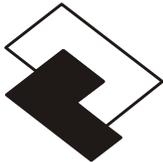




**M O L H U D**

MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT



**PREMIUM  
CONSULTING  
LIMITED**

# Mainstreaming Gender and HIV/AIDS Issues into the Draft National Land Policy

## *Draft Issues Paper*

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## **ABBREVIATIONS AND ACRONYMS**

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ACHPR	African Charter on Human and People's Rights
AIDS	Acquired Immunodeficiency Syndrome
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
DCPD	Declaration of the Conference on Population and Development
DLB	District Land Board
DRB	Domestic Relations Bill
HIV	Human Immunodeficiency Virus
JLOS	Justice, Law and Order Sector
MAPS	Agro-processing and Marketing
MFPED	Ministry of Finance, Planning and Economic Development
NAADS	National Agricultural and Advisory Services
NEMP	National Environment Management Policy
NIP	National Industrialisation Policy
NLP	National Land Policy
PEAP	Poverty Eradication Action Plan
PLWA	People Living with AIDS
PMA	Plan for Modernisation of Agriculture
UBOS	Uganda Bureau of Statistics
UDHR	Universal Declaration of Human Rights

## **EXECUTIVE SUMMARY**

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### **Background to the Land Sector**

1. Uganda has a total area of 241,039 sq km, of which 197,097 sq km. is land while the rest - approximately 43, 942, sq km - is covered by water and swamps. In addition, to lakes which cover approximately one-fifth of its territory, the country also has a complex system of rivers many of which are found in the south of the country and drain into Lake Victoria.
2. Uganda's population is approximately 24.2 million, growing at the rate 3.2% per annum (UBOS, 2002). It is expected to double every 20 years, which will increase pressure on land resources. At the same time, Uganda's population is characteristically a "young" with 56% of the total below 18 years and the sex ratio stands at 95 males to 100 females. Such a population structure means that in the next several decades, it will not only exert demands on the provision of social infrastructure and related services, but it will also impose a burden of economic and social production on the much less middle-aged and older members of society.
3. The Ugandan economy is mainly agrarian, with 71% of the population engaged in subsistence agricultural production. The professional, semi-professional and administrators collectively constitute a paltry 7% of the total working population. The agricultural sector employs a higher population of women (83%) as compared to 71% of men (UBOS, 2008).
4. Land in Uganda is increasingly becoming a problem for the poor people, with shortage of land being the second most important cause of poverty, after health. But perhaps one of the key concerns with regard to land use in Uganda relates to women's land rights, particularly denial of inheritance, inability to prevent sales by men, disincentives to development of the land they occupy, disinheritance of widows, etc.

### **The Land Sector and Gender in Uganda**

5. Gender is a social construction of men and women by society, giving them stereotyped roles and responsibilities. Society allocates roles and responsibilities for men and women putting the women more at a disadvantage than their male counterparts. This leads to unequal gender relations and their attendant effects, such as marginalisation, disempowerment, negative biases and a wide range of other injustices to women. In Uganda, as in other countries, women do not have as many opportunities as their men counterparts for social and economic development. They are economically constrained by their social roles and responsibilities, their low social status, lack of ownership and access to productive assets, low participation in decision-making and high workload.
6. Uganda has ratified the major international instruments on human rights, (e.g. the Universal Declaration of Human Rights and the International Bill of Rights) and particularly those relating to the rights of women such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Vienna Treaty on Human Rights, the Vienna Program of Action, the Declaration of the Conference on Population and Development (DCPD), the International Conference on Population and Development (ICPDC) and the Beijing Platform of Action, and the African Charter on Human and People's Rights (ACHPR). Uganda has also domesticated these instruments in her legal framework. The main domestic legal instruments which relate to gender include the Constitution of the Republic of Uganda of 1995, the Land Act, the National Environment Act 2000, the Local Government Act 1997, and others.

7. At the same time, Uganda has put in place a policy framework that seeks to address issues of gender. The main policies in this regard include the National Gender Policy, the Poverty Eradication Action Plan (PEAP), the Plan for Modernisation of Agriculture (PMA), the National Industrialisation Policy (NIP), the National Environment Management Policy (NEMP), Vision 2025 and a host of others.
8. The gender structure of land rights varies across the country, but in general it is highly unequal. For example, women work on land more than any category of people in society, but they suffer discrimination in all matters relating to land ownership. Their rights tend to be limited to access, while men are more inclined to enjoy ownership rights. Married women in Uganda are at a very great disadvantage as far as property is concerned. A mere 7% own property. Their rights to land are not secure even at divorce. The divorce law makes no specific provision for the division of property acquired during marriage. The only express law regarding distribution of property upon divorce is in cases where the divorce or separation is a result of adultery by the wife.
9. There is no presumption of marriage in Uganda and the Divorce Act makes no provision for persons who chose not to marry formally, but do cohabit. Because of this, there are no legal provisions to determine what will happen to property that they jointly acquired. Yet co-habitation is very common in the country. Although there are efforts to amend the law, the proposal has not received support from some sections of the population. Similarly, while there have been efforts to introduce the concept of co-ownership of land by spouses, it has not been possible to introduce provisions that take care of spousal co-ownership, leading to the so-called “lost clause”.
10. The bulk of household labour in Uganda is still provided by the woman, with the husband taking only certain limited roles. Unfortunately, in the event of the end of the relationship, a woman often fails to account for her contribution in real terms. A woman’s domestic efforts and services are usually treated as her duty to her husband and family, not entitling her to the property directly acquired by her husband in consortium with her. Consequently, an average woman, who works as a housewife throughout her married life, acquires no interest in the proceeds of her labour for that period of her life.
11. Some women inherit land particularly from their parents. Some wives also get shares from the estates of their husbands. Where a male spouse dies intestate, the Succession Act entitles the widow to 15% only of the estate, leaving 75% to the children, 9% to dependants and 1% to the customary heir. The allocation of 15% to the surviving wife in intestate succession effectively discriminates against women. Moreover, in a polygamous marriage all surviving widows have to share the 15% of the estate. Under customary law, a wife cannot inherit the husband’s estate. Rather, it passes to his sons or paternal relatives. Daughters are also denied inheritance and succession rights, although over 80% of all land in Uganda is held under customary land tenure.
12. Access to and use of land in Uganda is underpinned by the patriarchal nature of traditional communities, according to which women and girls can only gain access to land through their male kin in their life cycle. Girls and unmarried women can claim land through their fathers. When they get married, they and only claim land through their husbands. While, traditionally, this has worked well and women were always assured of access rights that were nearly as secure as those of men, this is no longer the case. With increasing population, scarcity of land and deepening poverty, men no longer fulfil their obligation of providing women with land and tools of production.
13. During the debate on the Land Bill in 1998, women activists successfully lobbied for a law that prevents the men from selling land from which the family derives its livelihood. The Land Act came up with a clause - popularly known as the “consent clause” - which was

meant to protect the spouses and the children. Although the consent clause was a workable and tangible achievement for the vulnerable groups, nonetheless, the subsequent Land Amendment Act of 2004 did away with the consent of children, ostensibly because land committees to represent children were an expensive administrative structure and could not be funded. Consequently, the absence of the “children’s voice” in land transactions has put their right to land at risk.

### **The Land Sector and HIV/AIDS in Uganda**

14. The HIV/AIDS epidemic in Uganda has lasted up to a quarter of a century. Currently, about 1 million people are living with the disease. The disease disproportionately affects women and men during the prime years of their productive life, with severe impacts on individuals, families, communities, the health sector, and the economy in general. Today, 6% of Ugandan adults aged 15-49 are infected with HIV. The central region and Kampala (9%) and the North-Central/Acholi region (8%) have the highest HIV-prevalence rates. The disease is a main cause of adult mortality. HIV has affected marriages, with 33% of women and men losing their spouses are HIV-positive, compared to 6% women and men who are married.
15. The impact of HIV/AIDS on development is apparent in terms of loss of trained personnel, manual labour through related morbidity and mortality, significant resource committed to the care and treatment of the sick both at household and national levels, and the increased burden of dependence. HIV/AIDS has introduced new dimensions to land rights for the marginalized, especially women and children. This is particularly true in cases where AIDS leads to the death of both spouses, who are usually the breadwinners and rights protectors in a family. This often leaves children orphaned, with some of them under age and/or infected by the disease themselves. AIDS and the resultant death of the parents, increases the vulnerability of the infected and affected persons.
16. Women’s limited control over productive resources, especially land (in rural areas) leads to a sense of powerlessness in negotiating safe sex or selectivity in relationships. This makes them more vulnerable to sexual and other forms of violence and often HIV/AIDS infection. Many of them choose to remain in abusive marriages because of the dependence on their husbands (who may be HIV infected) and the desire secure their land rights and those of their (usually male) children. Economic dependence is also another factor forcing women into re-marriage, with all the implications it might have for their health, and ultimately on their land rights.
17. Women’s access to land is usually through their spouses or male members of the family. Loss of a spouse therefore increases the chances of violation of their rights to land. HIV/AIDS-related deaths make the situation even worse. In Uganda to-date, there is widespread abuse and dispossession of widows by in-laws and/or relatives following the death of the husband. Women in HIV/AIDS-affected relationships are more vulnerable to landlessness and homelessness owing to distress sales and limited land rights within marriage.
18. HIV/AIDS also leads to the vulnerability of orphans in many ways, leading to compromising their land rights. Many orphans lose their parents to HIV/AIDS before they are of age. They become victims of a system which favours adults. Sometimes, they are not allowed to access their land. They are compelled to engage in child-labour, risky behaviour (such as prostitution and crime) and to become household heads. In the guise of supporting the orphans, relatives may express readiness to take on children under their care.
19. HIV/AIDS and the resultant deaths often leads to land and property disputes among wives of polygamous husbands, between widows or orphans and family members of the deceased, between siblings, and between widows and their children. While many cases have been

reported, and efforts have been made to ensure land administration institutions are gender responsive, nonetheless, the capacity of such institutions, offices in terms of HIV awareness and appreciation of associated issues with regard to land is limited. For persons living with HIV/AIDS, particularly for women, access to justice is further limited by stigma and the lack of resources which in most cases will have been substantially eroded by the need to care for the sick. At the same time, there are cultural practices that limit realization of gender rights are payment of bride price noted earlier; widow inheritance and polygamy. Widow inheritance usually weakens women's rights to inheritance, predisposes parties involved to HIV infection and re-infection.

### **Integrating gender and HIV/AIDS Issues in the National Land Policy**

20. The NLP is a framework which will ensure sustainable utilisation of Uganda's land resources for poverty eradication. Its main objective is to ensure sustainable development and good governance of the land sector in Uganda. It seeks to ensure efficiency and promotion of economic development in Uganda, equality and social justice within the land sector, as well as environmental protection and sustainable pattern of land use.
21. The draft NLP document has seven areas, (also known as thematic areas). These are: Land in the national development framework, the constitutional and legal framework, the land tenure framework, the land management framework, the land rights administration framework, the regional and international framework, and the policy implementation framework.
22. There are a number of gaps in many of the above thematic areas of the draft NLP document as far as gender and HIV/AIDS issues are concerned. With regard to the National Development Framework, the draft is silent on one important principle which would ensure gender equality, namely that policy must address the existing gender inequality and ensure that both men and women enjoy land rights without discrimination. The document also does not identify the laws and practices which limit access, control and transmission of land rights, nor does it define them.
23. In the land tenure framework, the draft NLP document recognises that attempts to outlaw discrimination against women and children have not been successful and proposes some measures to address the problem. However, it does not indicate who or which institution should implement them. With regard to HIV/AIDS issues, while it recognises the high cost of securing land rights under any land tenure system for the majority of Ugandans, it does not, however, make a special case for marginalised groups and particularly persons infected and affected by HIV/AIDS.
24. The main issues that must be incorporated in the NLP include: increasing the participation of women in land dispute resolution in their communities, selection of women and men of integrity to constitute land administration institutions that will investigate and resolve all historical land claims and injustices, provision of legal aid to deal with the ever increasing land litigation, the restoration of the consent clause to cover children, establishment and operationalisation of the Equal Opportunities Commission, enforce affirmative action in favour of women, children and people with disabilities, facilitation of persons who have disclosed their HIV status, sensitisation of HIV victims about their land rights, promotion of documentary proof to secure land rights, etc.

## **PART I INTRODUCTION**

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### **1.1 THE CONTEXT OF THE STUDY**

As in many other countries, land in Uganda is recognised as a basic resource, which is central to the development of the economy, and it is an important productive asset which is instrumental in the fight against poverty. All government programmes and policies, including the Poverty Eradication Action Plan (PEAP), the Plan for Modernisation of Agriculture (PMA), the Agro-processing and Marketing (MAPS), the National Agricultural and Advisory Services (NAADS), etc attach great importance to this key resource. Apart from the Government, the public is very interested in all matters relating to land and has been following the various debates surrounding the sector especially in recent times. In short, there are many stakeholders in the land sector and each one of them is keen to protect their interests as they relate to land.

Since 2005, the Government of Uganda embarked on the process of formulating a National Land Policy (NLP). So far, this exercise has produced three versions of the draft NLP, which have been widely debated, and is yet to be completed. The main objective of the NLP is to ensure sustainable development and good governance of the land sector in Uganda. It seeks to ensure efficiency and promotion of economic development in Uganda, equality and social justice within the land sector, as well as environmental protection and sustainable pattern of land use.

As the process of policy formulation continues, it is important to note that gender inequality and social protection in land management is increasingly becoming important. To this end, one of the key challenges of Uganda's NLP policy is ensuring that the interests of the marginalised groups are taken into consideration. Some of the marginalised groups include women, the poor, the sick and particularly those inflicted with the HIV/AIDS. In this regard, the interaction of gender, HIV/AIDS and land rights is very important and has in fact become a sensitive area because it involves the relinquishing of powers and rights by the holders of these rights to those who do not possess them. There has been concern that women's important contribution to development is not matched by the benefits they are entitled to and the control over economic, social and political processes they should exercise. Similarly, persons infected or affected by HIV/AIDS suffer the consequences that lead to the removal of the rights and privileges.

Land rights are a key development issue and are very crucial in the Government's strategy to fight poverty. There is sufficient evidence to show that women suffer from inequality of access to productive assets, including land. This fact is a major determinant of poverty. Without secure rights to land women's ability and incentive to participate in income expanding economic activities is impaired, since, for example, they are not able to control the income from farming activities and make decisions on land use.

An equally important development factor in Uganda is the HIV/AIDS pandemic. The HIV/AIDS disease has had devastating consequences on people's lives, especially the rural poor. It has deprived, and continues to deprive, families, communities and the country in general of the young and most productive people. It has deepened poverty, reversed human development achievements, worsened gender inequality, reduced labour productivity and has generally put a halt to economic development. The HIV/AIDS scourge has serious implications for the land sector and land rights. It has led to loss of land rights, distress sales in order to care for the sick,

land fragmentation, land grabbing, among other things. HIV/AIDS is therefore a major policy issue to be considered in the land reform and must be taken on board by the NLP.

This paper attempts to raise the issues that need to be taken into consideration by the NLP with regard to gender and HIV/AIDS in Uganda. The paper seeks to examine the challenges relating to the rights of women as they relate to land, identify the strategic and gender needs and issues that should be addressed by the NLP, the legal and policy framework, among others.

## **1.2 THE STRUCTURE OF THE PAPER**

The paper is made up of six parts or chapters. Part I is the introductory part. It is followed by Part II which provides some background information on the land sector in Uganda. Part III addresses the land sector and gender. Part IV focuses on the land sector and HIV/AIDS issues. Part V attempts to integrate the gender and HIV/AIDS issues into the draft National Land Policy document and attempts to identify the gaps in the draft document and makes recommendations on how the NLP should address those gaps. The VI part makes some concluding remarks.

## **PART II BACKGROUND TO THE LAND SECTOR IN UGANDA**

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### **2.1 GEOGRAPHICAL FEATURES AND ECOLOGY OF UGANDA**

Uganda is an East African country bordered by Sudan to the North, the Democratic Republic of Congo (DRC) to the West, Rwanda and Tanzania to the South, and Kenya to the East. Its total area is 241,039 sq km, of which 197,097 sq km. is land while the rest, which is approximately 43,942, sq km, is covered by water and swamps. It lies between latitudes 42<sup>0</sup> north and 1.5<sup>0</sup> south and longitudes 280 and 350 east. The country occupies a plateau, averaging 915 metres in the north and rising to 1,340 near Kampala. Uganda's highest point is the Margherita Peak of Mount Stanley, at 5,109 m (16,762 ft) above sea level, found in the western rift valley of the Rwenzori range of mountains, which lies along the south-western border near the Equator. In addition, to lakes which cover approximately one-fifth of its territory, the country also has a complex system of rivers many of which are found in the south of the country and drain into Lake Victoria, the second largest fresh water lake in the world. Africa's longest river, the Nile, has its origins at Jinja in eastern Uganda, where it pours out of Lake Victoria.

Uganda is on the equator; its climate is warm rather than hot with plenty of sunshine, moderated by the relatively high altitude of most areas of the country. Mean annual temperatures range from about 16° C in the South-western highlands to 25° C in the northwest; but in the northeast, temperatures exceed 30° C about 254 days per year. Daytime temperatures average about eight to ten degrees warmer than night-time temperatures in the Lake Victoria region, and temperatures are generally about fourteen degrees lower in the southwest.

Except in the north-eastern part, rainfall is well distributed throughout the country. The southern region has two rainy seasons, usually beginning in early April and again in October. Little rain falls in June and December. In the north, occasional rains occur between April and October, while the period from November to March is often very dry. Mean annual rainfall around Lake Victoria often exceeds 2,100 millimetres per annum and the mountainous regions of the south-east and south-west receive more than 1,500 millimetres of rainfall yearly. The lowest mean annual rainfall in the north-east measures about 500 millimetres.

### **2.2 POPULATION AND HUMAN SETTLEMENTS**

#### **2.2.1 Population Growth and Structure**

According to the 2002 census, the population of Uganda is approximately 24.2 million and is growing at the rate 3.2% per annum (UBOS, 2002). This is the third highest population growth rate in the World, after Niger and Yemen (World Population Report, 2005). Such a high annual growth rate means that Uganda's population will double every 20 years, which will increase pressure on land resources. The rate of growth remains higher in Northern Uganda, despite internal conflict and war that has raged for the last 19 years. It is followed by eastern Uganda, while the central and western regions of the country continue to record lower than average national growth rates. All districts have, in recent times, began to register positive growth rates as compared to the period 1980 – 1991 when a combination of war and HIV/AIDS decimated populations in some districts.

In terms of structure, the population of Uganda characteristically a “young population” with 56% of the population below 18 years. The sex ratio stands at 95 males to 100 females (UBOS 2002). This population structure has important implications for development in the next several decades. Apart from demands it is likely to exert on the provision of social infrastructure and related services, the burden of economic and social production will continue to fall heavily on the much less middle-aged and older members of society. This is already compounded by the impact of the HIV/AIDS pandemic on this particular, population cluster, within which 13% of the total number of children and orphans need care and protection.

### 2.2.2 Spatial Distribution of Uganda’s Population

Uganda’s population is unevenly distributed among regions and districts. The central region has the highest population at 27%, followed by western at 26%, eastern at 25% and northern at 22%. Fifteen (15) districts have populations ranging from 500,000 to 1 million, while 31 have between 200,000 to 500,000 and 8 with less than 200,000. This variation also exists at county and sub-county levels (UBOS, 2002).

**Table 2.1: Regional Distribution of Population**

Region	Population		Growth Rates (%)
	1991	2002	
1. Central	4,843,594	6,575,425	2.6
2. Eastern	4,128,469	6,204,915	3.5
3. Northern	3,151,955	5,148,882	4.2
4. Western	4,547,678	6,298,075	2.8
<b>Uganda</b>	<b>16,671,705</b>	<b>24,227,297</b>	<b>3.2</b>

*Source:* UBOS Statistical Abstract, 2008

The pattern of human settlements in Uganda is typical for countries in Sub-Sahara Africa. Eighty eight (88%) of the population live in rural areas where densities vary between 226 persons per square kilometre in eastern to 65 in Northern Uganda. Only 12% of the population lives in urban centres. The largest concentration of these settlements is to be found in the metropolitan area stretching from Kampala to Entebbe in the central region and Mbarara in the Western Uganda. Both account for approximately 60% of the urban population of the country (UBOS 2002).

Densities in central and western are approximately 176 and 126 persons per square kilometre respectively. The pattern of human settlements in the rural areas has been shaped not only by eco-climatic factors but also by such traumatic events as armed conflict and the HIV/AIDS pandemic. In Northern Uganda, where large populations are internally displaced and confined in security zones (camps), settlement patterns are, in addition, quite fluid and erratic. A major consequence of this is that availability and size distribution of land varies quite widely throughout the country. Overall, this spatial distribution of the population has important implications for land use, be it for agriculture, industry and other economic activities.

### 2.3 ECONOMIC ACTIVITIES AND LAND USE

Land is a key resource and the main capital available to the majority of Ugandans. It supports agriculture on which the country depends and access to land is therefore a basis for rural livelihoods. The success of Government in poverty eradication will depend, in a large measure, on the extent to which land matters are addressed, particularly to enable agricultural transformation – a gradual shift from subsistence to market-oriented production. According to

the MFPED (2003), some 18 million hectares of land is available for cultivation in Uganda. However, only a third of this is under arable cultivation and about 700,000 hectares is under large-scale agriculture.

The Ugandan economy is mainly agrarian, with 71% of the population engaged in subsistence agricultural production. The professional, semi-professional and administrators collectively constitute a paltry 7% of the total working population. The agricultural sector employs a relatively higher population of women (83%) as compared to 71% of men (UBOS, 2008). In the rural areas, the agricultural sector is dominated by millions of small farm holdings. In some cases, however, the type of land-tenure systems has led to low investment in land improvement and productivity. Many smallholders are suffering continuous fragmentation of holdings into uneconomic sizes, and farms are getting smaller in some areas. Moreover, many large farms that belonged to Government were sub-divided and sold to private investors.

According to the MFPED (2003), land is increasingly becoming a problem for the poor people. Quoting a participatory assessment conducted in 2001/02, it notes that shortage of land was found to be the second most important cause of poverty, after health. Other studies have supported these findings. In fact, they show that households are not accumulating land; rather this asset is diminishing in size. Large families, particularly polygamous ones, seem to be the main factor leading to land shortages in most parts of the country. Other important factors include distress sales by poor people, insurgency in the north of the country, inadequate land use planning, commercial farming and evictions to make way for forest and game reserves, and rural-urban migration.

One of the key concerns with regard to land use in Uganda relates to women's land rights, particularly denial of inheritance, inability to prevent sales by men, disincentives to development of the land they occupy, disinheritance of widows, etc.

## **2.4 THE SOCIO-CULTURAL ASPECTS OF LAND IN UGANDA**

Communities in Uganda, as elsewhere in the World, share a spiritual, cultural, social and economic relationship with their traditional lands. Access to, and control over, land often determine their socio-political structures. Traditional laws, customs, and practices reflect both an attachment to the land and the responsibility to preserving traditional lands for use by future generations. Land is perceived as a means of livelihood and it is at the centre of the social, cultural, and economic life of the various communities of Uganda.

The physical and cultural survival of indigenous people in Uganda depends upon the protection of their land and its resources. However, the relationship between the indigenous people and their environment has been eroded because of dispossession or forced removal from their traditional lands. Land rights, land use and resource management remain critical issues for indigenous peoples in many parts of the world. Development projects, mining, forestry activities, and agricultural and industrial programmes continue to displace indigenous people.

In the same vein, modern approaches to land use and management arising out of government interventions have challenged or contradicted the traditional perception of land, resulting in many obstacles in policy and project implementation. Privatisation of land, while positive in its intentions, contradicts the notion of shared access to land, interferes with people's livelihoods and introduces competition on already scarce resources. Article 29 (2)a of the Ugandan Constitution, for example, provides for the freedom of movement, but more often than not, this has been interpreted as "invasion of, and encroachment on, land by intruders", often resulting into

conflicts<sup>1</sup>. Similarly, introduction of projects and implementation of policies without consulting with the local people in an area may lead to conflicts on account of their perceptions of land, tenure structures, and land use, leading to low productivity of the land and the destruction of the biodiversity of the area. On the other hand, disaster management is usually hindered by strong attachment to land, especially in the location proposals, while land planning and development are subject to traditional perceptions that each person must own a piece of land.

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<sup>1</sup> This was the case in the districts of Kasese, Kibaale, Buliisa, the Teso region and other parts of Uganda.

## **PART III THE LAND SECTOR AND GENDER IN UGANDA**

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### **3.1 UNDERSTANDING THE CONCEPT OF GENDER**

Gender is a social construction of men and women by society giving them stereotyped roles and responsibilities. God does not biologically fix a social construction of man and woman. As such gender changes and differs from time to time and from place to place. The derivative of gender as a social construction of roles and responsibilities is that it confers power, status, opportunities and privileges, differently to men and women. It creates stereotypes and therefore influences attitudes and biases at a very early stage of the socialisation process. These lessons remain deeply entrenched and become part of the norm so much so that even formal education and professional qualifications are more influenced by the socialisation than vice versa (JLOS, 2002).

Research has established that society allocates roles and responsibilities for men and women putting the women more at a disadvantage than their male counterparts. This leads to unequal gender relations and their attendant effects, such as marginalisation, disempowerment, negative biases and a wide range of other injustices to women. It follows also that men's and women's experience of the legal system occurs within complex sets of differing social and cultural expectations (JLOS, 2002). The attributes of the social set up affect the legal system and its users as a result of which justice is obstructed for the less powerful and less privileged, stereotyped as weaker and submissive who invariably tend to be women. Because human beings make law, it is not devoid of influence. Male dominated parliaments have for centuries passed gender-biased laws that promote the interest of men. In terms of power relations, the gender-biased laws explicitly promote gender-based discrimination. In other instances, the law remains completely silent on issues of gender oppression.

Moreover, when the legal system operates on the presumption that every person is equal before and under the law, and that equality of opportunity exists for all persons to seek protection of the law, when in reality this is not the case, it further widens the gap between legal and social justice to the detriment of those already socially (Mukasa, 2000).

### **3.2 GENDER AND POVERTY**

In many countries, including Uganda, there is gender inequality reflected by the women's limited or lack of control of over land and land resources. Women play an important role in the development of national economies all over the world. Their contribution to the labour force and providing the backbone to the agricultural sector particularly in the developing countries is well recognised. Given their central role in agricultural production, the protection of their rights on land and security of access to land has important implications for agricultural development, in terms of investments into the sector and its improved productivity.

In Uganda, women do not have as many opportunities as their men counterparts for social and economic development. For example, they lag behind in terms of education levels and incomes. They are economically constrained by their social roles and responsibilities, their low social status, lack of ownership and access to productive assets, low participation in decision-making and high workload. Even where women have sought employment outside the home, as is increasingly the case, this economic empowerment has not been accompanied by a corresponding social empowerment. Then there is a clear division of labour between men and women. While

men are more involved in community activities, women are more involved in domestic and reproductive activities, particularly the care for the family. Indeed, both men and women participate in production. However, men concentrate more on large livestock keeping, fishing, and cash crop production, while women are involved in food production as their main domain.

One of the intriguing characteristics of gender inequality relates to the sharing of household benefits arising from the sale of produce, which in most cases does not favour women. An increase in household income does not necessarily increase in access to this income by female members, or even improved quality of life for all members, especially in terms of nutrition for children. In addition, access, control, ownership and inheritance of assets (including land), tends to favour men at the expense of women, although the extent of the inequality varies from location to location. Most women, however, are dependent on their husbands or fathers for access to productive assets and income. In general, women in Uganda do not own land, although they may have access to it for growing food. They are also discriminated against in land (and many other domestic) disputes. Within the household, it is men who make decisions concerning economic activities. The involvement of women in this regard differs from region to region and depends on the level of understanding and cooperation within the household.

In households where women are heads, such women are often able to develop and may be better off than their married counterparts, who are usually constrained by the unequal power relationships in the households. However, in cases where a woman has many children and few productive assets, (few because they are usually grabbed by in-laws and relatives upon the death of the husband), she may be particularly vulnerable to poverty.

### **3.3 THE LEGAL FRAMEWORK OF GENDER**

#### **3.1.1 International Instruments Relating to Gender applicable in Uganda**

Uganda, along with many other countries in the region, has ratified the major international instruments on human rights, such as the Universal Declaration of Human Rights [UDHR], the International Bill of Rights and a host of others. It has also ratified the key instruments that relate to the rights of women, including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)<sup>2</sup>, the Vienna Treaty on Human Rights, the Vienna Program of Action, the Declaration of the Conference on Population and Development (DCPD), the International Conference on Population and Development (ICPDC) and the Beijing Platform of Action. Moreover, Uganda has ratified a number of regional human rights instruments, which further promote and protect gender equality such as the African Charter on Human and People's Rights (ACHPR).

Uganda has also actively participated in a number of related fora which have advocated for the improvement of its people, emphasizing the observance and protection of women's rights. Notable among these are the world conferences on women in Mexico City, Copenhagen, Nairobi and Beijing that were hallmarks in the history of the emancipation of women in Uganda. Uganda also actively participated in the Earth Summit (Rio De Janeiro, 1993) the World Conference on Population (Cairo, 1994) and the Social and Development Summit (Copenhagen, 1995).

The general principle of law that is being dealt with and which forms the basis of Uganda's international and a constitutional obligations, is respect for the equal rights of men and women. This principle has been emphasized by the institution of marriage and has been consistently

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<sup>2</sup> Uganda ratified the CEDAW in July 1980.

upheld in all the international and regional instruments mentioned above. As a result, the principle has almost gained universal respect and has been upheld since 1945 (UN, 1945).

#### **A. *The Universal Declaration of Human Rights***

Article 55(c) of the UN Charter provides for “... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”. The 1948 Universal Declaration of Human Rights stresses the equality of the rights of men and women. In particular, in Article 1, the UDHR states that “All human beings are born free and equal in dignity and rights.” Article 2 of the UDHR gives content to this general status, noting that everyone is entitled to all the rights and freedoms outlined in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 7 of the UDHR, then goes ahead to specify that all persons are equal before the law.

Article 16 of the UDHR puts particular emphasis on women’s right to equality in marriage, noting that “Men and women of full age ... have the right to marry and found a family. They are entitled to equal rights at marriage, during marriage and at its dissolution.” This provision recognises the fact that the institution of marriage had hitherto legally and culturally subordinated women all over the world and it was necessary to specifically ensure their equality in marriage. Without this provision, the Declaration would have been meaningless because the majority of women in the world are born, brought up and trained to live within, and know no other life except the institution of marriage. Every international human rights instrument thereafter has recognised the women’s general right to equality with men and their specific right to equality within marriage. These include the ICCPR, CEDAW, and the regional instrument; namely the African Charter on Human and People’s Rights (ACHPR).

#### **B. *The Convention on the Elimination of all forms of Discrimination against Women***

The CEDAW lays down the various specific rights within marriage and family life that it seeks to protect, so that for the avoidance of doubt, Article 16 of the UDHR is broken down into 8 parts. The most relevant of these are: (i) same right to choose a spouse, enter into marriage with free and full consent, (ii) same rights and responsibilities as parents, (iii) same rights to guardianship and custody and (iv) same rights to ownership, acquisition, management and disposition of property. It should be noted, however, that while the CEDAW is providing for these rights, Uganda has so far failed to translate them into a workable national law, which would ensure that the rights acquired at and during marriage form the basis for women’s claims at the termination of the marriage or at death of the husband. By the same token, Uganda has not been able to come up with a law that would guarantee the women’s right to inherit property [*read land*] of their parents.

### **3.1.2 The Legal Instruments in Uganda Relating to Gender**

#### **A. *The Constitution of the Republic of Uganda***

The Constitution of the Republic of Uganda, 1995 [as amended] is hailed for being one of the most gendered constitutions in Sub-Saharan Africa, with regard to property rights, including land rights as well as being gender sensitive and inclusive (AD & CBR, 2006). It recognises the significant role of women in society and commits to protect them and their rights, taking into account their unique status and natural maternal functions in society. It provides for the equality of all persons before and under the law in all spheres of political, economic, social and cultural life and in every other respect and guarantees equal protection before the law [Article 21 (1)]. Equality before the

law does not mean that women should be treated as men, but that women should be treated in a non-discriminatory way. Indeed, Article 21 (2) specifically prohibits discrimination against any person on grounds of sex, race, colour, ethnicity, tribe, creed or religion, or social economic standing, political opinion or disability. Discrimination is defined by Article 21 (3) as the different treatment given to persons on the basis of the terms set out in article 21(2) of the Constitution. The Constitution prohibits discrimination within marriage in Article 31 where in part it states that:

**“(1) A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age to:**

- (a) found a family; and**
- (b) equal rights at, and in, marriage, during marriage and at its dissolution.**

**(2) Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.”**

These constitutional provisions are fundamental and do conform to the principle of equality of men and women in all spheres of life, and specifically in marriage, which is the basis of all international human rights instruments to which Uganda is signatory. It is against this backdrop that the NLP ought to emphasize gender equality in respect of matrimonial property.

Article 33 of the Constitution expressly provides for the rights of women, taking into account their unique status and natural maternal functions in society. It emphasizes gender equality, giving women full and equal dignity of the person with men. This Article further provides that women shall have a right to equal treatment with men, and the right shall include equal opportunities in political, economic and social activities.

Article 32 provides for the right to affirmative action in favour of women and other marginalized groups. This provision is a faster and better vehicle for mainstreaming gender in the NLP. The Constitution commits the state to “... take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them” [Art. 31 (1)]. It prohibits Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised groups to which clause (1) relates or which undermine their status, are prohibited by this constitution [Art. 31 (2)], and creates a commission called the Equal Opportunities Commission whose composition shall be determined by an Act of Parliament [Art. 31 (3)].

### ***B. The Land Act***

Section 3 of the Land Act defines land tenure systems (customary, “Mailo”, freehold, leasehold). Customary tenure is defined as a form of ownership applicable to a specific area of land and a specific description or class of persons. It is governed by rules generally accepted as binding and authoritative by the class of persons to which it applies. It applies local customary regulation and management to individual and household ownership, use and occupation of, and transactions in land. It also provides for communal ownership and use of land, which parcels of land may be recognised as subdivisions belonging to a person, family or traditional institution and is owned in perpetuity. This definition of customary land tenure is gender neutral but when the veil is lifted, it is in fact gender insensitive, veiled with all sorts of discriminatory biases against women.

Since Uganda is a patrilineal society, land is customarily owned by men. Daughters and their mothers rarely get shares of customary land. The gender implications here are complete denial of their right to own land, controlled and or limited access and use to the female folk both before marriage, during marriage and after marriage. Against this background, Section 4 of the Act provides that customary land owners may acquire a certificate of customary ownership for their land as conclusive evidence of their rights. The district land boards are supposed to issue the certificates. Of course, it is the men who ordinarily qualify for these certificates with the majority of women left out as explained above. Unfortunately, however, although the area land committees, to which applications for the certificates have been established, have not been operational in all places in Uganda since 1998<sup>3</sup>. The committees were supposed to be at parish level but the law was later amended placing them at a higher sub-county level<sup>4</sup>. This defeats the spirit of decentralisation under the Local Government Act intended to bring services nearer to the people. The poor and marginalised people, the majority of which are women, are may not afford moving long distances for the intended services. As a result, nobody has ever successfully applied for the certificate of customary ownership.

Under Section 9 of the land Act a person, family community or association may convert their customary ownership to freehold and acquire a certificate of title in perpetuity. This is a positive provision that can enable the holder, without discrimination, [both men and women] to exercise full powers ownership including using and developing the land for any lawful purpose, taking and using any and all produce from the land, entering into any transaction in connection with the land, including but not limited to selling, leasing, mortgaging or pledging, sub-dividing creating rights and interests for other people in the land and creating trusts of the land; or disposing of the land to any person by will.

Under Sections 15-26 of the Act communities may form Communal Land Associations and manage common land under a Common Land Management Scheme<sup>5</sup>. As already observed these shall be male-dominated because of the gender-insensitivity of our cultural institutions.

Tenants on registered land have security of occupation and can apply for a certificate of occupancy for the land they occupy. Section 29 defines a “lawful occupant” and a “bona fide occupant”. The provision as it is offers security to both men and women occupying and using bibanja on registered land. However the recently introduced Land Amendment bill has provisions which specifically protect tenants against eviction by land lords and this has met with a lot of politicised resistance especially from the away-landlords of Mailo land in Buganda.

Section 38A of the Act provides for security of occupancy for spouses on family land. Every spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred to in section 39 which may affect his or her rights<sup>6</sup>. Under Section 39 spouses must consent to transactions in land where they usually live. Family land is defined as land on which is situated the ordinary residence of a family and from which the family derives sustenance. This law is good enough to protect the interests of married men and women but fails to protect the rights of spouses legally separated<sup>7</sup>. The common happening is men causing legal separation and disposing of property unhindered by the law. Worse still the law no

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<sup>3</sup> Section 64 of the Land Act

<sup>4</sup> Section 27 of The Land (Amendment) Act,2004

<sup>5</sup> Section 25 of the Land Act

<sup>6</sup> Section 19 of the Land (Amendment) Act, 2004 introduced this.

<sup>7</sup> Section 38 A (5) of the Land (Amendment) Act,2004

longer provides for the consent of children in transactions in family land. This has left the rights of children, and more so orphans, to own land unprotected<sup>8</sup>.

The consent clause wrongly assumes that all land is registered land for it provides for lodging a caveat on the certificate of title, certificate of occupancy or certificate of customary ownership to indicate that the property is subject to the requirement of consent. Much of the land spouses sell secretly behind the backs of their partners in marriage is unregistered customary or clan land. Even where the land is titled land the women are prevented from lodging such caveats by ignorance of the law and technical procedures.

The Land Act operationalises the Uganda Land Commission, District Land Boards, and District Land Tribunals<sup>9</sup>. The gender balance of their composition is still a big problem since men dominate these institutions. Affirmative action is needed to ensure that women are brought on board to participate in land management and disputes resolution.

Under section 44 Government or a local government holds in trust for the people and protects natural lakes, rivers, ground water, natural ponds, natural streams, wet lands, forest reserves, national parks and any other land reserved for ecological and touristic purposes for the common good of the citizens of Uganda. The government may grant concessions or licenses or permits in respect of these natural resources. Our research has shown that very few women, if any, are granted these concessions, licences and permits. Women and children who till the land, collect firewood, harvest materials for weaving crafts, gather fruits and fetch water for family use should be actively involved in the conservation and controlled of these natural resources for meaningful development to take place.

### ***C. The National Environment Act, 2000***

This is another important legal instrument to consider when drafting the NLP. The Act provides for the management of wetlands in section 37, hilly and mountainous areas. In the second schedule hereunder The National Environment (Wetlands, River Banks and Lake Shores Management) Regulations, 2000 are made. These regulate activities in a wet land such as cultivation, fishing, brick making, drainage, burning, and sewerage filtration. We note with grave concern that gender is not considered as a major factor or principle affecting the management of wet lands. Women and children who till the river banks or hills, collect firewood, harvest materials for weaving crafts, gather fruits and fetch water for family use should be actively involved in the conservation and controlled use of these natural resources for meaningful development to take place.

### ***D. The Local Government Act, 1997***

As part of the effort to improve governance and efficiency in service delivery, the Government passed the Local Government Act of 1997. The Act, as amended, provides the legal basis for decentralisation and the devolution of functions, powers and services from the centre to local governments. This process began in 1992 and aims to ensure good governance, democratic participation in, and control of, decision-making by the people. Through the decentralization process, political and financial power is being devolved to local governments, enhancing service delivery by bringing services nearer to the people and empowering them in the management of affairs that affect them.

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<sup>8</sup> Further discussed under Property in marriage, the consent clause and co-ownership

<sup>9</sup> Parts iv and v of the Land Act

Engendering the composition and functioning of district land boards (DLB) and area land committees will strengthen the decentralisation policy of land management, administration and provide for women's participation in all mechanisms for land-related conflict resolution.

### **3.4 THE POLICY FRAMEWORK FOR GENDER**

The overall goal of mainstreaming gender issues into the NLP is to ensure that there is gender equality based on the Government's international policy commitments. These commitments emphasise human, economic and social rights, poverty eradication, democratisation and sustainable development. Mainstreaming of gender issues into the NLP must focus on engendering the provisions on land contained in the Constitution of the Republic of Uganda, 1995, (as amended) and the Land Act, 2000. The most significant provisions stated in these instruments are: (a) that land belongs to the citizens of Uganda and (b) that ownership is under four types of tenure, namely, customary, freehold, "*mailo*", and leasehold. Both the Constitution of Uganda and the Land Act also provide for a range of land management institutions, for customary owners to acquire certificates of ownership and to convert customary and leasehold tenure to freehold, and for security of occupancy on *mailo*, freehold or leasehold land for lawful or bonafide occupants.

A number of existing key national policies and related declarations seek to inform the design of the NLP. They include (i) the National Gender Policy [1997], (ii) the Poverty Eradication Action Plan [PEAP], (iii) the Plan for Modernisation of Agriculture [PMA], (iv) the Decentralisation Policy, and (v) the National Environment Management Policy [NEMP].

#### **3.4.1 The National Gender Policy**

A comprehensive National Gender Policy (NGP) was formulated in 1997 under the auspices of the Ministry of Gender, Labour and Social Development (MOGLSP). Its overall goal is to mainstream gender issues and concerns into the national development process in order to improve the social, legal, political, economic and cultural conditions of the people of Uganda, particularly women. It notes the gender disparity in access to, and control over, economically significant resources and benefits. In this sense, the land sector is particularly important due to the very high disparity between male and female land ownership. The NLP will provide a policy framework to address this differential.

#### **3.4.2 Poverty Eradication Action Plan**

The Poverty Eradication Action Plan (PEAP) is Uganda's comprehensive development framework, which aims at reducing the proportion of the population living below the poverty line from the level of 35% (2001) to below 10% by the year 2017. The PEAP has four main goals: (a) creating a framework for rapid economic growth and structural transformation; (b) ensuring good governance and security; (c) increasing the ability of the poor to raise incomes; and (d) increasing the quality of life of the poor.

Land is central to all the programs of rapid economic growth and structural transformation of Uganda. The PEAP recognises that women's land rights are limited in Uganda, both by the inequitable legal structure and by traditional practice. It notes that female-headed households have less land than male-headed households. While widows have quite high land holdings per adult equivalent, nonetheless, they tend to lose these assets over time as their male children grow up. Thus, women's land rights are less secure than those of men. Not only do women have

weaker land rights, but also there is a traditional cultural bias against women's involvement in decision-making on land issues.

Against this background, the PEAP recognises the need to strengthen women's land rights in order to achieve poverty reduction.

### **3.4.3 The Plan for the Modernisation of Agriculture**

The PMA is a strategic and operational framework for the transformation and structural change of the subsistence farming sector through policy, institutional and organisational reforms and changes in the type and methods of service delivery leading to increased profitability and competitiveness in the agricultural sector. The PMA seeks to re-orient the subsistence farmers from producing predominantly for consumption, to producing more for the market. In order to achieve this, the natural resource-based livelihoods of the masses of the population must be improved in a sustainable manner without discrimination based on gender or sex. Thus, from the gender perspective, the PMA seeks to ensure that gender concerns are routinely and adequately addressed in the planning, implementation, monitoring and evaluation of all interventions and institutions. It advocates for the participation of both men and women at all levels and the orientation of all institutions to be gender-responsive. It also commits itself to pursue rigorously the equality of access and control over economic resources and benefits, as well as the recognition of women's roles and contributions to national development efforts.

### **3.4.4 The National Industrialisation Policy**

The National Industrialisation Policy (NIP) is a very recent policy introduced only in February 2008. It recognises that Uganda is still underdeveloped and dependent on subsistence agriculture, which limits its general economic transformation. It also recognises that industrial development is an integral and important part of the country's overall development strategy. The NIP therefore sets out the strategic direction for industrial development in Uganda for the next ten years and puts in place principles that will guide it well beyond that period.

From the gender perspective, the NIP seeks to promote the participation of disadvantaged sections of society (who include women) in industrial development activities and to create jobs for the widest section of the population. The main strategies which the NIP seeks to pursue with regard to gender include: (i) to review, assess and harmonise existing gender policies and practices in government and industrial establishments with a view to strengthening capacity for gender mainstreaming and removing inconsistencies in the industrial sector; (ii) to train stakeholders in gender analysis, gender planning, and realistic application of gender strategies and measures in industrial operations; (iii) to establish gender focal points in industry and industrial support institutions to ensure that gender is addressed in employment policies and practices, and technology skills development; and (iv) to promote and develop vocational and technical education for the disadvantaged sections of society such as women and people with disabilities, including affirmative action to increase the percentage of such groups in technical and vocational institutions as well as other industrial related disciplines.

### **3.4.5 The National Environment Management Policy**

Environmental sustainability is an important cross-cutting theme for all Uganda's sectoral policies. The National Environment Management Policy (NEMP) includes a number of principles relevant to the land sector, and which are reflected in the objectives and strategies of the NLP. In

particular, the fundamental importance for sustainable natural resource use of security of land and resource tenure is recognised.

A gender sensitive NLP will seek to involve both women and men in land use practices that promote sustainable natural resource use and environmental management, increasing awareness and understanding of environmental and natural resource issues, and promoting social equity in the allocation of resource use.

#### **3.4.6 Vision 2025**

The NLP forms part of the realization of the 2025 Vision for Uganda of a “Prosperous People, Harmonious Nation and Beautiful Country”. Vision 2025 recognises the fact that sustainable national development requires the effective involvement of both men and women. It recognizes the important roles played by women and warns that ignoring the principle of gender equality can inhibit national development. Vision 2025 applauds affirmative action and calls for more policies with women specific interventions and considerations.

### **3.5 GENDER AND LAND RIGHTS**

#### **3.5.1 Land Ownership and Security of Tenure**

Rights to land take different forms (from individual ownership to user rights to communal property) and are associated with varying degrees of freedom to lease out, mortgage, bequeath or sell. These rights may be acquired through various means, such as inheritance, membership in a community, lineage or kin group, through gift, pledge, share cropping, from transfers by the state, or from market purchase. Rights may exist for different time periods, such as over a person’s lifetime or seasonally<sup>10</sup>. Rights also vary with age (junior versus senior). In South Western Uganda, for example, men cannot claim patrilineal land until they marry, and once married they get land from their father’s group, but then it is passed on to their wives to manage and to farm (Rao, 2005). Changes in marital status, such as divorce or death of a husband can also change a woman’s rights to land. In much of patrilineal Africa, property (including land) acquired during a marriage, becomes the husband’s property, whether acquired by him or his wife. A divorced woman may also have no rights to her husband’s land, including the trees she herself planted and tended. This property can also be sold without her permission.

While women are often disadvantaged, at the same time, there is room for manoeuvre within marriage, for gender relations are not only about conflict and subordination, but also about mutual support and sharing. Such an understanding leads to the issue both of inclusive, perhaps collective rights and of collective interpretations of individual rights as forms of social protection, particularly in indigenous communities, marginalised from the mainstream.

A key point to note in considering land is that as a productive asset, it is rarely considered individual property by either men or women, but is seen as a joint household resource, whose use is subject to negotiation. Both men and women do not act as autonomous individuals in relation to land resources, as both have gendered roles to play and gendered ideologies to live up to, be that of home-maker or of provider. The problem of women in terms of ownership arises when they marriage breaks down. In a context of scarce resources and declining per capita land

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<sup>10</sup> For example, in Sierra Leone, the management of certain plots of land is the responsibility of men during periods of groundnut cultivation, and of women during fallow periods.

holding, women lacking legal title are then threatened with destitution and this is where the existence of an enabling legal environment becomes critical.

In Uganda, over 80% of land is held under customary tenure. According to the draft NLP, that situation may not change any time soon. In fact, the Constitution and the Land Act recognise it as one of the four main tenure systems, through which land rights may be secured.

### 3.5.2 Women's Land Rights

In Uganda, the gender structure of land rights varies across the country, but in general it is highly unequal. It is well acknowledged that women work on land more than any category of people in society. The Draft NLP notes that women provide 80-90% of labour, in subsistence production and over 70% of labour in cash crop production. In spite of this, however, women suffer discrimination in all matters relating to land ownership. Women's land rights tend to be limited to access, while men are more inclined to enjoy ownership rights. Their land rights continue to be determined by their marital status, and by laws of inheritance, succession and divorce. As a result of this, women's rights in Uganda are less secure than those of men. This inequality with respect to land – a key productive asset – has particularly serious negative implications for rural women in terms of poverty levels and social status. Without secure rights to land, women's ability and incentives to participate in income-generating (or expanding) activities are reduced. Women's weaker land rights are exacerbated by the traditional bias against women's involvement in decision-making on land issues. Many people continue to regard land as a "man's issue". And although recent legislative changes have introduced quotas for women's representation on various land sector decision-making bodies, the land sector still remains dominated by men at all levels.

The rights of women to own property especially land, in Uganda have, like in most jurisdictions, been controversial. Apart from some Baganda women who come from the propertied families that acquired "mailo" land, under 1900 Agreement, the majority of women in Uganda do not own real property. Similarly, it is not common for a parent in most cultures in Uganda to give land to a daughter. It is also quite rare for a husband in Ugandan cultures to give land to a wife, even upon death. Customary laws throughout Uganda tend to favour sons in this respect.

The above notwithstanding, in recent times, there has emerged a category of women in Uganda, particularly among the Baganda, who have joined the ranks of the landed class (Mulyagonja, 2000). Many of these women have had failed marriages or are widowed. They are usually successful in business or educated professionals, who have accumulated wealth and acquired property in their own right, including land. There are also many married women in Uganda, who, on account of the inequitable marital property laws and customs, are opting out of contributing to the joint marital property. Unfortunately, society's attitude towards such women is still negative. Many husbands treat such wives with suspicion because of their financial independence. They often accuse them of adultery since to them "behind every successful woman, there must be a man!"

### 3.5.3 Property in Marriage (Matrimonial Property)

Married women in Uganda are at a very great disadvantage as far as property is concerned. They are assumed to co-own property with their husbands in whose shadow they live. According to the 3<sup>rd</sup> Country Status Report of the GOU on CEDAW, 1999, only 7% of women in Uganda own land. A wife may own chattels but not land. Clan land is left in the hands of men with women having the right to access for use while in marriage or before their husbands die. Even where it is public land with a lease or title, the title deed is made in the names of the husband – the

traditional head of the family. These attitudes continue to exclude women from the control of resources and from decision-making within the family, making them dependent on men.

#### 3.5.4 Property at Divorce

The divorce law in Uganda was inherited from the colonial masters in 1904.<sup>11</sup> Although the Divorce Act was revised in 1932 and 1964, its provisions are still basically the same as the common law of England as it stood in 1904. Provisions in it relating to property are scanty, irrelevant and discriminatory of women (Mulyagonja, 2000). The Act makes no specific provision for the division of property acquired during marriage which, in most cases, constitutes of a matrimonial home on a piece of land held in the names of the husband and other household property. Recognition of property rights in the Statute relates to pre-nuptial and post-nuptial settlements made on each of the parties. Women in Uganda rarely get any property from their natal families and in most cases they get married before they acquire any of their own<sup>12</sup>. To that extent the provisions are irrelevant. The wife, who had no property before the marriage and did not acquire any during its subsistence, therefore leaves the marriage destitute in the event of separation or divorce. The only express law regarding distribution of property upon divorce is in cases where the divorce or separation is a result of adultery by the wife. Section 26 of the Divorce Act provides that court may order the whole or any part of the wife's the property to be given to the husband or the children of the marriage or both. Fortunately, the Constitutional Court has, in **Uganda Association of Women Lawyers & 5 others Versus Attorney General**<sup>13</sup>, declared this and other related sections discriminatory and inconsistent with the Constitution.

The apparently unfair system, or the lack of any mechanism in the law for the division of family property, is more distressing because of the increased financial contributions that wives make to the family income in addition to their house-keeping and child-rearing roles. It is all too evident that though wives earn an income for the family, in most cases it is spent on expendable items so that at the end of the marriage they cannot account for their contributions to the family income because the courts of law require documentary or cogent evidence as proof of this contribution. On the other hand, Ugandan society has not yet accepted the fact that the multiple roles played by the woman in the home deserve recognition or compensation in the event that the marriage comes to an end (Mulyagonja, 2000).

#### 3.5.5 Property in Cohabitation

There is no presumption of marriage in Uganda and the Divorce Act makes no provision for persons who chose not to marry under the four recognised forms of marriages (namely, civil marriage [for Christians], customary, Moslem and Hindu). Because of this, there are no legal provisions to determine what will happen to property that they jointly acquired. Yet co-habitation is very common and frequently involves young women and rich older men who are already married.<sup>14</sup> In such a case, if the young woman is chased away by the man, she will only have recourse to filing a civil action under the general law of contract to claim for her share in any property they may have acquired.

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<sup>11</sup> Divorce Ordinance, 15 of 1904 and 25 of 1932.

<sup>12</sup> There is also still a tendency for uneducated women to get married in their teenage. Educated women normally get married soon after they leave tertiary institutions. They have not yet accumulated any property of their own to take to the marriage.

<sup>13</sup> Constitutional Petition No. 2 of 2003

<sup>14</sup> Though this is bigamy and is an offence according to the Divorce Act, it is sanctioned as customary marriage.

Fortunately, there has been a move to amend the law. The legislature is seeking to rectify the situation by enacting a Domestic Relations Act. The proposed Act attempts to merge into one law the different legislations related to the different types of marriage laws together with the Divorce Act. The proposal has not received popular support from some sections of the population because it seeks to establish the same standard for everyone irrespective of the diversity in cultural and religious beliefs norms and practices. The most controversial parts of this Bill are the attempt to kill or limit polygamy and the ambitious provisions that attempt to give wives a share in the family property upon divorce<sup>15</sup>.

Many people interviewed in the course of this study, echoed and supported statements made by H.E. President Museveni, who suggested that women should share property from their natal families, but not with their husbands! (*The New Vision, May 10th, 2000*). Many men in Uganda have capitalised on this statement and used it as an excuse to deny women their rights whenever the issue of the co-ownership of family property comes up for discussion.

### 3.5.6 Co-ownership

Efforts to amend the law relating to domestic relations in Uganda were preceded by an attempt to introduce the concept of co-ownership of land by spouses. Spousal co-ownership of land arises from the premise that there is a joint interest in land on which the family derives its livelihood. Joint tenancy by a family embodies interest and time as differentiated from tenancy in common, which encompasses unity of possession to exist with a clear definition of shares in the family property. Spousal land co-ownership therefore accords rights in land on a continuous basis, free from imposition and interference (security of livelihood) to reap the benefits of one's labour and capital invested in that land while meeting the marital responsibilities and obligations as husband/wife.

When Government decided to amend the land laws which were also previously scattered in about six statutes, the women and human rights groups lobbied and advocated for the inclusion of a provision which was to require that spouses co-own their matrimonial home. Their views were forwarded to the relevant committees but were never incorporated in the subsequent drafts. Hon. Miria Matembe and other legislators reintroduced the issue in Parliament as an amendment. The issue was debated and accepted in principle, but again it was deliberately left out by the drafting committee of experts, who in their wisdom, did not seem to approve of it. The provision was therefore not included in the Land Act 1998 and eventually came to be popularly known as the "lost clause". The consequence of this was that the women in Uganda continued be excluded from the use of property jointly acquired in marriage or co-habitation because of the lack of a legal framework to resolve property issues in the event of termination of their relationships.

Fortunately, the Court of Appeal, in its most recent judgment in **Julius Rwabinumi Versus Hope Bahimbisomwe**<sup>16</sup> held that matrimonial property is joint property between husband and wife and any property owned individually by the spouses before marriage becomes joint matrimonial property after the fact of marriage. Therefore upon separation, matrimonial property should be equally divided and shared to the extent possible and practicable, irrespective of who paid for what and how much was paid. The parties to a marriage contract, however, have a right to exclude any property from those to be deemed as matrimonial property. This judgment is a great boost to the efforts still being made to lobby for the inclusion of the co-ownership clause in the Land Act by amendment.

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<sup>15</sup> The law was reintroduced as a fresh bill and is generating a lot of contentious debate, failing to be passed as an Act.

<sup>16</sup> Civil Appeal No. 30 of 2007 as decided by Justices A. Twinomujuni, C. N. B. Kitumba and Kavuma.

### 3.5.7 Women's Work

The theme of women's work is also treated at the level of unpaid domestic labour, which is often viewed as unemployment in Ugandan society. Both in the Ugandan urban middle-class households and in typically peasant rural households, the bulk of household labour is still provided by the woman, with the husband taking only certain limited roles. For the urban middle-class woman, who, in many cases has a job outside the home [either as a professional, or in the formal or informal commercial sector], this means more work, even when she can afford house help. In spite of this, however, there still remains the "sexual politics" of access to household income. Because of the woman's comparatively meagre earnings, there is a pooling of household income. There is reason to believe that the woman contributes more of her smaller income to the household<sup>17</sup>, and she expects this to result into co-ownership of the matrimonial property, including land. Unfortunately that is not the law in Uganda; in the event of the end of the relationship, a woman often fails to account for her contribution in real terms, only to realise too late that all along in the relationship she had been exploited.

### 3.5.8 Compensation for Women's Work

Traditional property law does not recognise that rights to another party's property can be acquired through the performance of domestic work. Consistent with this, in Uganda a woman's domestic efforts and services are usually treated as her duty to her husband and family, not entitling her to the property directly acquired by her husband in consortium with her. The result of this is that the average woman, who works as a housewife throughout her married life, acquires no interest in the proceeds of her labour for that period of her life. On the other hand, a wife who works outside the home and makes direct financial contributions to the acquisition of marital property will only have this contribution recognised for purposes of compensation when the marriage breaks down, and this is only strictly upon production of proof of her contribution. The household labour and services still go uncompensated.

### 3.5.9 Property under Succession

The other law that is important for the land and gender policy is the Succession Act, 2000. Some women inherit land particularly from the male parents who bequeath it to their daughters. Some wives also get shares from the estates of their husbands. Under S. 27 of the Succession Act, where a male spouse dies intestate, the surviving spouse is entitled to 15% only of the estate, leaving 75% to the children, 9% to dependants and 1% to the customary heir. The allocation of 15% to the surviving wife in intestate succession effectively discriminates against women and needs to be revised. Moreover, in a polygamous marriage all surviving widows have to share the 15% of the estate. Obviously, they have difficulty in sharing the 15% amongst themselves in complete disregard of their contribution in the acquisition of the estate. But then, a widower who survives more than one of his spouses takes 15% from each of their estates.

The recognition of a customary heir under the Succession Act has far reaching implications for women's opportunities to have an equitable share in the distribution of the estates in the short term, and their pursuit for economic empowerment in the long term. Restriction of the provision to an "heir" under S.2 of the Act not only implies that they must be male, but that they should be succeeding a deceased male as required under the rites and customs of the patrilineal system that prevails in the majority of Ugandan tribes or communities. The logical conclusion is that the lawmakers did not envisage females as having estates to bequeath. A review of the laws and

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<sup>17</sup> Women tend to give priority to household needs related to health, education and nutrition, while men spend a high proportion of their household income on alcohol at the expense of other necessities (MFPED, 1999).

procedures in the office of the Administrator General also confirmed this conclusion from the framing of the form on which a report of death is made.<sup>18</sup> This is one of the instances where the law mirrors and reinforces gender-based injustices in society.

But perhaps the most gender-insensitive provisions in Uganda can be found in the customary law, under which a wife cannot inherit the husband's estate. Rather, it passes most often to his sons or paternal relatives (brothers, uncles or nephews or even grandsons). Daughters are equally denied inheritance and succession rights under customary law (Okumu Wengi, 1997). Yet over 80% of all land in Uganda is held under customary land tenure.

In light of this marginalisation and deprivation by the community the Land Act introduced reforms to strengthen and protect land rights of women, dependent children and orphans. Any decisions relating to land that deny females and children access, ownership occupation and use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution have been declared null and void<sup>19</sup>.

Property rights of married women are determined differently in succession. Under S.14 and 15 of the Succession Act, CAP162, Laws of Uganda, a married woman acquires the domicile of her husband and follows that of her husband during marriage. It is further provided that the domicile of the wife no longer follows that of the husband if they are separated by the sentence of a competent court. This, of course, means that a husband may not take the domicile of his wife. Gender equality would demand that there should be free choice of domicile so that the spouses acquire and establish a matrimonial home anywhere they feel safe and not necessarily where the husband chooses to live.

Under Sections 26, 27 and 29 of the succession Act and the Rules in the second schedule to the Act, law allows the widower to keep the matrimonial home upon remarriage while it requires the widow to relocate if she is to remarry. Fortunately, in the case of **Law & Advocacy for Women in Uganda Vs Attorney General**<sup>20</sup>, the Constitutional Court held that Sections 2(n) (i) and (ii), 14,15, 26, 27, 29, 43, 44 of the Succession Act and Rules 1, 7, 8 and 9 of the Second Schedule to the same Act are inconsistent with and contravene Articles 21(1) (2) (3), 31, 32(2) of the Constitution and they are null and void.

The declaration as unconstitutional of sections 14, 15 [in regard to domicile of a married woman], 27 [regarding the distribution of property of intestate males which leaves a meager 15% entitlement to the widow while the widower almost always claim all of his deceased wife's property], 29 [which allows the widower to keep the matrimonial home upon remarriage while it requires the widow to relocate], and 44 [which stipulates the preference of a guardianship to a lineal descendant other than to a mother] is but an important decision affecting married women's land rights.

### 3.6 LAND USE

Rights to property during marriage determine power relations between spouses. Similarly power relations in any society are determined by property relations. As a result, people who control property in a society also control the society because control of the means of subsistence allows

<sup>18</sup> Research Project on Women and Inheritance: Ministry of Women in Development, Youth and Culture (1994). On recommendation of the report, the form has since been revised.

<sup>19</sup> Section 28 of the Land Act

<sup>20</sup> Constitutional Petitions NOS. 13/2005 and 05/2006

them to impose their will on that society. Property relations in any given family unit determine power relations within that family. Admittedly, the process of decision-making in a family is a complex interaction of the use of persuasion, power, and threats. However, the question about whose decision prevails depends to a very large extent upon the power positions of the spouses. (Ncube, 1997). Again the Land Act protects land rights of women, dependant children and orphans. Any decisions relating to land that deny females and children access and use of any land or impose conditions which violate Articles 33,34 and 35 of the Constitution are null and void.<sup>21</sup> Article 237 adds another dimension to the affirmative action under Article 32. It provides that land in Uganda belongs to the citizens of Uganda. As Matembe (2002) ably argues, while women are the majority of Ugandans, only 7% of them own land. The majorities of rural women who till the land neither own nor control it. For instance in household, a woman does not have the right to decide which piece of land to till for her food crops. The decision how each section of land is used and by whom is left to either the father, the husband or the son (Matembe, 2002). As a consequence men have allocated themselves fertile lands for growing cash crops while the women are allocated infertile pieces for food production. This has often resulted into food scarcity and famine in many parts of Uganda. The NLP must therefore advocate for recognition and protection of the women's rights to own and use the land as full citizens.

### **3.6.1 Culture, Gender and Access to Land**

Access to and use of land in Uganda is underpinned by the patriarchal nature of traditional communities. This means, in practice, that talk about rights is often really about the rights of male members of the community. The patriarchal nature of land tenure arrangements is based on the assumption that women and girls can only gain access to land through their male kin at every point in their life cycle. As girls and unmarried women, they can lay claim to land through their fathers. When they get married, their claim to land can only be to or through their husbands.

Traditionally, this has worked well and women were always assured of access rights that were nearly as secure as those of men. Through marriage, a woman entered into a relationship and association with the family of her husband and through them with the community and, thus, her access to land for use was assured during and beyond the life of her husband. Because she, in effect, married into the community, even the death of her husband did not undermine her rights. Moreover, since effectively all members of the community (both male and female) only had rights of access and use, there was little difference in reality between the rights of men and those of women. Divorces were rare in traditional communities but, whenever they occurred, the woman would return to her home and claim the same rights of access and use through her father or brothers. Customary institutions were available to protect the rights of the woman as a member of the community, whether of her parents or of her husband.

Today, however, things have changed and the reality is quite different. Women can no longer be guaranteed access to land through their male kin. With increasing population, scarcity of land and deepening poverty, men no longer fulfill their obligation of providing women with land and tools of production. In addition, not all women get married or stay married, and not all male children take care of the land needs of their mothers. A woman's position has become less secure as the customary systems and institutions that protected her have collapsed while the traditions that deny her direct access to land have persisted in rural Uganda. Moreover, certain assumptions about the woman, such as that she would always have a man through whom to make claims for land, are no longer true. Many women live outside wedlock either because they choose not to marry or because their marriages collapse. Furthermore, as a result of the HIV/AIDS pandemic,

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<sup>21</sup> Section 28 of the Land Act

many women are widowed much earlier in life and are left to fend for themselves. In rural areas, such women need secure access to land in order to support themselves and their children. The above situation has affected the economic rights of the vulnerable under customary land tenure.

### 3.7 LAND TRANSACTIONS

During the debate on the Land Bill in 1998, women activists successfully lobbied for a law that prevents the men from selling land from which the family derives its livelihood. Section 39 of the Land Act 1998 provided for the consent of the spouses and the children when one spouse wanted to sell the family land. Hitherto, it was possible for a man to sell land without seeking the consent of his wife or children. It was not uncommon for a wife and her children to wake up one day and find themselves evicted by some secret buyer, leaving them with no where to go. The Land Act therefore came up with a clause - popularly known as the “consent clause” - which was meant to protect the spouses and the children. If the children were minors (i.e. not of majority age), then, the local committee would represent them.

The consent clause was a workable and tangible achievement for the vulnerable groups. Unfortunately, the subsequent Land Amendment Act, 2004, did away with the consent of children. Government argued that land committees to represent children were an expensive administrative structure and could not be funded. The absence of the “children’s voice” in land transactions has put their right to land at risk. A widow or widower (usually victims of AIDS) can, for instance, easily sell off family land without due care for the children’s future. In some cases, a husband who is legally separated from his wife can take advantage of the absence of his wife to transact in family land because he has only himself to consult, leaving out the children. Many respondents have called for a return to the 1998 position as far as the consent clause is concerned.

### 3.8 CONCLUSIONS

The above analysis allows us to make the following conclusions:

- (i) Equality of property rights for both men and women is fundamental to gender equality both socially and economically. There is a lot of discrimination of women in most of the recognised land tenure systems in Uganda which is not only unjust, but also undermines the enjoyment of their basic human rights. Securing women’s land rights makes economic sense and is important for poverty reduction, because women play an important role in agricultural production, especially in rural and peri-urban areas. They are the major producers of food and they play important roles in feeding the families and in general household management. In fact, there is a strong correlation between women’s land rights, economic growth and poverty reduction. Secure land rights for women, have the potential to promote investment, access to credit facilities, leading to better land use and productivity.
- (ii) Gender discrimination in Uganda is culturally engrained. There are cultural customs, values and practices which promote the discrimination of women and thereby constrain their property rights. Customary land tenure, which is predominant in most parts of the country, has inherent discriminatory practices, especially with regard to inheritance. Discrimination of women has been further promoted by the patriarchal systems found in most communities in Uganda with regard to rights definition, divorce and inheritance. Moreover, the structure of institutions that govern access, use and ownership of land under customary tenure tend to be male-dominated. Consequently, the patriarchal structure of

land rights has a negative impact on agricultural productivity, food security and poverty reduction.

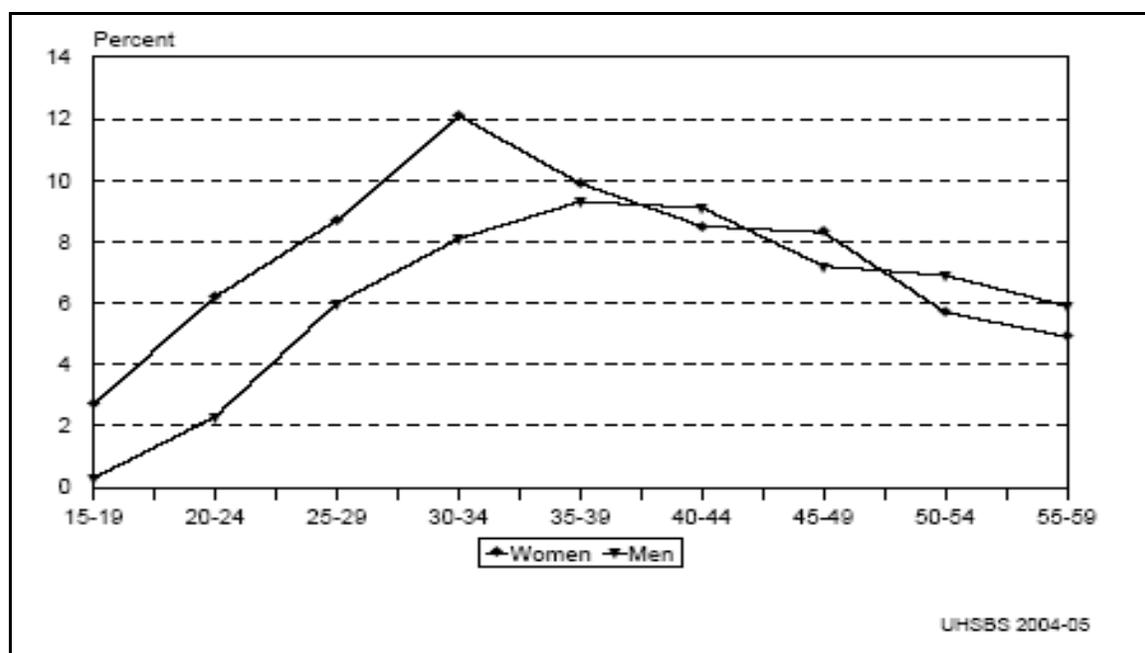
- (iii) While Uganda is hailed for having some of the best policy and constitutional framework relating to gender, and particularly to women's land rights, there is a large gap between what is on paper and the practice. Indeed, provisions in the Constitution, the Land Act (1998), etc, as well as the various international instruments to which Uganda is signatory, appear to give women rights to land. Nonetheless, in practice discrimination still persists. There are some inherent weaknesses in some of the Ugandan legal instruments which need to be addressed. For example, while the Land Act itself is, to some extent, neutral, some of its sections are framed in a manner that presumes it will apply to both men and women equally, with no consideration of the gender-related barriers. Sub-section (1) of Section 39 incorrectly assumes that men and women own family land jointly, but this is negated by the traditional views and practices which go against joint ownership of land even for married couples. The protection given to women in the Land Act is open to abuse, given that few women, especially in rural areas, can read and understand the law and their rights. The Act fails to take into account the power relations in households in Uganda.
- (iv) The protection and enforcement of women's land rights is still problematic in Uganda. There are still gender-related barriers in accessing justice, such as physical accessibility to the agencies responsible for the administration and enforcement of law, the training and orientation of those responsible for the administration and enforcement of the law, the degree of gender-sensitivity of both technical and non-technical officers in the system, the technical capacity of those involved in the justice system, confidence in the justice delivery system as impartial and transparent, and the delays in the delivery of justice.

## PART IV THE LAND SECTOR AND HIV/AIDS IN UGANDA

### 4.1 THE HIV/AIDS STATUS, THE LESSONS LEARNED AND THE MAIN CHALLENGES

The HIV/AIDS epidemic in Uganda has lasted up to a quarter of a century, long enough for its effects to penetrate most spheres of people's lives. The epidemic peaked in the early 1990s. Subsequently, antenatal HIV sero-prevalence steadily declined throughout the remainder of the 1990s. Currently, HIV sero-prevalence has stabilized at 5-10% in urban areas and below 5% in rural areas. About 1 million people are living with the disease (MOH and ORC Macro, 2006, UNDP, 2007). The disease disproportionately affects women and men during the prime years of their productive life, with severe impacts on individuals, families, communities, the health sector, and the economy in general. Currently, 6% of Ugandan adults aged 15-49 are infected with HIV (8% for women and 5% for men). Younger women have higher a higher HIV/AIDS prevalence than men (MOH and ORC Macro, 2006).

**Figure 4.1: HIV Prevalence in Uganda by Sex and Age**



*Source:* (Ministry of Health (MOH) [Uganda] and ORC Macro, 2006: 101)

According to the MOH, the central region and Kampala (9%) and the North-Central/Acholi region (8%) have the highest HIV-prevalence rates. Surprisingly, this prevalence increases with wealth. Over half (55%) of cohabiting couples in Uganda are discordant (MOH, 2006). The disease is a main cause of adult mortality. Concerning marital status and HIV, women and men who have lost their spouses are by far more likely to be HIV-positive than any other group. Thirty three percent of women and men who have lost their spouses are HIV-positive, compared to 6% women and men who are married. Those who are divorced or separated have an intermediate HIV-prevalence (14%), while those who have never been in a marital union have a relatively low

prevalence (2%). The estimated number of orphans nationally is 2 million (MOH, 2006). Given that HIV infections are increasing among married people, it is very likely that the disease is a factor in marital instability, dissolution and widowhood, which for many infected and affected women means loss of their property rights, including land rights.

#### **4.1.1 Multiple Partners**

There has been an increase in multiple partnering. Recent surveys conducted by the MOH show that the proportion of sexually-active adults who had two or more sexual partners increased from 2% to 4% between 2000-01 and 2004-05 for women and from 25% to 29% for men in the same period. Fifteen percent of women and 37% of men aged 15-49 who were sexually active in the 12 months preceding the survey engaged in sex with a non-marital, non-cohabiting partner. This is likely to be the reason for the increase in HIV infections among married persons (MOH and ORC Macro, 2006).

Although transactional sex and high HIV/AIDS prevalence among women is usually associated with poverty and disempowerment, the opposite is true among women and men of relatively high socio-economic status. In a typically traditional setting, one of the expressions of wealth among men is multiple partners in form of polygamy. This practice is particularly common among the wealthy class, although it manifests in form of temporary or semi-permanent sexual relations. This leads to increased vulnerability to HIV/AIDS and its consequences.

#### **4.1.2 HIV/AIDS-Related Stigma**

People living with HIV/AIDS are often viewed by society with disdain and the disease is perceived to be a result of personal recklessness and irresponsibility, particularly because the main channel for contracting it is through unprotected sex. Such people are often despised and shunned by society, making them feel disgraced and embarrassed. In technical terms this is referred to as stigma. Stigma leads to secrecy and denial which hinders affected persons from seeking VCT, care and support services, plus planning for infected and affected persons. According to the MOH (2006), such attitudes form the basis of marginalization and rights violation. Indeed, HIV-related stigma persists in Uganda despite efforts to reduce it.

Studies carried out in Uganda reveal that more women are far more affected by stigma than men. This is clear from the low levels of HIV/AIDS testing and disclosure, particularly by spouses. Only about 13% of women aged between 15 and 49, compared to 11% of men in the same age group, have tested for HIV and received their results. Discussion of HIV/AIDS issues between partners and knowledge of partner's status are low. According to the MOH (2006) and UDHS (2006), about 83% of female respondents surveyed had never discussed HIV with any sexual partner, and 89% did not know the HIV status of any of their partners. Similarly, for men, about 84% had never discussed HIV with any sexual partner, and 89% did not know the HIV status of any of their partners.

#### **4.1.3 Land for Production**

The impact of HIV/AIDS on development is apparent in terms of loss of trained personnel, manual labour through related morbidity and mortality, significant resource committed to the care and treatment of the sick both at household and national levels, and the increased burden of dependence. As Kamusiime and Rugadya (2007), UAC (2004), and UNDP (2007) note, HIV/AIDS can result in destitution through loss of employment, depletion of available resources and sometimes loss of access to land. The consequence is a slowdown in development. In fact,

HIV/AIDS has contributed to land fragmentation and an increase in female and child headed households.

## 4.2 HIV/AIDS AND LAND RIGHTS

HIV/AIDS has introduced new dimensions to land rights for the marginalized, especially women and children. This is particularly true in cases where AIDS leads to the death of both spouses, who are usually the breadwinners and rights protectors in a family. This often leaves children orphaned, with some of them under age and/or infected by the disease themselves. AIDS and the resultant death of the parents, increases the vulnerability of the infected and affected persons. The disease has significant economic costs in terms of loss of labour due to time allocated and commitment of financial resources to care for the sick. This is in addition to the physical, emotional and psychological drain of all those involved. HIV/AIDS carries stigma, which reinforces the vulnerability of the infected and affected persons, especially persons that are already marginalized in communities who are less capable of defending their rights.

HIV/AIDS has further weakened property rights of women, who are usually subjected to increased marginalization given the existing gender discrimination regarding land rights. Although many Uganda cultures actually condone multiple sexual partners for men and polygamy, women are expected to remain faithful. However, even then, women are usually blamed for infecting their partners and more often than not, this is used as justification for disinheritance of property, including land.

### 4.2.1 Women's Economic Dependence, Inequality and Household Poverty

Poverty and women/girls' lower social economic status and infringement of their human rights are recognized by the Uganda AIDS Commission (UAC) and other key stakeholders as some of the persistent challenges to addressing higher risk of HIV infection. Marriage is associated with status in most communities in Uganda and is often a place of economic refuge for women. In fact, marriage and childbearing is virtually mandatory in most Uganda cultures. These two guarantee inheritance rights of a woman in a family in the event of death of the husband from AIDS. However, the unmarried PLWA face problems. For example, they may not easily disclose their HIV status, especially if they wish to get partners for childbearing, for fear of rejection. Given the significant value attached to children (especially in marriage), women are often under intense pressured to have children, irrespective the individual or couple's sero-status. This can also be a challenge in cases of non-disclosure.

Women's limited control over productive resources, especially land (in rural areas) leads to a sense of powerlessness in negotiating safe sex or selectivity in relationships. This makes them more vulnerable to sexual and other forms of violence and often HIV/AIDS infection. Intimate partner violence is common in marriage. In fact, there are many cases involving PLWA where men have refused to use condoms and raped women when they declined unprotected sex (see Box 4.1). Many women choose to remain in abusive marriages because of the dependence on their husbands

(who may be HIV infected) and the desire secure their land rights and those of their (usually male) children. This is also usually compounded by social norms which compel women to remain in marriages irrespective of the consequences, such as infection and/or re-infection with HIV.

#### Box 4.1: Sex-related Violence

“The very first time I asked my husband to use a condom, because I did not want to give birth, he refused. He raped me and I got pregnant. I'm still with him because I do not have a cent. He at least pays rent.”

Source: ICRW, 2008

The spread of HIV has also been associated with gender inequality, food insecurity and risky sexual behaviour. Lack of alternative livelihood sources or means of survival increases the possibility of HIV infection or spreading of the disease through risky behaviour. Often, when women are disinherited, they become desperate and reckless in order to survive. Prevention of HIV/AIDS therefore requires securing the land and property rights of women and children. Indeed, as Mataka notes, “We can not talk about HIV prevention without talking about poverty and economic independence of women” (FAO, 2007). Similarly, it is unrealistic to talk of positive living when widows are deprived of their livelihood and the right to own and use what they shared with their spouses.

Economic dependence is also another factor forcing women into re-marriage, with all the implications it might have for their health, and ultimately on their land rights. In Iganga, for instance, remarriage for economic survival is common, hence, increasing the chances of HIV infection and re-infection. This is usually common among HIV/AIDS widows who have no property or alternative sources of income or livelihood. In such cases, the desire to access or own land is central, especially in rural settings.

#### 4.2.2 Disclosure

Although one of the principles of the national HIV policy is openness, nonetheless, on account of the persistent stigma, disclosure especially by HIV-infected men is still limited. While women are more likely to know their HIV sero-status (since they get tested at antenatal clinics), nonetheless, disclosure for them is even more challenging. Women stand to lose more, given their subordinate position in marriage. Security of marriage is very important especially for women, but it is threatened when they are infected with HIV (UNDP, 2007). Disclosure may result into loss of property, including land rights as well as status. Moreover, disclosure may also lead to violence against women. Indeed, because of this, women are reluctant to ask partners to use condoms, to test for HIV or to disclose the results because of fear of violence meted on them by their partners (Box 4.2).

#### Box 4.2: Violence and disclosure

“As soon as you return home and say that you have taken a test and your results are positive, the man can bring out pangas, knives and sticks. He would ask you to name all the men you have had affairs with, and how you brought the disease into the home.”

Source: ICRW, 2008

Disclosure is limited even among the educated and wealthy people who have understanding of the disease and its implications and the resources for treatment. To that extent, even the empowerment of women may not necessarily lead to increased disclosure. Consequently, stigma and the fear of related consequences, compel spouses among PLWA to shun disclosure. This can also hinder securing of property, land inclusive for the family.

#### 4.2.3 Discordance

Discordance is when one of the two partners is HIV positive, while the other is not. In such relationships, where only the woman is the infected party, chances of separation or abandonment by the husband are high. In the reverse case, however, where the man is the infected party, the woman will usually opt to stay with her infected spouse. Consequently, HIV-negative women in discordant relationships are in danger of being infected owing to their dependent status and limited capacity to negotiate safe sex in marriage. Protective measures for women are still limited (the female condom is yet to be popularized). There is still limited awareness concerning discordance. Even some discordant couples may not believe they are discordant, which increases chances of infection of the HIV-negative partner. Currently, most preventive measures (e.g.

condoms and circumcision) are largely male centered. This limits women's active role in prevention given their lower status in negotiating safe sex.

#### 4.2.4 The Vulnerability of Widows

As noted earlier, women's access to land is usually through their spouses or male members of the family. Loss of a spouse therefore increases to the chances of violation of their rights to land. HIV/AIDS-related deaths make the situation even worse. In Uganda to-date, there is widespread abuse and dispossession of widows by in-laws and/or relatives following the death of the husbands (Box 4.3). Moreover, an individual's health status is considered in land allocation and inheritance. Widows that are suspected of carrying the HIV virus are refused to inherit land since they are expected to die. In Northern Uganda, violence is used by relatives, neighbours, and sometimes clan heads in the process of dispossessing widows and orphans of land.

##### **Box 4.3: Case I: Violence to widows associated with HIV/AIDS**

N assaulted her mother, throwing her out of her father's house. Her father died of AIDS. She reasons that her mother does not belong to her clan and is therefore not entitled to inherit the matrimonial home or Kibanja or any growing crops thereon. She ordered her mother to go back to her own clan and ask for land in her natal home. When the mother resisted the unlawful eviction she was assaulted.

Court case, Rakai District

Women in HIV/AIDS-affected relationships are more vulnerable to landlessness and homelessness owing to distress sales and limited land rights within marriage. In one case, reported to this study team, an HIV-positive man sold land and left only space with a hut where he lived with his wife. Widows are often not allowed sell land irrespective of the justification. This contrasts with widowers and men in general, who are free to sell since they have rights to land ownership. In situations of HIV, women are likely to experience further marginalization; their consent is not likely to be considered as important in concluding land transactions.

Whereas in the past, in Northern Uganda and elsewhere in the country, widows had assured access to land, today, with or without children, their eviction by families of the late spouses (including female members of the spouses' family) is becoming the norm<sup>22</sup>. A typical case of eviction is cited in Box 4.4. In some cases however, widows with male children may be lucky and survive the wrath of the relatives and neighbours, especially if the children are approaching adulthood. Widows who refuse to be inherited by the deceased husband's relatives may have their land grabbed.

##### **Box 4.4: Case II: Property grabbing and eviction associated with HIV/AIDS in Kalisizo, Rakai District**

A father-in-law moved into the premises of his deceased son in town, took cattle and collected rent of 2 years in advance claiming that the deceased son left a will in his favour, yet the widow was not aware of such a will. She, together with her two children, was thrown out of the premises and the property was grabbed. Both parties (couple) were HIV positive

Court case, Rakai District

The fact that male close kin take land inheritance as a given is also evidenced in the case cited in Box 4.5 below.

<sup>22</sup> Land especially under customary tenure system is usually held as clan land. Female clan members too claim a superior title over widows and participate in evicting them out of their matrimonial homes!

Property grabbing and forced evictions from marital homes as illustrated in Boxes 4.4, 4.5 and 4.6 is a (new) form of gendered violence against women, denying them their rights to access to shelter, livelihoods, and property, and most importantly, a life with self-esteem as a human being. Women who are evicted from matrimonial homes at the death of their spouses either have to go back to their natal homes or remain destitute often with the children. Stigma, poverty, deteriorating health, lack of support, physical and mental harassment, and humiliation by in-laws all together put pressure on widows who are already in a situation of extreme distress, often leading to premature deaths.

Distress sales are common among poor people infected or affected with by HIV/AIDS. Unscrupulous money lenders, who are increasing in numbers in areas with high HIV prevalence, take advantage of the situation to appropriate land and property from such desperate situation as is illustrated in a case cited in Box 4.6.

It is important to note, that, men too, are vulnerable to abuse by scrupulous relatives. When one of them is struck by the disease, they see that as an opportunity and start anticipating his death in order to lay claim to or simply grab his property. Even before the patient dies, they may manipulate him and compel him to give in to their wishes. In some cases, they may even accelerate his death especially if the patient has reasonable property, particularly land. As one key informant put it, “Land grabbing is rooted in culture, greed and corruption in our society and not just HIV. HIV is a catalyst that brings to light what already exists.”

The drive to inherit the property of the deceased by relatives and friends tends to override the need to prevent HIV/AIDS. Widows who are usually in no position to survive economically without the matrimonial property are still being forced to accept inheritance arrangements against their will. This is attributed to payment of bride price where the widow is the property of her spouse’s family, and the fear of loss of property to another man or clan, in case the widow remarries elsewhere. In cases of

**Box 4.5: Case III: Property grabbing associated with HIV/AIDS in Kalisizo**

The accused, K, aged 25, is a grandson of X. X died of AIDS and was survived by his wife N and a daughter M. He left a will giving his property to his daughter M, an aunt to the accused K. K, as the only surviving male descendant of X, thought he should be the heir to inherit the grandfather’s land. He tried to throw out the two ladies by force. On one occasion he assaulted both the M [Aunt] and N (grand mum). He was arrested and is on trial for assault.

Court case, Rakai District

**Box 4.6: Case IV: Property grabbing associated with HIV/AIDS**

Mrs. G had a dying daughter. She decided to borrow money from an illegal money lender, Mr. K, who was also an LC1 Chairperson. The loan agreement was drafted as if the lender was receiving land in an outright sale instead of a mortgage. When she failed to repay the loan, Mr. K confiscated the property and claimed he had bought it. The case is pending hearing.

Court case, Rakai District

**Box 4.7: Widow inheritance and re-marriage**

In Iganga, a 47-year old HIV-positive rural widow was inherited twice.

“I was not consulted. They told me no other man would be allowed to stay in their son’s house apart from his brother. He did not help me in any way. If anything, he benefited from my late husband’s property. He did not have any other wife. After his death they brought another man. This time I refused!”

“One day, one of his brothers came and told me that the clan members had selected him to come and stay with me and also help me to raise the children. At first I refused. But I had no choice since they had threatened to chase me away after the husband’s death. My children were still very young. We stayed together for four years and produced two children. He was a brother to my late husband. After four years, he also died.”

ICRW, 2008

remarriage outside the clan, women are sent away from the deceased spouses' property. Widow inheritance is still practiced in especially in Karamoja and parts of Eastern and Northern Uganda. Thus, widows are forced to remarry as a way of retaining their rights land use and also to secure land for their children.

#### **4.2.5 Vulnerability of Orphans**

HIV/AIDS also leads to the vulnerability of orphans in a number of ways, leading to compromising their land rights. Many orphans lose their parents to HIV/AIDS before they are of age. They become victims of a system which favours adults. Sometimes, they are not allowed to access their land. They are compelled to engage in child-labour, risky behaviour (such as prostitution and crime) and to become household heads. In the guise of supporting the orphans, relatives may express readiness to take on children under their care. In many cases, this has been with the sole purpose of grabbing and selling the property of deceased father. Such relatives rarely take good care of orphaned children.

Adherence to culture still persists especially under the customary tenure systems where land is inherited rather than purchased. There is evidence of reversal of inheritance, where the grand parents take over property, only to sell it using the excuse of "caring for the orphans". In some cases, with premature HIV-associated deaths, some male heads die leaving their families on land allocated to them by their fathers, with no right to pass the property on to their wives or children. The father would continue to have the ownership right and can decide to allocate that plot to any son in his will upon his death. This often works to the disadvantage of widows.

There have also been cases of misuse of inherited property, including land by careless adult children, particularly sons following the fathers' death. In many of these cases, the adult children sell off the land and squander the proceeds disregarding the wellbeing of their siblings or widow mothers. Similarly, there have been cases nationwide of murder of old people by the orphaned youth when they have been refused to sell land.

### **4.3 HIV/AIDS AND LAND RIGHTS ADMINISTRATION**

HIV/AIDS and the resultant deaths often leads to land and property disputes among wives of polygamous husbands, between widows or orphans and family members of the deceased, between siblings, and between widows and their children. Many cases have been reported in Iganga involving women, especially widows who are entangled in disputes over land. Some efforts have been made to make land administration institutions gender responsive, by requiring at least one third representations of women on committees, tribunals. HIV/AIDS specific issues are yet to be considered. However, the capacity of such institutions, offices in terms of HIV awareness and appreciation of associated issues with regard to land is limited.

#### **4.3.1 Land Titling**

This is mainly vested in men. Lack of authentic documentary proof of land ownership for PLWA and affected parties increases vulnerability to land grabbing. Where HIV related stigma prevails, women are less likely to be included in titles.

#### **4.3.2 Will Making**

Proper will making with due consideration of rights of spouses and children limits possibilities of property grabbing. However, the practice of making of wills remains limited even in context

where HIV-infected persons know their sero-status. At an HIV and AIDS care and support organization for instance only about 15% of clients make wills. This is attributed to lack of relevant skills and information, and superstition.

### 4.3.3 Seeking for Justice

HIV is a factor in the exercise of rights, and access to justice, particularly for widows and orphans. The justice system has been found to be largely gender-insensitive and this, coupled with HIV-related stigma, often works against women as widows and persons infected with or affected by HIV. This is in addition to the physical and socio-economic constraints they face in search of justice. There have been cases of deliberate delays of court cases involving widows and the relatives of the deceased husband over land. Such delays are often instigated by the relatives in the hope that the HIV-positive widow would die before the judge reaches a decision which is likely to be in her favour. Similarly, there have been cases of bias on the part of land officers regarding granting of titles to PLWA.

#### Box 4.8: Case V: Delayed justice associated with HIV/AIDS

Mr. S (the deceased) is survived by a childless widow Mrs. C. Their only child died of AIDS too. The heir (brother to deceased) took over the estate forcing her out of the late husband's house. The heir is supported by the mother-in-law (the defendant). The mother-in-law argues that the house is property of children of the deceased born out of wedlock. No such children have been introduced to the widow and she insists they are non-existent. The dispute has taken 5 years and the defendant is wondering why the plaintiff is not dying of AIDS. The case is not yet fixed for hearing.

Court case, Rakai District

The case cited in Box 4.8 was in Kalisizo (Rakai District). But as can be seen it brings out gender dynamics and marginalization with regard to HIV/AIDS and land. It also illustrates the intentional delays of court cases aimed at frustrating the vulnerable parties in terms of high costs, stress with expectations that they could pass away, naturally! It is clear from the above that there is need for affirmative action to handle cases of PLWA expeditiously.

### 4.3.4 Access to Justice

For persons living with HIV/AIDS, particularly for women, access to justice is further limited by stigma and the lack of resources which in most cases will have been substantially eroded by the need to care for the sick. The administration of law is challenged by the limited understanding, insensitivity, and lack of appreciation of HIV/AIDS issues with regard property rights on the part of personnel involved in land administration. Similarly, gender and HIV-based dispute-resolution fora at community level are not always gender-responsive or gender inclusive. The work of local councils' is heavily influenced by their cultures and upbringing. As Blackden (2004) notes, patriarchal cultures and religion and associated power imbalances play a role in community response especially in cases of land disputes.

Some of the main cultural practices that limit realization of gender rights are payment of bride price noted earlier; widow inheritance and polygamy. Widow inheritance usually weakens women's rights to inheritance, predisposes parties involved to HIV infection and re-infection. Polygamy on the other hand presents challenges to inheritance of land, especially where wives share the same matrimonial home, and competition among male heirs.

#### 4.4 CONCLUSIONS

The analysis in the above section leads us to the following main conclusions:

- (i) Although Uganda has registered a significant reduction in HIV prevalence, the disease (HIV/AIDS) nonetheless remains a major threat to human and economic development. The effects of the epidemic are compounded by the persistent stigma which contributes to limited levels of VCT and disclosure. These have the potential for undermining the HIV prevention and mitigation efforts.
- (ii) Land is a central factor of production in an agro-based economy such as Uganda's. HIV/AIDS-related morbidity and mortality lead to loss of labour and resources for investment in improved agriculture. They have also resulted into land fragmentation, under utilization of land and land related abuses involving HIV infected and affected persons. Gender- and age-based marginalization play a significant role in HIV-associated land rights abuses. Women and young orphans in Uganda have had to bear the brunt of stigma and related land rights abuse. The low socio-economic status and the resultant limited or lack of land rights (where land is a key source of livelihood) is a central factor in women's vulnerability to HIV infection and the spread of the disease.
- (iii) The key challenges concerning HIV/AIDS and land include complacency with respect to HIV prevention, sex and gender based violence, land rights violation especially among HIV (suspected or confirmed) associated widows and orphans such as disinheritance, evictions, widow inheritance, and remarriage for economic reasons. Orphans often have no legal protection under the clan system. Resource deprivation through land grabbing and limited support from the extended family system makes them vulnerable to HIV infection. Will making and land titling among people living with HIV/AIDS is still limited by stigma and non disclosure. Land administration structures are not yet HIV sensitive even in cases of disclosure. HIV infected and affected persons' access to justice is constrained by stigma (in addition to limited awareness, economic and institution based challenges). Complacency among policy and implementing institutions, where HIV activities receive limited or no resource allocations constrains progress in prevention of HIV and mitigation of its impacts.

## **PART V      INTEGRATING GENDER AND HIV/AIDS ISSUES IN THE DRAFT NATIONAL LAND POLICY**

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### **5.1      AN OVERVIEW OF THE DRAFT NATIONAL LAND POLICY**

As noted earlier, the process of formulating a NLP started in 2005 and it is not yet complete. So far three drafts of the NLP have been produced. The main driver of the process of designing the NLP is the Ministry of Lands, Housing and Urban Development (MOLHUD), working in conjunction with other government agencies and the various stakeholders. The Ministry has made a lot of efforts in disseminating the draft in order to secure consensus of the various stakeholders. The aim of the consultations is “to ensure that the background information provided is accurate, the description of the land sector is adequate, the presentation format is acceptable, all issues that should go into the Draft Policy have been captured, the policy principles and statements made under each heading are politically and socially realistic in Uganda’s context, and those principles and policy statements are capable of efficient and cost-effective implementation” (MOLHUD, 2007).

The NLP is a framework which will ensure sustainable utilisation of Uganda’s land resources for poverty eradication. Its main objective is to ensure sustainable development and good governance of the land sector in Uganda. It seeks to ensure efficiency and promotion of economic development in Uganda, equality and social justice within the land sector, as well as environmental protection and sustainable pattern of land use.

The NLP is structured in main two parts. The first part is an introductory one and provides some useful background information on the land sector in Uganda. This part is made up of two chapters. The first chapter discusses the land sector in Uganda, starting with the demographic context. It articulates the land question in Uganda, including the historical perspective and the current system of property law and the framework for land management. It outlines the main challenges (such as the system of tenure, suboptimal and unsustainable land use, land degradation, etc) which have emerged over the years with regard to the land sector. It also points out a whole range of specific challenges facing the land sector today (such as the chronic underutilisation of agricultural land, increasing pressure on the land, the deterioration of land quality, poor and wasteful administration of land-related services, among others.

The second chapter of this part attempts to justify the need for a NLP. The chapter talks about the imperatives – both national and international – which are driving the process for the design of the land policy. In the national context the it points out the historical complexity of land issues in Uganda, the paradigm shift to refocus discourse on land from overemphasis on property rights to its essential resource value in development, the existence of policy gaps on issues which are important to the land sector, and the need to consider the regional and international trends relating to land policy. The chapter develops a wide range of policy development benchmarks to inform the process of policy formulation. Most importantly, the chapter identifies seven issues (also known as thematic areas) for critical assessment. These are:

- Land in the national development framework;
- The constitutional and legal framework;
- The land tenure framework;
- The land management framework;
- The land rights administration framework;

- The regional and international framework; and
- The policy implementation framework.

Part II of the draft policy provides a systematic assessment of these issues and proposes principles and strategies needed to address them.

## 5.2 THE MAIN GAPS IN THE DRAFT NATIONAL LAND POLICY REGARDING GENDER, HIV/AIDS ISSUES AND LAND

### A. Gaps relating to Gender and Land Rights

#### A1. Land in the National Development Framework

The draft NLP identifies a number of important principles for integration of the land sector into the national development framework (paragraph 44). However, it is silent on one important principle which would ensure gender equality, namely that **policy must address the existing gender inequality and ensure that both men and women enjoy land rights without discrimination.**

Similarly, in paragraph 47, the draft NLP document notes the link between the “livelihoods and well-being for most Ugandans and the sustainable management and development of land”. Consequently, it calls for the protection of the poor from activities that deny them access to land resources. However, the draft NLP document does not identify who the poor are, the majority of whom, in our opinion, are women, widows, and orphans. Moreover, when it comes to sharing of household incomes, the men control all at the expense of women and children.

The draft NLP document in paragraph 50 (iv) talks about elimination of all discriminatory laws and practices in the manner in which access, control and transmission of land rights are determined. However, not only does it leave out customs and traditions, but it also does not define what these are. At the same time, we recognize that the failure to define the customs, traditions and practices which undermine the status of women is constitutional problem under Article 32 of the Constitution which provides for affirmative action. It is important therefore that the NLP identifies the discriminatory laws, customs, traditions and practices, which it intends to eliminate.

Under Section 3.2.5, the draft NLP document puts faith in proper management of land resources to enhance peace and security. Unfortunately, this does not take into account recent events in the country particularly the unique nature of post-conflict land disputes. As we know, the post-conflict period in Northern and North-Eastern Uganda has been characterized by land ownership disputes, where individuals are claiming their rights in the lands they held before displacement. As Sebina-Zziwa et al (2008) argue, these disputes are closely linked to the clan logic which sets to ostracize non-clan members [outsiders], implying that they have no land rights on clan land. Those who were born in the IDP camps or were left home when they were very young do not know where their parents’ land is located. They face indiscriminate eviction and they have no idea of where to go. Those who can identify their old homes are embroiled in boundary disputes with neighbours. Widows are mainly filing disputes related to inheritance and property grabbing implying that they are more likely to be disfranchised than the men.

#### A2. The Land Tenure Framework

In Section 5.2.8, the draft NLP document seeks to establish a legal framework that will ensure non-discrimination against women and children. It recognises that attempts by the Constitution and the Land Act to outlaw discrimination against women and children have not been successful.

It makes a number of proposals to address this issue, but does not indicate who or which institution should implement them. In our considered view the Ministry should support the formation of an Equal Opportunities Commission to, among other things, set and enforce standards of gender mainstreaming, advocate for law reform, and popularise domesticated international human rights instruments.

Under the same section, one of the strategies proposed is “reform the country’s property laws including those considered “gender neutral” to ensure equality and equity in ownership and control of land”. However, in its current form, the strategy ignores the gendered power relations before marriage, in marriage and outside marriage. Special attention should therefore be given to those power relations when designing the strategy.

The draft NLP in Section 5.2.15 also addresses regularisation of informal tenancies. It states that “Informal sector development often occurs on terms which confer access to land on a limited, temporary or non-legal basis. Tenancies by occupancy, at will, or at sufferance are common in urban areas or rural farmlands, land use under these conditions, although precarious, is important for both poverty eradication and the attainment of ecological balance in these areas. State refusal or reluctance to legitimize such bases of occupation and use is the cause of much injustice and misery in urban and rural Africa. It is important that informal tenancies be stabilised and regularized so as to facilitate the mainstreaming of land use activities in the informal sector into national development”. However, the draft document does not recognise property regimes in cohabitation.

Indeed, just like property is acquired from informal tenancies, it is also acquired in cohabitation. There is no presumption of marriage in Uganda and the Divorce Act makes no provision for persons who chose not to marry under the four recognised forms of marriages. Because of this, there are no legal provisions to determine what will happen to property that they jointly acquired. Yet co-habitation is very common and frequently involves young women and rich older men who are already married. In such a case, if the young woman is chased away by the man, she will only have recourse to filing a civil action under the general law of contract to claim for her share in any property they may have acquired. Failure to recognise property regimes in cohabitation has serious negative implications. It lowers productivity and investment on the part of women who feel insecure in cohabitation.

## **B. Gaps relating to the Effect of HIV/AIDS on Land Rights**

A closer look at the draft NLP document reveals a number of gaps relating to HIV/AIDS and land issues that were not given prominence. Indeed, the document makes some passing reference in some thematic areas to issues of persons that experience discrimination but in most cases, HIV infected and affected persons are not mentioned. This section attempts to identify the main gaps relating to HIV/AIDS issues and land in the thematic areas.

### **B1. The Constitutional and Legal Framework**

Under clarification of the nature of property rights under designated tenure regimes, HIV infected and affected persons are not included along side the poor concerning simplification of the process of access to land.

### **B2. The Land Tenure Framework**

Issues relating to HIV/AIDS and land are mentioned for the first time in Chapter 5, (Section 5.2.10) of the NLP document. The introductory part of this section talks in abstract about the social costs of HIV/AIDS with regard to production especially in the agricultural sector. While the document does mention widows and orphans as the most the most at risk, it leaves out men

who, as we know, are also victims of, and are affected by, HIV/AIDS as it relates to their land rights. Even then, the document does not mention all the rights of widows and orphans that are abused (such as inheritance, ownership, land transactions, among others).

The draft NLP also makes no mention of the fact that persistent HIV associated stigma not only limits disclosure and access to health care, but, together with lack of awareness and resource scarcity limits securing of land for family members through will making and titling. The fact that securing of land rights for marginalized, economically dependent persons (women) is central in containing the HIV epidemic especially in rural areas is not stressed, yet limited or lack of land rights particularly on the part of women has been associated with their vulnerability to HIV infection and further spread of the disease.

The NLP document commits itself to strengthen customary tenure in Section 5.2.11. It recognizes that over 80% of land in Uganda is held under customary tenure and this is not likely to change any time soon. The draft document also acknowledges that customary tenure has been suppressed, disparaged and sabotaged by property regimes. It notes that the Constitution and the Land Act have partially restored the status of customary land tenure by recognizing it as one of the four main regimes, although that recognition has come with some hidden distortions, which must be removed. Unfortunately, however, not only does the draft NLP not mention these distortions, but with regard to HIV/AIDS, it does not acknowledge the fact that the process of recording, certification and registration of customary land is insensitive to women and HIV-infected and affected persons that may be excluded because of discrimination. The proposed measures in paragraph 104 do not address these weaknesses with regard to HIV-infected and affected persons.

The draft NLP in Section 5.2.6 proposes a framework for supporting land rights. While it recognises the high cost of securing land rights under any land tenure system for the majority of Ugandans, it does not, however, make a special case for marginalised groups and particularly persons infected and affected by HIV/AIDS. The draft document goes ahead to propose measures for supporting land rights, including enhancing and consolidating civil society advocacy. Nonetheless, it does not, in this regard, emphasise the fact that civil society organizations to be engaged for advocacy should include organisations that advocate for rights of marginalized groups e.g. on the basis of gender and HIV/health status.

### **B3. The Land Management Framework**

Training of land management agents should integrate rights of HIV infected and affected persons both in content of training, and representation. This also applies to institutionalization of effective land quality assurance measures, yet marginalized groups such as women, HIV infected and affected persons, the poor usually lack capacity for adequate land quality assurance. Content of training, approaches to their inclusion in training, ensuring their benefit from extension services must be considered in planning.

### **B4. The Land Rights Administration Framework**

The draft NLP is silent about the fact that, in practice, the land administration system tends to be gender-blind and is rarely sensitive to the HIV-associated discrimination. Land administration structures must be informed and sensitive to gender and HIV land associated issues. These issues need to be considered at all levels of the land administration system. Land registries at the various levels should be designed in such a way that land rights of marginalized groups can be monitored. The draft omits the need for designating specific budget allocations to address key bases of discrimination namely, HIV/AIDS and gender within the broader funding of administrative structures. The need for capacity-building of administrative staff and awareness

raising at all levels concerning on influence of stigma on land rights of PLWAs; the need for will making; and criminalize property grabbing is also omitted.

Concerning the cost of land surveying and mapping, the draft NLP document omits highlighting the need for affirmative action to ensure that the poor and marginalized groups such as female household heads, and (HIV-associated) widows and orphans benefit from such services. Extension of affirmative action to afford HIV infected and affected persons quicker land dispute resolution; provision of legal aid including an ombudsman for such families is not addressed. Paralegals and community volunteers whom infected and affected persons could report to, who could also take action and participate in monitoring progress are not included. Note of the fact that plans for land revenue generation should take into consideration the socio-economic status of marginalized groups in necessary.

### **B5. The Policy Implementation Framework**

The draft policy omits stressing the fact that the policy implementation unit should have HIV, gender and equity expert representation. Engagement of marginalized groups stakeholders, or their representatives in the preparation, operationalisation, monitoring and evaluation of the policy is omitted. This is in addition to the need for budget allocations, capacity building among land administrators, awareness raising at all levels, and monitoring considerations with regard to the specific sub sectors highlighted above.

### **5.3 STRATEGIC AND PRACTICAL GENDER NEEDS AND HIV/AIDS ISSUES THAT SHOULD BE ADDRESSED BY THE NATIONAL LAND POLICY**

#### **A. Gender Issues**

- **Increasing the participation of women in land dispute resolution in their communities:** As explained in the earlier analysis, most of the land is held under customary tenure, where the women are excluded from the dispute resolution fora (clan courts, etc). The women's voice must be heard and one of the strategies for this is to increase their participation in the land-related dispute resolution.
- **Constitution of the land administration institutions:** There is need to select women and men of integrity to constitute land administration institutions that will investigate and resolve all historical land claims and injustices. There strong belief and faith in the clan and customary courts in the Northern and North-Eastern region of Uganda. The strategy should be to seek their participation in land-related dispute resolution.
- **The provision of legal aid to deal with the ever increasing land litigation:** Currently, there is a huge backlog of land cases filed in the High Court and Magistrates Courts in Uganda and it is increasing everyday. There is need for substantial number of lawyers and judicial officers to be able to clear the backlog. This means there is need to ensure provision legal aid to assist the poor who cannot afford private advocates.
- **Consent of children:** Our analysis of the Land Act we argued that the 1998 version of the "consent clause" (Section 39) protected the children's land rights. The removal of this clause by the 2004 Land Amendment Act took away the protection earlier provided. We also indicated that many observers and interest groups called for the return to the 1998 position in order to protect the rights of the future generation. It is therefore important to re-enact and enforce provisions in the Land Act requiring the consent of children or their representatives in all land transactions where the children are orphans or live with a single parent, or the spouses are divorced or legally separated.

- **Equal Opportunities Commission:** Establish and operationalise the Equal Opportunities Commission charged with mainstreaming gender into development planning so as to improve the status of women.
- **Existing laws against gender equality:** Our earlier analysis provided a number of test cases brought before the Constitutional Court to test the constitutionality of some existing laws against gender equality. Many of them have been declared unconstitutional, although Parliament has not yet amended the impugned sections of the law. It is against this background that the new NLP should seek to enforce affirmative action in favour of women, children and people with disabilities by identifying and defining customs, traditions and practices that are outlawed by the constitution.
- **Presumption of marriage:** Given the serious negative implications of not recognising cohabitation as a form of legal marriage, it is important to reform the law to presume the existence of a marriage for purposes of securing the property rights of spouses who have acquired property in cohabitation for a period of not less than 2 years.

## B. HIV/AIDS Issues

- **Facilitation of persons who have disclosed their HIV status:** All persons who are HIV-positive and have disclosed, especially those that have formed groups, should be facilitated to acquire and own land, especially through the land fund. Moreover, there should be affirmative provisions to ensure that widows and women household heads benefit from the land fund. It is also important to work with HIV infected and affected persons to identify their own strategies in addressing all challenges associated with land rights.
- **Sensitisation of HIV victims about their land rights:** Government should take measures to sensitize and educate all stakeholders, including HIV infected and affected persons, about their land rights. Such sensitization and education should be carried out at community level and should involve all local leaders, (cultural, religious and others) and institutions, all levels of justice law and order sector, local government, civil society and policy makers. The sensitisation programmes should address issues of bias against infected and affected persons' ownership of land, stigma, disclosure, the link between rights abuse and vulnerability to HIV infection or spread of the disease. In order to ensure that property rights, including land rights of HIV infected and affected persons, are understood and appreciated, they should be integrated into the school curriculum.
- **Documentary proof:** Documentary proof, (especially wills, land titles, memory books<sup>23</sup>, etc) is essential for ensuring security of land rights. Moreover, the enforcement of these documentary proofs is just as important as their preparation. Documentary proof is critical especially for HIV infected and affected persons because of the discrimination they experience within the patrilineal family set up. It becomes convenient since knowing one's status allows them to make the necessary preparation before they die. Where couples have disclosed their HIV status, they should be encouraged to articulate their rights in a will (with due consideration of co-ownership, and children's rights). Consequently, Government should therefore encourage and support (through subsidies) the practice of preparation of will-writing, the demarcation of lands and the issue of land titles in order to protect the rights of individuals. In addition, all HIV awareness campaigns as well as counselling services for people living with HIV/AIDS should integrate will-making in their programs. Promotion of safe keeping of wills is important. In order to strengthen

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<sup>23</sup> The "Memory Book" includes writing of wills to secure children's property rights. It is a simple way of showing family and children the facts about their property before parents die, and of helping to protect children from property grabbing (Izumi 2007).

their authenticity, where necessary, will should be registered by HIV infected and affected persons with primary courts.

- **Capacity-building:** Institutional structures for land administration, both formal and informal, require significant investment and capacity–building regarding gender and HIV associated land rights issues. The judiciary and police need to be trained in international standards, conventions on women’s rights, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, the national HIV/AIDS policy, and the national equal opportunity policy and the sixth and third Millennium Development Goals which promote the rights of people living with HIV and AIDS and gender equality and the empowerment of women.

- **Joint titling of land among married persons:** All titles of land owned by a family should be in the names of both the man and wife, or else clearance has to be obtained from their spouses, irrespective of their HIV sero-status.

#### 5.4 CONCLUSIONS

In concluding this part of the report, we wish to note that:

1. The draft NLP in its current form is a fairly good attempt to address the key issues surrounding the land sector in Uganda. It lays a good foundation for developing a good policy that will address the most burning issues in the land sector, which is such an important productive resource. Indeed, a lot of work still needs to be done on it, not least the mainstreaming of gender and HIV/AIDS, which this paper attempts to do.
2. In attempting to mainstream gender and HIV/AIDS issues, it is important to remember that because of the patrilineal nature of Ugandan society, many of the proposals will most likely not be accepted in some quarters. Part of the problem is that culture, customs, and practises are deeply entrenched in Ugandan society. It will therefore require Government working together with the cultural and religious leaders if these proposals are to be accepted and implemented.

## **ANNEXES**

## ANNEX 1: REFERENCES

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## ANNEX 2: PERSONS INTERVIEWED

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1. Mr. Savino Katsigaire, Commissioner, Physical Planning Department, Ministry of Lands, Housing and Urban Development;
2. Ms. Sarah Kulata Basangwa, Ag. Commissioner, Land Registration, Ministry of Lands, Housing and Urban Development;
3. Mrs. Catherine Mulinde Mukasa-Kintu, Assistant Commissioner, Inspectorate, Ministry of Lands, Housing and Urban Development;
4. Mr. Richard Oput, Assistant Commissioner, LSSP, Ministry of Lands, Housing and Urban Development;
5. Mrs. Florence Muhwezi, HIV Focal Point, Ministry of Lands, Housing and Urban Development;
6. Mr. Denis Obbo, Information Officer, Ministry of Lands, Housing and Urban Development;
7. Mrs. Naome Kabanda, Secretary NLP Committee, Ministry of Lands, Housing and Urban Development;
8. Mr. Mugyimba, Assistant Com., Dept of Poverty Eradication, Economic and Civic Rights;
9. Mr. Mubarak Mabuya, Principal Gender Officer, Ministry of Gender, Labour and Social Development;
10. Mr. Robert Kawuga, HIV and Gender Mainstreaming Officer, Ministry of Agriculture, Animal Industry and Fisheries;
11. Ms Connie Acayo, Principal Information Scientist, Ministry of Agriculture, Animal Industry and Fisheries;
12. Mrs. Brenda Malinga, Gender/Advocacy Programme Officer, UNFPA Uganda
13. Joanna Bosworth, Social Development Advisor, DFID, former Chairperson, Gender Donor Group;
14. Ms. Carolyne Kego, Irish Aid, member of the Gender Donor Group;
15. Ms. Lorna Amutojo, Legal and gender analysis policy analysis specialist;
16. Ms. Jackie Asiimwe, Legal, Gender Expert /activist;
17. Ms. Judy Adoko, Programme Coordinator, Land and Equity Movement in Uganda;
18. Ms. Mary Nalwadda, Manager, Monitoring and Evaluation, Uganda Aids Commission;
19. Ms. Jackie Nakiwala, HIV/AIDS Focal Point, Uganda Catholic Secretariat;
20. Mr. Godfrey Onetho, [Justice and Peace Commission, Uganda Catholic Secretariat;
21. Mr. Peter Ssebanja, Director Special Duties, The Uganda AIDS Support Organization.
22. Mr. Eddy Gayiya , Lecturer and Consultant
23. Mrs. Abby Sebina Zziwa, Lecturer and Consultant, Makerere Institute of Social Research;
24. Irene Mulyagonja, Judge, High Court, Jinja;
25. Ms. Miria Matembe , Human Rights Activist, Ex- Minister and Former Women MP
26. Ms. Joyce Nalunga Mubiru, Advocate, M/S Busingye, Mubiru & Co Advocate;
27. Mr. Joe Mukisa , District Speaker Rakai District;
28. Mr. Mireego Eddie, Programme Manager, Rakai AIDS Information Net work
29. Mr. Kavuma Paul, Member, Rakai District Land Board
30. Kikirengoma Edward, Land Officer, Rakai District
31. Mr. Kalyesubula Fred, Ag DCAO, Secretary Rakai District Land Board
32. Ms. Carol Kintu, Magistrate Grade I, Kalisizo, Masaka;
33. Ms. Nakafeero Betty, Data Entrant, Rakai Health Sciences Programme;
34. Nakyeeyune Mary, Local Activism Officer, Rakai Health Sciences Programme
35. Ms. Nakaggwa Matilda Annet, Reproductive Health Officer, Rakai Health Sciences Programme
36. Mr. Kiwanuka Deus, Coordinator, Rakai Health Sciences Programme
37. Hon. Mukibi, Judge, Masaka
38. Ms. Lorna Juliet Amutojo, Lawyer/Gender/ Legal Policy Analyst.

## **ANNEX 3: THE TERMS OF REFERENCE**

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### **Background**

Uganda is a signatory to a number of international instruments that prohibit discrimination against marginalised groups. The 1995 Constitution domesticates a number of these international provisions and in Article 21 (2) outlaws discrimination on the ground of sex, race, ethnic origin, tribe, birth, creed, or religion, social or economic standing, political opinion or disability.

Addressing marginalised issues on gender inequality and social protection in land management has become increasingly important because of the social justice and human rights concerns and for the economic efficiency and sustainability. Gender, HIV/AIDS and land rights is a very sensitive area because it involves relinquishing powers and privileges by the holder of those rights to those who do not possess these rights. Women's important contribution to development is not matched by their equal benefits and control over the economic, social and political processes. Likewise, persons infected and affected by HIV/AIDS suffer from consequences that lead to removal of the rights and privileges. Since these categories of people form part of the productive workers on the land, there is no justification for invisibility or ignoring of their rights to access and/or control, hence the need to address the existing gaps between these special interest groups.

Poverty eradication is the main objective of Uganda's national development strategy. Land rights are a key development issue, crucial to poverty eradication. For women, evidence shows that inequality of access to key productive assets is a fundamental determinant of poverty and social disadvantage. Without secure rights to land, women's ability and incentive to participate in income expanding economic activities is reduced, since they are not able to control income from farming activities and to make decisions on land use. There have been a number of initiatives got engender the land sector interventions. A gender baseline survey for the land sector was carried out in 2004, which revealed the low levels of women's participation and contribution, especially in terms of decision-making.

On the other hand, HIV/AIDS is also another major development issue of concern. The impact of the epidemic increasingly devastates people's lives, particularly in poor areas. It is even worse for female-headed households. The devastation caused by HIV/AIDS is unique because it deprives families, communities, and the country of their young and most productive people. The epidemic deepens poverty, reverses human development achievements, worsening gender inequalities, reduces labour productivity and supply, and puts a break on economic growth. The worsening conditions in turn make people and households even more at risk of, or vulnerable to, selling off of land to access treatment and care.

The challenges posed by the gender and HIV/AIDS scourge for land policy are enormous given the fact that problems arising from the epidemic are multifaceted; whatever responses are needed should be designed in such a manner that they address the root causes and consequences of the wider challenges to rural development. Land being a key production resource and very often than not the key household asset, it is at the heart of the HIV/AIDS – property rights linkage. The need to look at AIDS as a very serious policy issue for consideration in land reform is of paramount importance. If the land policy does not explicitly factor in the impact and trends of HIV/AIDS as a central feature of analysis of how to do land reform (or any other development activity) in Uganda, it will be considered professional negligence.

It is therefore anticipated that the policy must address land rights issues of the special interest groups in all thematic areas, especially for women and people living with/affected by HIV/AIDS,

in order to enhance their productivity and ensure their protection in the fight for equality, dignity and additional economic rights. The thematic areas under the National Land Policy include: Land in the national development framework, the legal regime, the land tenure framework, the land rights administration framework, the land use and management framework, and the policy implementation framework.

Against this background, the National Land Policy Working Group (NLPWG) seeks the services of a consultancy firm to analyse the draft, and provide detailed input, including consulting experts and selected beneficiaries for their input.

### **Objectives**

The main objective of the consultancy is to incorporate policy statements and options into the National Land Policy to be more gender and HIV/AIDS responsive.

Specific objectives include:

- To develop a gender and HIV/AIDS responsive policy document;
- To hold and facilitate the consultation process with the selected target groups for their input.

### **Scope of work**

- Compile an issues paper on land, gender and HIV/AIDS;
- Identify gaps on rights of women in all the thematic areas of the land policy;
- Identify strategic and practical gender needs and gender issues to be addressed within the seven thematic areas of the NLP framework, namely:
  - Land in the national development framework;
  - The legal regime;
  - The land tenure framework;
  - The land rights administration framework;
  - The regional and international framework.
  - The land use and management framework; and
  - The policy implementation framework.
- Provide a comprehensive gender analysis on issues in each of the thematic areas of the land policy;
- Identify international instruments that need to be considered while addressing women's rights to land;
- Identify gaps in all thematic areas of the land policy regarding the effect of HIV/AIDS on land rights;
- Facilitate two consultative workshops for gender experts and HIV/AIDS experts to get consensus on options developed;
- Facilitate special focus group (SFG) meetings to capture the voices of the marginalized with selected beneficiaries in four sub-counties; and
- Produce a process report on the entire consultancy, lessons learnt and recommendations.

### **Method of work**

The consultancy firm will identify and review all related documentation and interview individual/selected staff in the relevant institutions. The consultancy firm will then make an overall analysis and assessment, which will be presented as an issues paper. The consultancy firm will then be provided with the current consultation document on development of the national land

policy, to systematically incorporate gender analysis and HIV/AIDS perspectives, including developing policy options on gender and HIV/AIDS for the entire document.

The process is expected to be highly participatory, involving NLPWG, NLP Secretariat and other line ministry staff as will be identified. The inception report and the final revised policy document will be presented to members of the NLPWG.

### **Output**

- An Inception Report
- An Issues Paper highlighting gender and HIV/AIDS issues for incorporation in the National Land Policy;
- Proposed Final draft containing agreed statements and options on gender and HIV/AIDS for each thematic area in the land policy;
- A consultation report with voices of the women and people infected and affected by HIV/AIDS;
- An end of consultation report, highlighting the entire process and lessons learnt.

### **Key expertise**

The consultancy firm will be expected to have a professional background in land law, social development. Analytical skills (policy analysis) and working with communities is a requirement. Extensive experience in qualitative analysis and mainstreaming cross-cutting issues in policy development processes and research in the areas of land, gender and development and HIV/AIDS will be an added advantage.

The lead consultant shall be a social development expert, with experience in mainstreaming social development issues. S/he will work with a legal expert with experience in family and land law issues, and a policy analyst with experience in analysing and drafting policies in Uganda.

### **Timing**

The duration of the consultancy is 50 non-consecutive working days.

### **Responsibilities of the Ministry and Irish Aid**

- Avail any background information and documents required;
- Pay a professional fee to the consultancy firm;
- Organise for Ministry staff to give their input to the consultancy firm;
- Secure meeting venues;
- Pay the consultancy firm.