The court also relied on the fact that the appellant had adduced evidence to show that the respondent had not made any contribution to

²⁰² *Rwabinumi* case (n 194 above) 15.

²⁰³ *Rwabinumi* case (n 194 above) 16.

²⁰⁴ *Ambayo Joseph Waigo v Aserua Jackline* Court of Appeal Civil Appeal 100 of 2015 (*Ambayo* case).

²⁰⁵ *Ambayo* case (n 204 above) 18.

²⁰⁶ *Ambayo* case (n 204 above) 22.

the property as she earlier stated.²⁰⁷ For women to secure their land rights in divorce matters they need to illustrate with evidence their contribution in fact.

The decision in *Ambayo Joseph Waigo v Aserua Jackline* was met with mixed feelings. While some agreed that it is time for every party to earn what they contributed, others felt that it was unfair because often women may not have the actual money but make a huge contribution to enabling a man to create the wealth and build himself – through purchasing of land and other assets. Shortly after the decision, an article in a national daily captured the society’s perspective of court’s decision and stated that:²⁰⁸

For women in Uganda, the *Ambayo v Aserua* court ruling sounds like a chillingly familiar tune of undervaluation and silencing. The attempt at monetization of the duties that women perform in a home is the first indignity...valuing that critical contribution to the family’s development at only 20% of the value of their matrimonial home is not only disturbing but is also degrading to wives, stay-at-home spouses and the entire institution of marriage...So many women, like Aserua, get kicked out of their matrimonial homes they struggled to help build by the very men they supported to build them.

A critical analysis to the *Ambayo Joseph Waigo v Aserua Jackline* case is that the decision brought to fruition some of the arguments raised in the case of *Uganda Association of Women Lawyers and 5 others v The Attorney General*²⁰⁹ which sought to bring equality before the law between men and women at divorce. However, there remain deep concerns as to how courts arrive at equality. The learned Justice did not elaborate in detail the quantification methodology to guide in ascertaining what amounts to non-monetary contribution in marriage. Perhaps if the Court had guided on determinants to cost non-monetary contributions, a solution would exist to compute and ascertain what is due. Owing to the heterogeneous nature of women and diversity of family dynamics including finances this might be difficult to gauge. What perhaps now remains pertinent than ever before is that the women movement needs to empower women to work and make monetary contributions to their homes so that if

²⁰⁷ *Ambayo* case (n 204 above) 14.

²⁰⁸ ‘Court’s ruling on spouses’ rights on matrimonial property – a wife’s perspective 25 November 2022 New Vision <https://www.newvision.co.ug/category/news/courts-ruling-on-spouses-rights-on-matrimonia-148287> (accessed 18 April 2023).

²⁰⁹ *FIDA* case (n 193 above).

there is an unfortunate demise of the relationship, their contributions can be evaluated to their benefit. Sadly, this leaves some people including women who are unable to earn monetarily in pitiable circumstances if their marriages come to an undesired end.

4.5.2.3. Succession

To fully grasp the succession challenges women in Uganda face, there is need to consider earlier succession laws. During the colonial era, alterations were made in succession laws through the Succession Ordinance of 1906. Notably, although customary settings had their own customary law, the colonial powers sought the enforcement of their new law throughout the protectorate. The Succession Ordinance of 1906 governed succession in Uganda 10 years into her independence and was amended by the Succession (Amendment) Decree of 1972 to cater for intestate estates. Nonetheless, most colonial rule provisions were retained in the amendment. Following the promulgation of the Uganda Constitution in 1995, the Succession Act Cap 162 was enacted and replicated provisions of the Succession Amendment Decree of 1972. Prior to the enactment of the 2022 Succession Act, succession laws had several prohibitive provisions especially against women and did not make provision for the distribution of a woman's estate.

In 2005 and 2006, a suit was filed – *Law and Advocacy for Women in Uganda v Attorney General*²¹⁰ – which successfully challenged the discriminatory nature of the succession law. The suit specifically challenged sections 2(n) (i), 2(n) (ii), 14, 15, 23, 26, 43 and 44 of the Succession Act which were in contravention to the Uganda Constitution.²¹¹ The provisions related to the legal heir preference to a paternal ancestor, legal heir preference to a male over a female, domicile of a married woman, wife's domicile during marriage, mode of computing degrees of kindred, devolution of residential holding in the distribution of an intestate's property, testamentary guardian and statutory guardian respectively. It was argued that these provisions contravened articles 20, 21, 24, 26, 31, 33 and 44 of the Uganda Constitution which provide for the fundamental and other human rights and freedoms, equality and freedom from discrimination, respect for human dignity and protection from inhuman treatment,

²¹⁰ *Law and Advocacy for Women in Uganda v Attorney General* Constitutional Petition 13 of 2005 & 05 of 2006 (*Law and Advocacy* case).

²¹¹ *Law and Advocacy* case (n 210 above) 1.

protection from deprivation of property, rights of the family, women's rights and prohibition of derogation from particular human rights and freedoms respectively by limiting the enjoyment of these rights. Although the Constitutional Court in 2007 held that the aforementioned provisions of the Succession Act Chapter 162 were null and void and inconsistent with the Uganda Constitution, it took over fourteen years for the law to be amended by parliament.

As discussed in chapter two, after 15 years of agonising without updated succession legislation to govern Uganda, in May 2022, Parliament finally enacted the Succession (Amendment) Act to address numerous aspects of succession including discriminative provisions against women and make additional provisions to ensure gender equity in the distribution of estates upon death. Sensitisation and implementation of the new law is still work in progress by the Ministry of Justice and Constitutional Affairs Office of the Administrator General. Some of the salient features of the new law are: the law is now gender sensitive and includes estates of women; women can become heiresses; testamentary freedom has been managed; there are limits as to how long a person can hold letters for administration; fines have become aligned to the current economic status dispensing with obsolete fines; and safeguard of the matrimonial home as part of the property for distribution.

Nonetheless, the reality for many women in succession remains a challenge. Not every person has been sensitised about the new law. There are concerns about the capacity of the Office of the Administrator General in relation to the entire population of Uganda with the diverse ethnicities and languages which may delay outreach interventions. Additionally, there is an obvious negative situation which was created by the delay in enacting a law whose impact cannot be dispensed with in only one year of enforcement of the new legislation. In brief, a lot is yet to be done in securing women's rights during succession and concerted effort might be beneficial to all in dispelling with the narrative.

4.5.2.4. Refugee women

The strategic framework governing interventions for refugees in Uganda is the Refugee and Host Population Empowerment Strategy (ReHOPE).²¹² It provides humanitarian assistance through developmental lenses.²¹³ The strategy has twenty years' duration to create impact on the lives of refugees.²¹⁴ In Uganda, refugee settlements sit on land gazetted by Government to host refugees and provide a place for them to 'live with increased dignity, independence, normality in their host communities'.²¹⁵ Evidently, the fact that these families live on gazetted Government land is enough of circumstantial suffocation of women's land rights because the parcels of land allocated are small and not sufficient for self-sustenance.²¹⁶ Another issue is that should a dispute arise over land and the matter goes before the Refugee Welfare Committees that are dominated by men, women's voices will be silenced. Nonetheless, the land offered by Government is used for 'shelter and subsistence farming/agriculture'.²¹⁷ In Uganda, the refugee settlements include Rhino Camp, Paralonya, Kiryandongo, Kyangwali, Oruchinga, Nakivale, Kyaka II and Bidibidi.²¹⁸

Some of the concerns identified by ReHOPE are that 'among refugee women, disparities in access to financial services, land, and property exacerbate their vulnerabilities'. Refugee women face several challenges:²¹⁹

As has been widely documented, gender inequalities in access to and control of productive financial resources inhibit agricultural productivity and reduce food security. The breakdown of structural and family relations creates dysfunctional families...and social anomalies due to conflict

²¹² Government of Uganda 'The World Bank and United Nations Uganda Refugee and Host Population Empowerment Strategic Framework – Uganda' (Re HOPE) (2017).

²¹³ ReHOPE (n 212 above) 4.

²¹⁴ As above.

²¹⁵ ReHOPE (n 212 above) 22.

²¹⁶ T Berke & L Larsen 'Using land to promote refugee self-reliance in Uganda' 11 *MDPI* (2022) 5 'Initially, refugees were given a shelter plot measuring 15 m by 20 m as well as a cultivation plot measuring 50 m by 50 m. Over time, continuing demand required decreasing agricultural plots to 20 m by 50 m'.

²¹⁷ ReHOPE (n 212 above) 22; the researcher's visit and observatory notes in BidiBidi refugee settlement in 2019.

²¹⁸ As above.

²¹⁹ ReHOPE (n 212 above) 24.

Although there is no mention of access to justice strategies for refugees, it is noteworthy that some of ReHOPE's nine core principles include 'follow a rights-based approach that prioritises equity, human rights, gender responsiveness and women empowerment'.²²⁰ Despite the limited interventions for refugees and their justice needs under ReHOPE, the Government of Uganda is currently implementing a project funded by the European Union Supreme under the Access to Justice Sub Programme of the Governance and Security Programme (A2J-GSP) to provide justice services.²²¹ However, it is worth noting that most of the interventions in the A2J-GSP are geared at addressing gaps in the criminal justice system, rights awareness and empowerment. There is limited information on land rights especially for women in refugee settlements. For there to be holistic refugee rights for women and the entire society, it is imperative that land rights and the broader access to justice concerns are addressed systematically through Government's policy on refugees.

In view of the various spheres of influence, it is important to provide an overarching avenue for redress to balance the negative effects of cultures and customs as discussed below.

4.6. Lifting the cultural veil: An equitable remedy

The focus of this section is on the equitable remedy of lifting the cultural veil. In the context of land rights, the equitable remedy applies to both judicial and non-judicial interventions whose relief is not rooted in law. The equitable remedy of lifting the cultural veil aims at causing actions to be done or halting actions so that an aggrieved party can obtain justice. The equitable remedy is grounded in the socio-legal approach. This subsection commences by presenting the corporate veil analogy. The second subsection explains the cultural veil concept and proposes procedures for lifting of the cultural veil to safeguard women's land rights.

4.6.1. The corporate veil analogy

Although cultures and customs are cherished by many in Africa, there are instances where it has been applied to the detriment of women's rights. Though entirely

²²⁰ ReHOPE (n 212 above) 9.

²²¹ UNHCR *et al* 'Report on the rule of law, access to justice and security needs in refugee settlements and host communities in Arua and Isingiro districts.' (2019) for general readings on the Government's justice needs intervention for refugees.

unrelated to culture, the corporate veil analogy provides a possibility through which African culture can draw inspiration to safeguard women's land rights.²²² The corporate veil analogy enables us to preserve our heritage while unmasking deep rooted concerns for women and their land rights.

In corporate law, the general rule is that a corporate entity is considered 'an entity quite separate and apart from the individual shareholders'.²²³ However, when peculiar circumstances arise, 'this entity theory must be disregarded'.²²⁴ When the principle of an entity being different from the individual shareholders is dispensed with, the process is defined as lifting of the corporate veil which is an exception to the general rule stated above. This principle was championed in the landmark English case of *Salomon v Salomon*.²²⁵

The bone of contention in *Salomon v Salomon* which the Court had to resolve was whether despite the existence of the separate legal identity the company enjoyed, Mr Salomon could be held liable for its indebtedness. In resolving the matter, the Court of Appeal held that the company 'never had an independent existence: it was in fact the appellant under another name... he could pass any resolution, and he would receive all the profits – if any'.²²⁶ Being dissatisfied with the decision, Mr Salomon appealed.

When Mr Salomon appealed to the highest court – House of Lords – the Court opined that Mr Salomon 'is not shewn to have done or to have intended to do anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own'.²²⁷ It also pronounced that:²²⁸

²²² For details on the difference between lifting the cultural veil and article 2(2) Uganda Constitution; see also chapter 4 section 4.6.2.1 of this thesis.

²²³ IM Wormser 'Piercing the veil of corporate entity' (1912) 12 *Columbia Law Review* 496.

²²⁴ As above.

²²⁵ *Salomon v Salomon* [1987] AC 22-58 (*Salomon case*).

²²⁶ *Salomon case* (n 225 above) 28.

²²⁷ *Salomon case* (n 225 above) 34 Lord Halsbury judgment.

²²⁸ *Salomon case* (n 225 above) 38 Lord Watson's judgment.

...In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication...

The House of Lords further concluded that ‘the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with...’²²⁹ The court opined that there was no evidence to indicate that Mr Salomon had acted ‘fraudulently or dishonestly’ to be held liable for the company’s indebtedness.²³⁰ The highest court of the land declared Mr Salomon successful hence entrenching the principle of a company being separate from an individual and the possibility of lifting the veil that shields may arise in instances where the company acts contrary to the law.

Building upon the principles enunciated in *Salomon v Salomon*, if a company is in line with corporate law principles as was the case of Mr Salomon, there is no need to lift the company’s veil. However, where the company is fraudulent and concealing issues contrary to law, it is necessary to lift the corporate veil and address the deeper issues. This can be said of cultures and customs in relation to upholding women’s land rights.

Drawing from the decision of *Salomon v Salomon*, it is plausible to suggest that where culture, customs and formal laws exist in harmony there is no need to lift the veil for scrutiny. But, in instances where cultures and customs seem to be oppressive, the cultural veil must be lifted to systematically uproot that negative culture.

4.6.2. Lifting the cultural veil

The aim of this subsection is to deliberate on the concept of lifting the cultural veil. The second subsection suggests a procedure for lifting the cultural veil within the various land governance structures to strengthen women’s land rights in Uganda.

²²⁹ *Salomon* case (n 225 above) 45 Lord Herschell judgment.

²³⁰ *Salomon* case (n 225 above) 52 Lord Macnaghten; see also *Salomon* case (n 226 above) 54 there was no fraud or misrepresentation, and there was no body deceived;

4.6.2.1. The concept of lifting the cultural veil

In comprehending lifting of the cultural veil, it should be noted that without question, where cultures and customs illuminate the tenets of *Ubuntu* and extend kindness, consideration, respect for rights and the dignity of all persons including women, there is no need to lift the veil and unearth non-existing wrongs.²³¹ On the other hand, when cultures and customs are coloured with intention to defraud, manipulate, oppress, annihilate and suppress women's voices, it is the assertion of this thesis that there is need to lift the cultural veil, recalibrate with inspiration from *constitution-gauge* and transform cultures and customs for the wellbeing of society which comprises women. The notion of a *constitution-gauge* is the measure of customs and cultures against the Constitution to establish compliance in line with article 2(2) of the Uganda Constitution. Notably, the application of the *constitution-gauge* for purposes of this study is within the socio-legal framework. Lifting the cultural veil and the provision of the Constitution's article 2(2) are distinguished in the preceding paragraphs.

Additionally, the intention of Uganda's legislature in relation to cultures and customs is lawfully documented in the Uganda Constitution. The Uganda Constitution provide for supremacy of the Constitution which 'shall have binding force on all authorities and persons throughout Uganda'.²³² It further articulates that where any custom is varying with any Constitution provision, the Constitution shall triumph, 'and that other law or custom shall, to the extent of the inconsistency, be void'.²³³ As held by Lord Watson, the intention of law makers can be only lawfully deduced from what is codified.²³⁴

Notably, it is important to distinguish lifting of the cultural veil from article 2(2) of the constitution to fully harness the peculiarity of lifting the cultural veil notion. What

²³¹ *Ubuntu* is a Bantu word that implies humanity. It is used all over the African continent by Bantu ethnicity groupings in East and Southern Africa.

²³² Uganda Constitution (n 162 above) article 2(1).

²³³ Uganda Constitution (n 162 above) article 2(2); see also Uganda Constitution (n 162 above) article 246 even the existence of traditional or cultural leaders and institution and the practice of their culture and customs are subject to the constitution; see also Uganda Constitution (n 162 above) article 32 'Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group...which undermine their status, are prohibited by this Constitution;' see also Uganda Constitution (n 162 above) article 33(5) 'without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purposes of redressing the imbalance created by history, tradition or custom.'

²³⁴ *Salomon v Salomon* (n 225 above) 38.

distinguishes lifting of the cultural veil from article 2(2) is that while the former is a procedural and equitable remedy, the latter is substantive and legislative remedy. The equitable remedy works through socio-legal lenses to ensure that an action is done or not done to safeguard women's land rights. Implementation of the equitable remedy should apply in court and administrative processes. On the other hand, the legislative remedy is rooted in law and implemented through a petition to the Constitutional Court to declare the inconsistent cultures in contravention with the law prior to obtaining a remedy. Article 2(2) provides the enabling environment to implement lifting of the cultural veil to safeguard women's land rights in this instance. For a very long time, article 2(2) has been implemented through adjudication for remedies. This equitable remedy of lifting the veil provides additional avenues to address cultures and customs that are inconsistent with the Uganda Constitution including administrative processes. In summation, although lifting of the cultural veil and article 2(2) are both hinged on the law and desirous of ultimately uprooting, disintegrating and or sieving negative cultures, customs and practices that inhibit people from enjoying their rights, another distinguishing factor is that lifting of the cultural veil is heavily rooted in the socio-legal approach since it seeks to create modifications to societal wrongs through the law while article 2(2) is a pure legal concept.

For a very long time, interventions for article 2(2) have been rooted in law and pure legal remedies of litigation. To illustrate this is the case of *Mifumi & 12 others v Attorney General and Kenneth Kakuru*. The issue before court was whether the request for reimbursement of bride price as a requirement precedent to a legal termination of a customary marriage is unconstitutional. In her judgment, Justice Kisaakye of the Supreme Court opined that though article 37 provides for the right to culture and State Objective XXIV(a) urges the state to keep cultures and values that promote the dignity and wellbeing of Ugandans, article 2(2) outlaws any customs which are irregular with the constitution and renders them void to the extent of that irregularity coupled with article 33(6) which forbids cultures and customs that go against the 'dignity, welfare or interest' of a woman.²³⁵ She held that voluntary gifts by

²³⁵ *MIFUMI & 12 others v Attorney General and Kenneth Kakuru* Supreme Court Civil Appeal 2 of 2010 (*MIFUMI* case) 2.

the woman's family are not unconstitutional but the practice of 'demanding' for gifts prior to a valid customary marriage is unconstitutional.²³⁶

Another case that addresses article 2(2) is *Law and Advocacy for Women in Uganda v The Attorney General* where the petitioners sought to declare the custom and practice of Female Genital Mutilation practiced among the Sabiny and Tepeth to be declared void on grounds that it has 'no medical or social advantage and is not justifiable in a free and democratic society and is inconsistent with...constitutional provisions'.²³⁷ The main issue before the Constitutional Court was whether the custom and practice of Female Genital Mutilation is unconstitutional and should be rendered void. In determining the matter, Justice Twinomujuni held that undoubtedly, the practice is detrimental to women's rights and is entirely irregular with constitutional provisions and being aware that a bill was tabled and approved by parliament to outlaw it welcomes it. He further declared that the practice 'must be outlawed for being inconsistent with the Constitution of Uganda'.²³⁸

Furthermore, it is important to lift the cultural veil sometimes because some injustices are heavily masked and shielded for all to see and address for the good of culture. This is observed by Banda who states that the right to privacy is unfortunately utilised as a mask to enforce unfair experiences for women in the name of culture.²³⁹ When culture is unmasked to weed the good from the bad, it reinforces positive culture to develop into something more beneficial, relevant and acceptable for the advancement of women's land rights.

Veils of patriarchy deeply rooted in culture need to be unmasked. Some scholars view patriarchy 'not a conspiracy among men' considering the fact that they too encounter enormous pressure as a result of patriarchy.²⁴⁰ They argue that the point of patriarchy is not to subjugate women but owing to its male-centeredness, the outcome is suppression.²⁴¹ However, it is an open secret that patriarchy has had some

²³⁶ *MIFUMI* case (n 235 above) 8.

²³⁷ *Law and Advocacy* case (n 210 above) 3.

²³⁸ *Law Advocacy* case (n 210 above) 21.

²³⁹ Banda (n 73 above) i.

²⁴⁰ M Becker 'Patriarchy and Inequality: Towards Substantive Feminism' (1999) 1999 *University of Chicago Legal Forum* 30.

²⁴¹ Becker (n 240 above) 24-25.

negative impact on the realisation of women's land rights in Africa and Uganda. Whatever the point in defence for patriarchy or not, the cultural veil needs to be lifted so that women speak up for their land rights in the face of unmasked patriarchy. As rightly articulated by Oduyoye:²⁴²

...Why should women close their eyes and seal their lips? To denounce injustice is a necessary prophetic work that might lead to healing for the whole community. As nurturers of the generations, women must mediate this sense of urgency to share the power and mysteries of life without resorting to violence. If they do not do so, then women lose their vital role as the communicators of life in its pristine wholeness...

It is for this reason that the cultural veil must be lifted to unmask the rot in culture so that it can be scrapped for good culture to thrive.

If corporate veils can be lifted for companies, why not cultural veils in the pursuit of land rights for women? Lifting the cultural veil will offer cultural institutions, leaders, clan heads the opportunity to illustrate how culture serves to protect women and reveal those who wish to manipulate culture to their favour.

Finally, lifting of the cultural veil can apply in both the informal and formal mechanisms as constitutionally articulated. In both settings, where cultures and customs are questioned, the veil is lifted to assess it based on the Uganda Constitution and enabling laws. The formal mechanisms can assess the cultures and customs during adjudication and administratively. During adjudicating, a presiding officer may apply the culture to a standardised test. The same can be done for the administrative matter before a decision made. The procedure for lifting the cultural veil is further articulated in the next subsection.

4.6.2.2. Procedure of lifting the cultural veil

As discussed previously, lifting the cultural veil involves two approaches – the informal and formal approach which happens in national and sub national institutions. Both approaches entail administrative and adjudicative mechanisms in line with article 2(2)

²⁴² Oduyoye (n 32 above) 33.

of the Uganda Constitution which declares supremacy of the Constitution over any legislation or customs that are inconsistent.²⁴³

The informal approach of lifting of the cultural veil the subnational structures can be done when administratively handling matters through LCCs and subnational structures previously introduced in chapter three of this thesis. For example when LCCs meet to handle issues administratively relating to land as provided for in the LCCA Schedule, they can lift the cultural veil to establish the impact of culture before making an administrative decision. The Ministry of Local Government (MoLG) should provide a register book to keep track of instances where cultural veils have been lifted. The information collected in the LCC cultural veil registers will be useful for decision-making and trends analysis since the highest percentage of Ugandans go to LCCs for justice as opposed to the formal system.²⁴⁴

On the other hand, when LCCs sit as a court, during the trial, they may adjudicate by conducting an assessment to establish whether the cultural practice in relating to women's land rights is oppressive or not before its application. All procedures should be done not to erase cultures or customs but to eliminate the negative aspects that may deprive one of their land rights. Since LCCs are largely informal in their operations, the procedure is established by the LCC in line with the LCCA. Notably, lifting of the cultural veil applies to non-statutory institutions notwithstanding the need to phase them out and realign with legislatively established institutions.

It is noteworthy that lifting the cultural veil can be done in the national statutory land governance structures during administrative processes. The administrative processes apply the same way as subnational structures and include formal communication through a letter for attention to be given to a particular concern which

²⁴³ Uganda Constitution, (n 162 above) article 2 (2) provides for supremacy of the Constitution (2) and states that 'If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void'.

²⁴⁴ Hague Institute for Innovation of Law (HiIL) 'Justice needs and satisfaction in Uganda 2024' (2024) 94 there is an increase in reference to LCCs for dispute resolution. In 2020 13% went to LCCs but currently its 26% in comparison with formal courts where 4% in 2020 and 10% went for redress.

requires lifting of the cultural veil. The other aspect is through formal courts of law while adjudicating to advance the case for women's land rights in Uganda. The formal adjudication function is done by courts in the Supreme Court, Court of Appeal, High Court's Family Division and Land Division and magistrate courts. The matter commences in the respective courts while acknowledging the hierarchy of courts in Uganda and in compliance with procedure laws by notice of motion supported by an affidavit.²⁴⁵ The request to lift the cultural veil can also be incorporated in the main petition which addresses diverse issues of law and should preferably be raised at the earliest opportune moment in the main application.²⁴⁶ It is noteworthy that the adjudication may occur in institutions with quasi-judicial functions including the Uganda Human Rights Commission.

Formal lifting of the cultural veil may involve an administrative action within MDA to scrutinise cultures to ensure that it is not prohibitive to enabling women enjoy their land rights. This may especially occur at the Office of the Administrator General/ Public Trustee where meetings and detailed discussions are held in relation to estates of deceased persons.

Finally, when lifting the cultural veil, cognisance should be made to human rights-based approaches since they provide clear parameters to safeguard rights as discussed in Chapter three. Another issue to consider is harnessing technology. In instances where customs or cultures are in question, a litmus test can be developed through digital technology as an e-justice solution which can be applicable on phone. It could be used as a self-test assessment and since it may not necessitate writing, it could be good for LCCs who sometimes dispense justice to the detriment of women and their land rights in Uganda.

²⁴⁵ The Civil Procedure Act 282; see also the Civil Procedure Rules, S.I. No. 71-1; see also the Judicature Act Cap 16 which supports an application by notice of motion supported by an affidavit.

²⁴⁶ The main application is usually by petition. It can also be averred to in the written statement of defence in reply to a petition or in a rejoinder. The petition, written statement of defence and rejoinder are all documents submitted to court for a case to be resolved.

4.7. Conclusion

Culture is the essence of our heritage and provides a sense of belonging to most people in Africa, including Uganda. Nevertheless, culture's fluidity sometimes creates uncertainty about land ownership especially for women. Culture sometimes negatively impacts the implementation of legal safeguards and affects land governance structures whilst fulfilling their mandates. As a result, the intangible nature of culture sometimes leaves some women swaddled and unable to disentangle themselves from its shackles. On the other hand, the unharnessed positive culture remains limitedly tapped leaving culture summarily labelled as negative hence the purpose of this chapter.

The critical question answered in this chapter centred on the extent to which customs and cultures deliver on women's land rights in Uganda. The chapter commenced by delving into explaining the notion of customs and culture. Thereafter it deliberated on the paradoxical nature of culture and customs by; expounding on the puzzling nature of customs and cultures, the extent to which cultures and customs deliver on women's land rights, and mechanisms of neutralising the paradoxes of culture and customs through socio-legal perspectives. Additionally, the chapter conceptualised legal pluralism and its influence on women's land rights. Also analysed was the spheres of influence, customs, culture and women's land rights in Uganda through lenses of marriage, divorce, succession and refugee women. It was found that though Government is doing a lot, there is more that is yet to be done. Special attention was made to the lifting of the cultural veil as a proposed equitable remedy for women in advocating for their land right including the procedure on how this can be implemented.

Notwithstanding the constant battles that cultures and customs wage against women's land rights, there is light at the end of the tunnel for reforms, modifications and obliterations to uphold these rights. Even though cultural adjustments may take time, cultures and customs are not static. Although we may not currently see the fruits, erosion of negative culture that subdue and limit women from enjoying their land rights will most certainly gradually grow and bear fruit with the concerted effort and implementation of propositions to mitigate the current concerns as articulated in the subsequent chapter.

CHAPTER FIVE: SUMMARY OF KEY FINDINGS, FINAL CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This chapter summarily presents key findings, the final conclusion and recommendations on how limitations within legislation, the land governance architecture and customs and cultures can be addressed to safeguard women's land rights in Uganda. The chapter also makes suggestions on areas for further research.

5.2. Summary of key findings

This study focused on women's land rights in Uganda within the context of the land governance architecture. As this study concludes, it is imperative to review the findings so that the most suitable recommendations are made to strengthen women's land rights in Uganda. The summary of key findings is classified by the research questions. Additionally, this section presents all the key findings to ensure that all questions have been answered. The research questions to consider while addressing the summary of findings are: what is the historical and socio-legal context of women's land rights in Uganda? What is the influence of land governance architecture in securing women's land rights in Uganda? To what extent do customs deliver women's land rights in Uganda? How can limitations in land governance architecture, customs and legislation be remedied to protect women's land rights in Uganda?

5.2.1. Historical and socio-legal context of women's land rights

This subsection represents chapter two's key findings of the historical and socio-legal context for women's land rights from the pre-colonial, colonial and post-colonial era. It was found that during the precolonial era, societies were structured and thrived through kingdoms and chieftaincies. It was established that though women's land rights had not been fully conceptualised and developed, women enjoyed access and user rights like the rest of the community. The enjoyment of what we now call land rights was realised communally through clans and families in semi-kingdoms and chieftaincies – there was a communality of enjoyment of land rights for posterity. Additionally, it was established that towards the end of the nineteenth century

imperialists and colonialists invaded African communities, declared Uganda a British Protectorate and immediately started massive land grabbing. Thereafter, the colonialists started altering the land holding patterns leading to legalism, commercialisation and individualisation of land rights.

Further, the study established that when the colonialists signed the various agreements with kingdoms in Uganda, land grabbing was consolidated through legislation to govern land ownership in Uganda. Several laws were developed to distinguish the various types of land – crown land, *mailo*, native freehold, adjudicated freehold. Additionally, legislation was enacted to cater for peasant farmers – *busuulu* and *envujju* since the precolonial arrangements were distorted and disenfranchising portions of the society. Owing to individualisation of land, *kibanja* holders had to be equally catered for to distinguish them from the *mailo* landowners. It was established that in the colonial era, land was redefined and boundaries changed and even the size of parcels of land – kings and chiefs were not spared by the colonial powers. At this point in history, the concept of women's land rights in Uganda as a protectorate had not emerged though land was held in posterity for future generations. However, it must be noted that enjoyment of land rights as customary tenants continued at a more limited level during the colonial era. Consequently, it can be safely argued that the colonial era ushered in the beginning of complexities in women's land rights in Uganda.¹

Additionally, it was found that the post-colonial era witnessed the strong emergence of women's rights in Uganda especially in the Museveni era. It was shown that throughout the 1960s, 1970s there was no specific discourse on women's individual land rights. Although two Uganda constitutions were promulgated in the 1960s, women's land rights were not yet a subject of discussion. The 1970s witnessed the expulsion of Asians from Uganda which was a huge dent to the broader realisation of land rights for women and men – especially for those of Asian descent who owned properties in Uganda. In the Amin era land legislation was enacted which altered land holding in Uganda. It was revealed that owing to political turmoil, implementation of the legislation was limited. It was also found that although the 1967 Uganda

¹ Chapter 2 section 2.2.2.

Constitution was reinstated from 1980 to 1986, there was immense political turbulence to have a logical discussion on women's land rights.² The study found that after 1986, a Constituent Assembly was established, a constitution drafted and promulgated in 1995.

Furthermore, this study traced the women movement in Uganda which was reenergised post 1986 with several non-governmental organisations being established to campaign for reforms to strengthen land rights for women. The progress registered post 1986 mainly included the recognition of women's rights in the Uganda Constitution. Impliedly, all enactments of parliament must meet the threshold of safeguarding women rights. Nonetheless, there are some pitfalls in the women's rights journey including delayed protection of the matrimonial home especially when a husband died. To illustrate this, despite judicial activism to protect matrimonial homes, progress towards legislatively safeguarding the matrimonial home was only realised in 2022 through the Succession (Amendment) Act.

More still, in relation to global, regional and sub regional safeguards for women's land rights, the study showed that there are no explicit safeguards for women's land rights notwithstanding general non-discrimination provisions geared at holistically encompassing all rights. Furthermore, the study found that though the African Commission on Human and Peoples' Rights passed a resolution calling upon governments to safeguard women's land rights by eliminating cultural practices that limit the enjoyment of land rights, progress towards realising this right has remained elusive owing to the complexities in intersecting diverse cultures and the different colonial ideologies and legislation imposed on African countries.³ Also, it was established that in order to realise the African Union Agenda 2063, land rights for women must be on the agenda of every African nation on the continent. Additionally, it was established that the sub regional level has made no deliberate effort to champion the discussion aimed at securing women's land rights amongst member states. More still, though the EAC Vision 2050 provides for uplifting women as key players in

² Chapter 2 section 2.2.3.

³ African Commission on Human and People ACHPR/Res.262(LIV)2013 'Resolution on Women's Right to Land and Productive Resources' during the 54th Ordinary Session from 22 October to 5 November 2013 <https://www.achpr.org/sessions/resolutions?id=282> (accessed 3 March 2020).

strengthening agriculture, food security, rural development and nutrition, there is no explicit mention of securing the right to land which enables a person to among others have food security, nutrition and development.

Still on legislation, at the national level the study found that there are strong national safeguards for women's land rights enshrined in the Uganda Constitution and legislative enactments.⁴ The legislation includes safeguards of family interests in land, protection of the matrimonial homes, grassroots adjudication for women's land rights, protection under compulsory land acquisitions by government and matters relating to the departed Asian's property. More still, the study established that Uganda has robust policy frameworks all geared at strengthening implementation of land rights. Nonetheless, it revealed that there is limited utilisation of subsidiary legislation which does not necessarily have to go through parliament to strengthen women's land rights. Regarding Uganda's policy framework, as discussed in chapter two the NDPIII, NLP and the National Gender Policy all make contributions to strengthen women's land rights. The greatest concerns remain full implementation of these laws and policies and the absence of clear targets within these policy frameworks to ensure that steady progress is achieved to secure women's land rights in Uganda.

5.2.2. The influence of land governance architecture and securing women's land rights

Chapter three addresses key findings on the influence of land governance architecture and securing women's land rights in Uganda. The chapter assessed the unsettling realities about Uganda's land governance institutions and women's land rights. It examined national and subnational statutory structures including institutions within the executive, judiciary and parliament. Within the executive, it was established that generally, there are no clear statistically engendered institutional targets geared at enhancing security of tenure for women in Uganda. It was unearthed that some institutions like the ULC face immense challenges including funding, limited coverage, corruption and absence of neutrality owing to the nature of their appointments. State funded legal aid service providers and Ministry of Justice and Constitutional Affairs (MoJCA) Office of the Administrator General/Public Trustee (OAG/PT) relatedly have

⁴ As discussed in Chapter 2 in the national legislation section.

funding gaps, coverage concerns and limited human resource to deliver on the mandate which is important to securing women's land rights. Furthermore, it was shown that the absence of state funded legal aid for vulnerable persons extending to land justice deepens concerns of representation from the lowest court until the highest level of appeal hence negatively impacting on security of land tenure for women. Relatedly, the finding revealed that the judiciary has concerns with limited funding, underutilisation of registrars of court, limited number of judicial officers in relation to the case load, overwhelming case backlog, complex and bureaucratic issues and land fraud. Similarly, the study showed that the legislative arm of government is not fulfilling its oversight and legislative mandate effectively. There are immense delays in legislating to enhance women's rights in the spheres of succession, divorce and marriage. Parliament encounters interference by the executive coupled with corruption, insufficient time and information and limited capacity to deliver on the mandate which negatively impacts on their legislative and oversight mandate.

Concerning the subnational structures, the situation is dire for land governance institutions within the executive. Several of them are marred in corruption and gross mismanagement including land grabbing, uncoordinated interventions with pluralised avenues for redress which eventually clogs the land justice and administration processes and impedes women's land rights.⁵ The access to justice sub programme and subnational structures which are in abeyance following the creation of the GSP have created a gap in bridging justice actors to collaborate, coordinate and cooperate in address justice concerns including land rights issues for women. The MoLHUD has a myriad of entities lacking in coordination, knowledge to effectively empower, human resource, transparency and general managerial skills.⁶ Additionally, within the judiciary, the DCCs and RCCs do not make sufficient provision for land justice which leaves a gap for many people including women. Sadly, corruption is also present at the subnational level within the judiciary that is meant to safeguard the rights of all persons in society and promote the highest level of integrity in the dispensation of justice and protection of rights. Furthermore, the Local Council Courts (LCCs) were found to be in calamitous state. For example, some LCCs are incompetent because

⁵ Chapter 3 section 3.

⁶ As above.

they do not have knowledge of the law and yet they have the mandate to handle certain land issues which affects the quality of justice. Also, there is poor LCC supervision by the chief magistrate courts which compounds the negative effects on society including women.

In relation to cultural institutions, it was found that although cultural institutions are not permitted to involve themselves in land matters, they are very present in land related issues, for example, the Acholi Ker Kwaro and the queen of Toro kingdom. Another illustration with a twist is the Buganda kingdom's Buganda Land Board which separately handles land matters but nonetheless remains a facet of Buganda kingdom. Consequently, the study found that inclusion of cultural institutions would create an opportunity to bridge the gap at the grassroots and champion women's land rights.⁷

Further, the study analysed the disruption by non-statutory institutions including the UPF, UPDF, Department of Land at State House, RDCs and the Committee on Illegal Land Eviction. Statistics from UPF indicate limited number of land grabbers notwithstanding the numerous incidences of land grabbing countrywide. Additionally, it was established that the infiltration by the UPDF in land is indicative of the enhanced impunity and reflective of the fact that the land problem is political. Another issue is that interventions by some non-statutory entities like the Department of Land at State House, RDC and Committee on Illegal Land Evictions are not conclusive hence sometimes women remain stuck in the justice system because State House cannot conclude their matter, yet they spend a lot of effort in the numerous entities pursuing parallel and intertwined land justice mechanisms. The study also found that the broader land governance concerns are deeply and firmly rooted in politics which exacerbates the circumstances of many women since they cannot challenge the political establishment.

Moreover, the study analysed aspects of harmonisation of the land governance institutions while focusing on technology and land governance; forum shopping and access to justice; oversight and monitoring of land governance institutions; and the

⁷ Chapter 3 section 3.4.

human rights-based approach (HRBA) to land governance. It was realised that harnessing technology could serve to strengthen land governance in Uganda especially for women. Also, it was understood that a hybrid system could most probably provide an all-inclusive governance system and cater for the entire society which includes women. Further, in relation to forum shopping, it was found that it is because of political interference and compounds uncoordinated efforts to obtain justice. Forum shopping is also partly attributed to case backlog because out of desperation people start oscillating frantically for justice. Additionally, the study revealed that parliament's oversight and monitoring mandate over land governance institutions is wanting. Another finding was that the IGG and Auditor General have an important role to play in strengthening oversight and monitoring to deliver on women's land rights.⁸ Finally, it was shown that HRBA promotes the application of human rights principles and remain essential in land governance to ensure that women are not left behind in obtaining their land rights.

5.2.3. Customs and cultures and how they deliver on women's land rights

This subsection provides a summary of key finding in chapter four on customs and cultures and how they deliver on women's land rights. This study conceptualised and analysed the notion of culture and customs. It deliberated on the paradoxical nature of cultures and customs while contextualising it to women's land rights under the following subthemes: understanding the paradoxical character of customs and cultures; the extent to which cultures and customs deliver on women's land rights; and avenues through which the paradoxes of cultures and customs can be addressed using diverse socio-legal perspectives. Further, it presented an understanding of legal pluralism within the context of women's land rights. It showed that culture and customs are generally uncodified, existed before colonialism and were greatly influenced by colonialism hence the constant oscillation to balance all.⁹ It also revealed that owing to such a history, customs and formal laws co-exist in Uganda and impact on women's land rights.¹⁰ It was found that the gender construct does not serve women what they deserve. Further, it was revealed that women's land rights are often perceived as

⁸ Chapter 3 section 3.6.

⁹ Chapter 4 section 4.2.

¹⁰ Chapter 4 section 4.3.

below that of men.¹¹ The study also revealed that culture is not static and evolves while dispensing with repugnant aspects.

Additionally, an assessment was conducted on how the various spheres of influence, cultures and customs manifest and the extent to which they deliver on women's land rights within the context of existing formal laws and social existence. The spheres assessed included marriage, divorce, succession and the refugee status. It was found that at the point of entering marriage under the laws of Uganda, there are generally no concerns relating to land rights for women. The study also established that Muslim and customary marriages have aspects of legal pluralism which at the point of entry into the union do not cause any concern for women.¹² Further, it was shown that concerns for women emanated at the point of divorce and succession which remain contentious even for women in civil and church marriages which are monogamous in nature with limited complexities as opposed to some polygamous marriages which has several parties involved coupled with legal pluralism. Additionally, the precarious dynamics of refugee women were discussed and it was established that since refugee women are already vulnerable, their vulnerability is exacerbated when it comes to land rights since patriarchy and refugee dynamics are at play.

In summary, it was unearthed that to strengthen women's land rights there is need to lift the cultural veil as an equitable remedy so that bad culture is eroded, good culture promoted and subsequently women's land rights are enhanced. Lifting of the veil may entail administrative action and or all court processes from the LCCs to the highest court of the land so that all negative cultures and customs that prohibit women from realising their land rights are dispensed with.

5.3. Final conclusion

This study explored the impact of the land governance architecture, customs and legislation on women's land rights in Uganda. It investigated the historical and socio-legal context of women's land rights in Uganda; analysed the land governance

¹¹ Chapter 4 section 4.4.

¹² Chapter 4 section 4.5.A.

architecture about securing women's land rights in Uganda; assessed the extent to which customs and cultures deliver women's land rights in Uganda; and finally, it scrutinised how limitations in land governance architecture, customs and legislation can be remedied to protect women's land rights in Uganda.

It has been deduced that the global, regional and sub regional levels, provide implicit provisions that safeguard women's land rights while there are stronger explicit safeguards for women at the national level in Uganda with opportunities in exploring subsidiary legislation. Although there are immense gaps in the land governance architecture within Uganda, all hope is not lost. Indeed, there is always room for improvement to strengthen our institutions, reduce duplicity, curb corruption and have clear targeted and measurable targets aimed at increasing the number of women owning land in Uganda. It can be safely stated that technology is a much welcome enabler to address some gaps and lead to a balanced society ready for economic development through land rights which releases land for production hence boosting our agriculture sector.

This thesis ascertained that that customs and cultures have an impact on women's land rights. It is emphasised that although culture and customs sometimes clash with formal laws, there are opportunities to intersect the two worlds by lifting the cultural veil and sieving the good from bad to ensure that women's land rights are protected. In brief, for the agricultural sector to attain its highest potential for the economic development of Uganda, a deliberate holistic conversation must be held to set clear targets and incrementally enhance women land rights. Women are the greatest tillers of land in Uganda and without protecting their land rights, economic growth through the agriculture sector – the biggest sector in Uganda's economy – will be stifled.

It has been concluded that the land governance architecture impacts on women's land rights in Uganda. It is revealed that the land governance institutional framework is proliferated with numerous entities involved in land administration and adjudication. This has left several users of the services forum shopping which impacts on the quality of justice and service delivery. Another conclusion is that there are several factors in the land governance architecture that limit the realisation of land

rights including land grabbing, evictions for largescale commercial purposes, corruption, poor coordination with the numerous land justice actors, limited human resource and capacity. Additionally, it is inferred that LCCs are under facilitated and trained to deliver on their huge mandate at the grassroots. Notably, cultural institutions are barred from participating in land governance notwithstanding their centrality in land governance since most land is held under customary tenure and their role as custodians of culture. Despite the existing concerns, opportunities abound in technology, HRBA, oversight and monitoring and addressing forum shopping.

In final conclusion, this thesis has contributed to the body of literature by presenting opportunities within subsidiary legislation which can be expounded to safeguard women's land rights. It has also suggested the need for a campaign to decolonise land legislation by including a co-ownership clause which contributes to perpetuity of land, a concept that strongly existed within families in the pre-colonial era. Further, it has provided an in-depth analysis of the land governance architecture in Uganda to deeply understand the root causes of bad land governance which negatively impacting on women's land rights and the need for system strengthening in land governance. Lastly, the study has introduced lifting of the cultural veil as an equitable remedy through which bad or negative aspects of customs and cultures can be unveiled to fully safeguard and deliver on women's land rights.

5.4. Recommendations

The thesis makes recommendations under three themes: the legislative; land governance architecture; and customs and cultures. The proposals will be addressed to the key stakeholders aligned to the various thematic areas as analysed in the earlier chapters. An overarching recommendation is that all entities need to work concertedly for women to secure their land rights.

5.4.1. Legislative

Chapter two studied the legislative framework from the pre-colonial, colonial and post-colonial era. A discussion was made on the policy framework and the women movement in Uganda and strides made.

The MoLHUD can deliberately include a provision in the land transfer forms to cater for co-ownership especially at the point of purchasing land so that it is automatically included in the land title. The form can be redesigned to prompt a co-ownership option through joint tenancy or joint ownership. This would provide some security of tenure for women during their marriages and mitigate disputes at dissolution. Landforms can be updated by the Minister MoLHUD through a statutory instrument. The co-ownership clause will feature alongside other options like individual land to provide clarity in ownership of land especially for women.

It is recommended that the Ministry of Local Government (MoLG) develops a policy handbook for LCCs so that their knowledge of HRBA in implementation of land rights for women is enhanced. Additionally, LCCs should be trained on how to adjudicate – record keeping and writing of coherent judgments – land matters under customary tenure which is within their mandate. The HRBA handbook can also serve to neutralise ambiguities created by negative culture.

Parliament needs to enact legislation including a co-ownership clause to explicitly define property acquired as matrimonial property. This may contribute to safeguarding women's land rights. It will also compound the true African spirit of communality that existed in the pre-colonial era. Communality ensured perpetuity of land for future generations which is the spirit of the co-ownership clause.

It is recommended that all global, regional and sub regional human rights frameworks particularly those mandated to champion women's land rights develop explicit guidelines and or a framework to guide member states on women's land rights. It is further recommended that the global, regional and sub regional human rights frameworks deliberately include a comprehensive discussion on women's land rights to strengthen interventions to enhance their security of tenure and initiate deliberate incremental interventions to stir national responses.

Although most land legislation provides for safeguards of land rights, it is important to develop subsidiary legislation that seeks to protect women's land rights through including forms that seek to safeguard women at the LCCs during adjudication of court matters for customary land. For example, subsidiary legislation forms can

explicitly include provisions relating to the relationship between petitioners and respondents to rule out biases and forms for judgments in the most basic way so that matters are not complicated. In addition, a mechanism of listing cultures and or customs that are harmful in relation to women would over the years enable the governance structures to easily resolve clashes between cultures and formal laws.

Parliament should urgently enact legal aid legislation and consequently MoFPED provides finance to implement the law for the safeguard of all rights especially women's land rights. Owing to the ongoing economic difficulties, the law should be gradually rolled out through existing government funded structures providing legal aid including the Law Development Centre Legal Aid Clinic, Uganda Law Society Legal Aid Project and Justice Centres Uganda.

For these recommendations to be realised, there is need for the MoFPED to release monies for the implementation of these recommendations which contribute to national development and enhancing the livelihoods of women in Uganda.

5.4.2. Land governance architecture

This section specifically provides recommendations to address the land governance architecture in Uganda which comprises the parliament, executive and judiciary. The recommendations are made to specific government entities and cater for national and subnational structures. Recommendations are also made in relation to cultural institutions and non-statutorily established land governance institutions including UPF, UPDF and RDCs.

It is recommended that targets are set by the NPA to ensure that the security of tenure for women is deliberately planned for, budgeted and implemented by the responsible government MDAs and most especially MoLHUD. This information needs to disaggregate in the annual reports to ensure effective monitoring on progress towards implementing the respective institutional plans and meeting NDP III targets. Relatedly, data collection tools need to be enhanced so that the Uganda Bureau of Statistics can accurately collect information to measure targets set by MoLHUD.

The Uganda Land Commission (ULC) funds should be increased to meet the mandate. In addition, non-interference legislative safeguards should be made to protect ULC's implementation processes so that when the ULC interacts with women in pursuit of their land rights, they can ably intervene and dispense justice.

Staffing gaps in the OAG/PT should be addressed so that there are sufficient people to handle estates of deceased persons. This will ensure that the legal aid gap in family justice which extends to land justice is bridged.

The ODPP should link their mandate with mechanisms – including MoLHUD – geared at protecting women. This will enable ODPP to provide information relating to land crimes so that the Government can plan for the best interventions and above all have information for decision making. The information needs to be disaggregated by gender so that gender disaggregated solutions are made.

The judiciary should measure their interventions for portions of the society without access to internet so that they benefit as much as those accessing ECCMIS. A hybrid system to cater for all categories of women would be a good innovation. Embracing ADR would go a long way to reducing case backlog in the judiciary. Relatedly, the judiciary should recruit more judicial officers to handle the case load.

The judiciary should strengthen the supervisory role of chief magistrates to LCs so that there is better service delivery at the lowest level. There is need to decentralize the Court of Appeal so that the remedy to appeal is easy to access.

Pursuing a case through the justice system is costly from whatever level until the high court. The Court of Appeal and Supreme Court are also a lot more costly than the other courts for the ordinary person. Currently, there is no government funded legal aid for many women to enable them to reach the highest level of appeal in pursuit of their land matters.

To adjudicate land matters effectively, every judicial officer should revisit Uganda's land history because unlike any other branch of law, land legislation requires in-depth understanding, socio-legal and historical contexts of land in Uganda by

engaging with the community, comprehending Uganda's land history and applying the socio-legal and historical context of land as opposed to lengthy litigious processes with thousands of witnesses who are sometimes rooted in fraud.

All non-statutory land governance entities should be disbanded. Land disputes need to be resolved through the statutorily established entities to order to promote good governance and rule of law. This would also serve to mitigate forum shopping.

All government entities should utilise technology to enhance land governance through e-justice mechanisms which bridge existing gaps. Additionally, while harnessing technology, government should ensure that they provide hybrid land justice interventions so that no one is left behind.

The government should release the report of the Commission of Inquiry into the Effectiveness of the Law, Policies and Processes of Land Acquisition, Land Administration, Land Management and Land Registration in Uganda so that the recommendations can be evaluated and where necessary adopted to safeguard the rights of all persons, including women.

For HRBA approaches to be embraced there is need to mainstream HRBA and gender in all land governance implementing institutions to ensure that no one is left behind in the quest for land rights.

The MoLHUD should enhance and expedite the maintenance of digital records for the most vulnerable of persons especially women for futuristic purposes as is the case for those who have fully embraced automation. Special mechanisms should be made for all persons to ensure that no one is left behind in digitisation processes.

Parliament needs to enhance its oversight and monitoring function to ensure that there is land governance through effective legislation. This will ensure strengthened accountability at the grassroots level where access to justice is sometimes limited.

The Administration of Justice Programme and Access to Justice Sub Programme of the GSP need to establish memoranda of understanding to ensure that though they are in different programmes, services delivered necessitate all justice actors to meet regularly as is the case with DCCs and RCCs to collectively agree on mechanisms to strengthen justice for all including women who seek land justice.

Increase the number of judicial officers and strengthen the mandate of Registrars of court whose mandate is largely administrative notwithstanding the immense case workload. Additionally, the Court of Appeal and Supreme Courts need to be made more accessible to all court users including women so that they can access the highest court of justice without encumbrances.

The National Planning Authority needs to strengthen the role of regional justice platforms including the Chain-linked Advisory Board, Regional Chain-linked Committees and District Chain-linked Committees. These platforms provide a space for regional actors to congregate and deliberate on how to strengthen access to justice. It is also hoped that these platforms will include discussions on land as opposed to only criminal law as discussed in Chapter Three.

The Government – through MoLHUD – needs to establish mechanisms of partnering with cultural institutions to ensure that they embrace HRBA since they are in touch with all people including women. This way, cultural institutions will amplify women’s voices without directly involving themselves in land matters but by directly influencing land actors.

Cultural institutions need to be recognised as essential in the pursuit of women’s land rights even though they are not established as land governance institutions under the Uganda Constitution. Negative cultures and customs are grounded in many communities and it might be best to work with the custodians of culture to offload obsolete oppressive cultures from their society and folktales.

The HRBA needs to be harnessed as a mechanism of strengthening women’s land rights in all government entities especially Parliament and LCCs.

All government entities with a mandate on land including MoLHUD and OAG/PTC should sensitise the community on land rights so that people understand their rights and responsibilities, identify the duty bearers, their mandate and where to obtain redress.

The MoFPED urgently needs to release funds for the realisation of these recommendations and the safeguard all people including women.

5.4.3. Cultures and customs

This section presents recommendations relating to culture, customs and formal laws. It is recommended that the paradox of cultures and customs is reconciled for women to realise their land rights. To bridge the existing paradox of customs and cultures, there is need for a marriage of customs, culture and formal laws to ensure that there are no drawbacks to the realisation of women's land rights – harmonious existence of legal pluralism. Therefore, it is important to delicately integrate and interconnect customary law with formal law guidance to arrive at HRBA land law solutions to safeguarding women's land rights. The lead entities to implement this recommendation include MoLHUD, judiciary, MoJCA and related government institutions.

To resolve the impasse of cultures, customs and formal land laws, there is need to amplify women's voices to influence policy so that gender equity gaps and other pertinent issues in relation to land and policy development and modification are addressed. Women's voices can be amplified by every woman including the numerous women parliamentarians and women representatives at grassroots who sit on the Local Council Executives.

In safeguarding women's land rights for those in polygamous relationships, there is need for legislation to guide in the definition of a matrimonial home in polygamous customary and Islamic marriages. Often, the absence of clarity in legislation creates concerns in the practice.

It is imperative that marriage and divorce laws are scrutinised to arrive at legislatively safeguarded equitable, deliberate and inclusive legal approaches of

enforcing land rights for women so that they can safeguard their land rights as enshrined in the Uganda Constitution.

There should be deliberate public sector interventions to test cultures and customs against safeguarded formal laws to ensure that women's rights are upheld. This can be done by lifting the cultural veil in all matters before court when adjudicating cases – specifically land rights for purposes of this thesis and handling administrative matters relating to women and land rights. Additionally, there are administrative processes where the cultural veil can be lifted to safeguard women's land rights.

Since the world is digitising, a technology application can be developed as a self-test assessment for LCCs and the public to self-assess whether their customs and cultures are in compliance with the law. This application can contribute to a mindset change in establishing what is acceptable within societies. This should be a collaborative intervention with MoLG, MoLHUD and in partnership with NGOs in Uganda.

The cultural veil cannot be lifted theoretically for the realisation of rights. Women should rise. Society needs to be alert to the concerns of society including women and act. Lifting of the cultural veil is an empowerment tool and does not necessitate budgetary allocations. It can be easily implemented for systems strengthening since it is budget neutral for government.

5.5. Propositions for supplementary research

This section provides suggestions for additional research. Notwithstanding the abundance of information on women and land rights in Uganda, there is limited attention given to discussion of specific practical steps in ensuring how the safeguard for women's land rights can be safeguarded through systematic lifting of the cultural veil. This thesis has shown how without tampering with the dynamics of legal pluralism in Uganda, formal laws, cultures and customs can congregate to weed out the negative, promote the good and strengthen culture for future generations alongside statutory laws for the good of all persons especially women.

This thesis brought to the fore some key issues which could be picked up for further analysis to strengthen women's land rights. Chapter two highlighted the implied provisions safeguarding women's land rights in global, regional and sub regional frameworks. As discussed in chapter two, sometimes implied legislation at a higher level does not provide the much-needed impetus at the national level to advance women's land rights. It is proposed that further research is invested in analysing how implied legislation can be harnessed to bring forth the issue and cause a positive reaction at the national level for the realisation of women's land rights.

Secondly, although the focus of this study was on women's land rights, there is need for a broader discussion on property rights for women at a regional and sub regional level particularly within the African continent so that home-grown solutions can be generated in the respective African countries with Pan African solutions geared at safeguarding women's property rights within the realm of legal pluralism.

Thirdly, this study has proposed lifting of the cultural veil regarding women's land rights at the national level in Uganda. It is suggested deeper research is conducted on lifting cultural veil amongst the various African countries in a bid to safeguard property rights for both men and women. If conducted, this study will enable the African continent to create durable solutions to unlocking Africa's suffocated revenue and potential which oftentimes locks horns with cultures and formal laws; exacerbates property squabbles; and results in limited family, community, national and continental development.

ANNEXURE I

Barbara Kitui
skitui@gmail.com
0772470149

17 July 2023

The Clerk to Parliament
Parliament of Uganda
KAMPALA.

Dear Sir/Madam,

RE: REQUEST TO CONDUCT RESEARCH IN THE PARLIAMENT LIBRARY

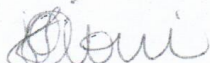
The above subject matter refers.

My name is Barbara Kitui a PHD candidate at the University of Pretoria and currently working for the Governance and Security Programme Secretariat, Ministry of Justice and Constitutional Affairs.

The purpose of this letter is to kindly request for permission to use your library. The subject of my thesis is on land governance and women's land rights in Uganda. I am interested in reading the Hansard which articulates concerns for Asian women in repossessing their expropriated properties. Although I had reviewed the COSASE report which is graciously available online, I was unable to find any information on gender and Asian women's peculiar concerns.

Your permission will be immensely appreciated.

For ease of reference, I have attached herewith a copy of my office ID and evidence of my studies.


Barbara Kitui

Director Library

Please assess this
request and handle
ECP

Received
a call from
Mr Bbake Library
Director on 21 July 2023

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