

AFRICAN FEMINISM, LAND TENURE AND SOIL RIGHTS IN AFRICA: A CASE OF UGANDA

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ABSTRACT

This article discusses the relationship between African feminism, land tenure and soil rights in Africa. It uses the lenses of African feminism, particularly the motherism brand, to provide a medium through which Africans can assert their rights to land and soil. It bases on a case of Uganda to critique the ideology of patriarchy which denies Africans automatic rights to land and soil or *jus soli*, through policy and the law. Automatic rights to land and soil would ensure that everyone in Africa is bonded to the land and soil as a mother is bonded to her child. Land and soil rights, which mean the same thing to an African, are contemporaneously acquired and are linked to citizenship rights, largely based on the principle of *jus sanguinius*. A general conclusion drawn is that in order to rectify the situation discussed African governments should use the lenses of African feminism to reconstruct policies and re-enact laws related to land ownership, soil and sustainable development. It recommends that African governments should review their land policies and laws, including constitutions, in order to grant land and soil rights to all Africans based on the principle of *jus soli*, while that of *jus sanguinius* should only be adopted in circumstances where it does not disadvantage any person. Future researchers should build on the analysis made herein and step up their advocacy drives to persuade African governments to undertake the necessary reforms in their land regulatory policies and laws.

1. INTRODUCTION

The African continent has various forms of land tenure systems, each tenure having unique characteristics and bestowing specific land and soil rights to the holder. Land tenure systems in Africa are a creature of western colonial powers and pose serious problems to land and soil rights of Africans. This article uses the lenses of African feminism, particularly the motherism brand to unpack, repackage and recommend reconstruction of land tenure systems to benefit all Africans without discrimination. In Africa, land rights are closely related to soil rights, with no clearly marked differences. For example in Uganda there is no difference between the concept of land and soil. Among the Baganda in the central region, the word ‘*etaaka*’ refers to the land and also the soil; in the western part of the country, the *Runyakitara* speakers use the word ‘*eitaka*’ to refer to land and soil as well.¹ The longevity of land rights under particular tenure systems is also contemporaneously equivalent to that of soil rights. Right to acquire land rights under a particular tenure system is, in majority of cases, determined by right of citizenship. Citizenship may be acquired at birth but may also be acquired or even lost at much later time. For purposes of this

¹ *Runyakitara* language unites the people of the western region of Uganda right from the Lake Albert and River Nile moving southwards up to the borders with the Republic of Rwanda. Ethnicities in this region include the Banyoro, Batoro, Bakonjo, Bamba, Banyankore and Bakiga.

article, land tenure refers to the value of interest a person has in a particular parcel of land while soil rights refer to the bundle of rights a person gets over land, including the right to utilize the land and staying on it either as a citizen or alien. In essence, the right to soil is a theoretical right attached to citizenship, the latter being the determinant factor in bestowing entrenched or limited land or soil rights to the holder. The article uses Uganda as a case to demonstrate the relationship between African feminism, land tenure and soil rights in Africa. The case study method enables the analysis made to identify the problematic misconceptions about land and soil rights as constrained by the various land tenurial systems identified in the article. Paradoxically, human life cannot be sustained on land without the land right holder enjoying soil rights. The relationship between land rights of holders and soil rights, therefore, is intrinsic and mutually reinforcing. It can be clearly understood using the lenses of African feminism perspective, which explains, albeit in a theoretical manner, the socio-legal foundations of each of these rights.

Rights to soil basically fall into two categories; *jus soli* (automatic soil rights based on birth right citizenship) and *jus sanguinius* (soil rights based on right of blood or familial lineage). *Jus sanguinius* is the prevalent form of soil rights in most African countries.² The discussion in this article, therefore, largely hinges on the *jus sanguinius* rights, which are tagged to blood or familial lineage a person has at the time of birth. For instance, children born in Uganda, but whose parents are not citizens of Uganda, or whose parents are not known to be Ugandan citizens do not get automatic citizenship and soil rights at birth. They, however, may be presumed to be citizens of Uganda by birth if up to the age of five, their parents remain unknown.³ Land tenure systems in Uganda are of two broad categories, those that grant perpetual interest in land, and hence accord perpetual soil interests to the land holder and those that grant only limited interest in land, and equally, limited access rights to the soil. Citizens of Uganda are entitled to acquire perpetual interest in land and also in soil under customary, freehold or *mailo* tenure systems; non-citizens, can only acquire limited rights to soil, under the leasehold tenure system.⁴ The main argument in this article is that acquisition of land and soil rights are important because they bestow firm rights to each of them, and entice the rights holders to sustainably utilize the same.

It therefore, becomes important to use a theoretical framework such as the African feminism to highlight the socio-legal regime governing land and soil rights, which historically were constructed within the realm of the ideology of patriarchy, and intended largely favour men, and to a limited extent, citizens. The patriarchal construction of society created a stratified gendered socio-legal arrangement where women in particular, citizens or non-citizens, are only expected to acquire land and soil rights through the forms of rights of their male acquaintances, husbands, brothers or fathers. Under this arrangement, the male acquaintances are in position to determine how the land

² See the Constitution of Uganda, 1995, Article 10 which provides: [T]he following persons shall be citizens of Uganda by birth(a) every person born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926, and set out in the Third Schedule to this Constitution; and (b) every person born in or outside Uganda one of whose parents or grandparents was at the time of birth of that person a citizen of Uganda by birth.

³ The Constitution of Uganda, 1995, Article 11(1) provides: A child of not more than five years of age found in Uganda, whose parents are not known, shall be presumed to be a citizen of Uganda by birth. Article 11(2) provides: A child under the age of eighteen years neither of whose parents is a citizen of Uganda, who is adopted by a citizen of Uganda shall, on application, be registered as a citizen of Uganda.

⁴ Perpetual interests in land and soil accrue to anyone who is, or who becomes a citizen of Uganda, without discrimination.

and soil rights can be acquired and accessed and how each can sustainably be utilized by any family member.⁵ The next section discusses how socio-legal stratification affects both land and soil rights in Africa, using the case of Uganda.

2. SOCIO-LEGAL STRATIFICATION, SOIL RIGHTS AND LAND TENURIAL SYSTEMS

The gendered nature of land and soil rights in Africa remains a problem in spite of the global steps taken towards bridging the gaps between women and men in the enjoyment of socio-legal and economic rights. The United Nations General Assembly recognized this fact while adopting the Beijing Declaration in 1995. During the Beijing Conference, the United Nations General Assembly *inter alia* stated:

[T]he status of women has advanced in some important respects in the past decade but that progress has been uneven, inequalities between women and men have persisted and major obstacles remain, with serious consequences for the well-being of all people.⁶

The obstacles alluded to in the Beijing Declaration include custom, colonial law, colonial history, colonial education, and religion all of which are informed by the ideology of patriarchy—the rule of the fathers.⁷ These obstacles create a stratified and sectionalized environment where accessing land and soil rights within the existing land tenurial systems remain skewed and tilted in favour of the male gender and the citizens.⁸ Within these stratified and sectionalized social structures, men and citizens are the perceived social and legal owners of the land and soil.⁹ Land tenure systems being the avenue through which land and soil rights can be accessed, determine how an individual may utilize a particular parcel of land and its soil. Access to land and soil rights in Uganda, therefore, cannot be divorced from the patriarchal ideological contestations that created the land tenurial systems. Land tenure systems in Uganda are provided for in the Constitution, 1995 and the Land Act, Cap. 227 as: customary, freehold, mailo and leasehold. The ideology of patriarchy, which conditions land and soil rights in Africa has its roots in the historical Greek philosophy. Historicizing patriarchy, Napikoski & Lewis aver:

[A] patriarchy, from the ancient Greek patriarches, was a society where power was held by and passed down through the elder males. When modern historians and sociologists describe a ‘patriarchal society’, they mean that men hold the positions of power and have more privilege: head of the family unit, leaders of social groups, boss in the workplace, and heads of government.¹⁰

Much as the ideology of patriarchy is the foundation for most land tenure systems in Africa, African land tenure systems are varied, and may not necessarily have the same impact on women and men and citizens and non-citizen’s land and soil rights.¹¹ The varied nature of land tenure

⁵ Kagoda, 2008.

⁶ Beijing Declaration, 1995.

⁷ Government of Uganda, Land Policy, 2013.

⁸ Busingye, 2012.

⁹ Busingye, 2017.

¹⁰ Napikoski & Lewis, 2018.

¹¹ For example, Chad, Lesotho and the United Republic of Tanzania, which have unrestricted *jus soli*, cannot be said to have the same problems associated with soil access rights like the majority of other African states which rely on the principle of *jus sanguinius*.

systems in Africa, therefore, makes it unrealistic to talk of an African land tenure system that regulates access to soil rights.¹² Moreover, the typology of African soils, which also determines how soils are utilized, varies from region to region and country to country on the African continent. Land use patterns are equally diverse on the continent. Much as it may not be possible to generalize land tenure systems in Africa, and hence come up with a harmonized position about continental land and soil rights, land tenure systems on the continent can conveniently be categorized as private, communal, open access and State owned tenures.¹³ Under the communal setting, access to soil rights, are constructed by, and specifically intended to serve the rights of the patriarch—male heads within the stratified socio-legal communal set up at the expense of women. The situation may not be so different under the private, open access and state owned land tenure systems. Each of these systems is either supported by custom or laws constructed and enacted within a male oriented patriarchal society. On its part, custom is society specific and excludes non-societal members, in the same way as citizenship excludes non-citizens from automatically accessing land and soil rights in a particular country.

The foregoing analysis makes it possible to understand that the norms embedded in custom and the law, which define how individual women and men, citizens and non-citizens acquire land and soil rights suffer from the inherent constraints in the ideology of patriarchy, upon which they are constructed and interpreted.¹⁴ The patriarchal society is stratified and does not benefit every member of the socio-legal class equally, women and men.¹⁵ Within the confines of the ideology of patriarchy and necessarily the stratified and sectionalised society, however, men, whether citizens or not, have more chances to land and soil rights than women.¹⁶ In this article, African feminism helps to identify the ideological tools of patriarchy, deconstruct and reconstructed them to enable women and men access equal land and soil rights.¹⁷ Unpacking the socio-legal stratified society is intended to make it clear that land and soil rights and land tenurial systems in Africa are inter-linked and reinforce each other within the stratified and gendered society. Based on this analogy, the next subsection identifies, through an African feminism theoretical framework, how land tenure systems that regulate access to land and soil rights can be repackaged to benefit women and men and citizens and non-citizens without discrimination.

3. THE LINK BETWEEN AFRICAN FEMINISM, LAND TENURE SYSTEMS AND SOIL RIGHTS IN AFRICA

¹²FAO, 2010.

¹³Wily, 2011.

¹⁴Muinde, 2013.

¹⁵ Saunders, 1990.

¹⁶Asiimwe, 2001.

¹⁷Kandiyoti, 1988.

The foregoing discussion highlighted that the theoretical, factual and legal rights to land and soil rights are problematic and are constructs of the ideology of patriarchy. Those rights are enjoyed differently by women and men and citizens and non-citizens. This section uses the African feminism theoretical perspective to interrogate the ideological contestations in the land and soil rights regime in Africa, using the case of Uganda. African feminism in this particular case uses analogy of motherism (mother's love to her children) to drive the nail in the socio-legal fabric constructed by the ideology of patriarchy.¹⁸ In so doing, the analysis unpacks and attempts to repackage the operational mechanisms in the existing land tenure systems in a better design capable of engendering sustainable utilization of the African land and soil. The analysis maintains a focus on the need to equitably redistribute land to women and men, citizens and non-citizens, without discrimination, in order to enable equitable access to land and soil rights. According to the African feminism, land tenure systems in Africa lean towards bestowing more access to land and soil rights to men than to the women.¹⁹ It suffices to note that African feminism, often dominated by debates on womanism (the biological factor of being a female, and also the weak gender), is a brand of the general feminism perspective and shares a lot with other brands of feminism.²⁰ A deeper understanding of the African feminism, and necessarily African womanism perspective, reveals that it shares a lot with the western written forms of feminism. In this regard, Mwale asserts:

[A]frican womanism, despite its pretensions to seeking cooperation or its advocacy for interdependency between men and women, uses a model of conscientisation of women that is foreign to Africa, and runs the risks of obscurantism, vulgarism, inauthenticity, and irrelevance.²¹

African feminism is, however, embedded within the African custom and part and parcel of the African society and identifiable with the African person in his or her own right. It can, therefore, easily be distinguished from the Western forms of feminism by understanding how African men and women relate to land and utilize the soil. The relationship between an African person and the land is in many ways similar to his or her relationship with the soil because there is no significant difference between land and soil within the African domain. It is essentially the same relationship a mother has with her children, hence, the analogy of motherism in regard to the relationship between an African and land or soil. In the case of Uganda, the *Runyakitara* word, *eitaka*, means either land or soil, the same applies to the *Luganda* word, *'etaaka'*. Contemporary African feminist attack the ideology of patriarchy and its *modus operandi* in terms of allocation of, or denial of land rights [and soil rights] to women and men, and citizens and non-citizens.²² The radical feminism perspective encourages a very liberal usage of the term patriarchy to apply to virtually any form of male domination.²³ Socialist feminism is mainly restricted to analyzing the

¹⁸ Mwale, 2002.

¹⁹ Asiimwe, 2001.

²⁰ Coetze, 2017.

²¹ Mwale, 2002.

²² Chopra and Mülle (Eds.), 2016.

²³ Kandiyoti, 1988.

relationships between patriarchy and class under capitalism.²⁴ Under the capitalist modal of classification, femininity denotes the weak—the women, while masculinity denotes the strong and decision-makers—the men, hence the socio-legal stratum of society.²⁵ In reality, African feminism attack of ideological of patriarchy conception goes well beyond the male/female divide. It also penetrates the feminine stratum which is equally classified it into the elderly, the mothers, the daughters, the in-laws, the illiterate and the elite and attempts to remodel it into a more accommodative structure.²⁶In regard to land tenurial systems and hence land and soil rights in Uganda, sectionalization of society elevates all the male gender over all the female gender; and citizens over non-citizens. It equally elevates the sectionalized patriarchal families of the fathers over those over the mothers.²⁷ In that regard, it creates a hierarchy of the landed, and the landless, the latter having limited access to soil rights.²⁸ Limited access to soil rights renders the whole concept of sustainable development untenable within the patriarchal African setting. Owners of the land and hence entrenched soil rights are not necessarily the ones that utilize the land, those that utilize the land, especially for agriculture purposes, have little stake in the land. The latter may over-exploit the soil without taking into account the need to conserve it, because they are not its recognized owners.

The uniqueness of African feminism in the drive to deconstruct and reconstruct land and soil rights lies in the fact that it is largely built on indigenous models of African motherism (love), African womanism (Queen mother), African femalism (greater respect for the female body), and snail-sense feminism (slow, but sure—women’s adaptation strategy to patriarchal systems).²⁹The implications of this theoretical analysis is that much as women and non-citizens are denied automatic access to land and hence soil rights by the patriarchy society, they nevertheless remain a potential force that can be relied upon to sustainably utilize the soil, if given a legal authority to do so. It is a fact that today; many industries and plantation farms in Uganda are owned by non-Ugandans, initially Indians of British origin, and now increasingly the Chinese.

African feminism paradigm being a medium through which the socio-legal phenomena that regulates land and soil rights is viewed and interpreted equally helps to critique the current move by contemporary African leaders to provide solutions to African specific problems, largely basing on harnessing the soil.³⁰ That is because the vision of sustainable development of African leaders is riddled with the western capitalist and exploitative paradigms that are not well integrated into the African social fabric. The so proclaimed paradigm of African solution to African problems is largely financed by the Western donor community whose hidden interest is to suffocate the indigenous African womanism paradigm that loves and cares for the African land and soil. That

²⁴*Ibid.*

²⁵ Valledor-Lukey, 2012.

²⁶Busingye, 2017.

²⁷ Busingye, 2017.

²⁸ Gingrich, 1999.

²⁹Nkealah, 2016; Ezenwa-Ochaeto, 2015.

³⁰ Mays, 2003.

remains true much as paradigm of ‘an African solution for African problems’ appears to front the human rights regime reminiscent in the Western ideologies.³¹The latter cannot be accommodated within the African society without appropriate reconstruction measures capable of making it African use friendly. That thinking, however, provides a window of hope because it shows that Africans are aware that they are endowed with capacity to meritoriously reason and ably provide their own perspectives of the factual socio-legal phenomena regarding access to land and soil rights.

Together with the African feminism perspective, the African paradigm of ‘African solution to African problems’ may therefore, cautiously be relied upon to provide possible solutions to the inequalities in the romanticized land tenurial systems created by the western patriarchy ideology during the colonial era to regulate access to soil rights. In this respect, motherism brings on board dynamics of rebuilding society in cooperation with mother nature at all levels of human endeavour.³²There are chances that African feminism can create a conducive environment which in the long run may bring about sustainable utilization of African land and soils by women and men, citizens and non-citizens.

The basis for this reasoning is that under the African motherism perspective, women are equated to nature, which is perceived as caring, and motherly.³³ The motherism perspective is valuable because within its purview, nature cannot be degraded to a worthless component of human existence. Moreover, women constitute the largest percentage of persons that harness land in Africa.³⁴ As a matter of fact, most households in Africa and Uganda in particular, depend on the soil and are dependent on rain-fed agriculture as their main source of income.³⁵ The agricultural sector employs over three-quarters of the active labour force. Eighty three percent of Uganda’s women are employed in the agriculture sector. Only seventy one percent of men are employed in the same sector.³⁶ Equal rights to land and soil rights, therefore, become a pre-requisite to sustainable development based on harnessing the soil.

In reality, the socio-legal stratification of society occurs because the ideology of patriarchy is a system of oppressive power relations that reorganizes society into sections of the privileged and under-privileged, based on privileged supremacy.³⁷Sectionalism necessarily discriminates against the less privileged members of society in various aspects.³⁸In such a problematic social order, the mothers, and non-citizens have fewer opportunities to access soil rights both under customary or the legal tenurial systems in their individual rights.³⁹ African feminism, has created a strong base

³¹ Chirisa, Mumba, O Dirwai, 2014.

³²Nkealah, 2016.

³³ Walker, 1995.

³⁴ Slavchevska, Delaocampos, & Brunelli, 2016.

³⁵Asiimwe, 2001.

³⁶Okonya and Kroschel, 2014.

³⁷ German, 1981.

³⁸ Ahmed, 1999.

³⁹Busingye, 2017.

of women agency that resists oppression of the ideology of patriarchy. Women, have, hence, through their agency, been able to gain a fair deal in accessing land, and hence access soil rights under the existing land tenure regime.⁴⁰ Women's agency encompasses the revolutionary power of women to rebel against the existing socio-legal constructed land tenurial systems.⁴¹ Non-citizens have equally been able to acquire long term leaseholds and large chunks of land and hence are able to exercise some degree of sustainable utilization of land and soil, because they are not threatened by imminent land evictions.

Through their agency informed by African feminism perspective, women in Uganda have for example influenced constitutional reforms. For example, Article 33 (3) of the Constitution of Uganda provides: '[T]he State shall protect women and their rights, taking into account their unique status and natural maternal functions in society'.⁴² With the women wriggling through their agency to transform society, stratification of society has now become archaic and dysfunctional. Its harmful societal values have equally been fundamentally weakened. In regard to non-citizens, and in a bid to grant them access to firm land and soil rights within the constraints of existing land tenurial systems in the country, the Constitution under Article 9 provides: 'Every person who, on the commencement of this Constitution, is a citizen of Uganda shall continue to be such a citizen'. The Constitution then provides for the modes of how a non-citizen of Uganda can acquire citizenship in the country.⁴³ Once acquired, Ugandan citizenship may be lost, but cannot, thereafter be taken away arbitrarily because it becomes a human rights aspect of the holder.⁴⁴

Indeed, Africa governments being part and parcel of the global community attempt to incorporate the philosophical foundations of the human rights regime envisaged under the Universal Declaration of Human Rights, 1948 into their national legal frameworks. Much as the human rights philosophical foundations provided for under the 1948 human rights framework are necessarily western ideals, they can be harmonized with the African feminism thinking to create a socially and legally balanced human rights framework for Africans. In this regard, the human rights approach in relation to access to land and soil rights under the existing land tenurial systems in Uganda fit well in the outfit provided by Gaard, who asserts:

[t]he moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract. This conception of morality as

⁴⁰ Namubiru-Mwaura, 2014.

⁴¹ Chopra and Mulle, 2016.

⁴² Constitutional reforms in Uganda were contemporaneously adopted with the global agitation for women's equal rights in all spheres at the various United Nations Women Conferences, including the Beijing Conference in 1995.

⁴³ Article 12 of the Constitution provides for acquisition of Ugandan citizenship by registration, while Article 13 provides for acquisition of Ugandan citizenship by naturalization.

⁴⁴ Article 14 of the Constitution provides for how Ugandan citizenship may be lost, namely: A person may be deprived of his or her citizenship if acquired by registration, on any of the following grounds: (b) voluntary service in the armed forces or security forces of a country hostile to or at war with Uganda; (c) acquisition of Uganda citizenship by fraud, deceit, bribery, or having made intentional and deliberate false statements in his or her application for citizenship; and (d) espionage against Uganda.

concerned with the activity of care centres moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rule.⁴⁵

This approach, therefore, helps to put into context the wraths of the ideology of western patriarchy, which, when viewed through the lenses of African feminism are clearly identified as the problematic arenas of oppression to women and non-citizens. Hartmann succinctly describes the fabric of western patriarchal ideology as:

[A] set of social relations between men, which have a material base, and which, though hierarchical, establish or create interdependence or solidarity among men that enable them to dominate women. [T]he material base upon which patriarchy rests lies most fundamentally in men's control over women's labour power ... [It] does not rest solely on childbearing in the family, but on all the social structures which enable men to control women's labour. Control is maintained by denying women access to necessary economically productive resources.⁴⁶

The analysis made in this section reveals that in the case of an African, soil rights are contemporaneously acquired with the acquisition of land rights under the various land tenurial systems on the continent. Land tenure systems are, however, constructed within the purview of the ideology of patriarchy, which discriminates against persons it designates as weak or foreigners, and deny them automatic soil access rights. Women and non-citizens are the victims of that ideology. The socio-legal foundations of land tenure systems on the African continent, therefore, need to be interrogated further using the lenses of African feminism for there to be a clear understanding of how problematic the situation is for those designated as weak and foreign within the purview of the ideology of patriarchy. Moreover, African feminism goes to the root of the African society and has been used by African women in particular to reinvigorate their agency that now resists African patriarchy manifestations in custom and the western forms of patriarchy that seek to exclude the women from accessing land and hence soil rights *in tandem* with the men. The discussion clearly brings out the symbiotic relationship between land tenure systems, soil rights and feminism perspective, the latter being the medium through which land tenure systems and soil rights in Africa are viewed, understood and interpreted. The analysis made in this section, therefore, forms the basis for a discussion of the land policies and laws in the next subsection, which goes a step further in interrogating the role played by law and custom to deny certain persons automatic access to land and soil rights on the African continent.

4. POLICY AND LEGAL REGULATION OF ACCESS TO SOIL RIGHTS

4.1 CONTEXTUAL PERSPECTIVES

⁴⁵Gaard (ed.), 1993.

⁴⁶Hartmann, 1979

The previous section discussed how African feminism theoretical framework can be relied upon to influence attitudinal change in access to land and soil rights on the African continent. African feminism specifically faulted both the African custom and the western forms of the ideology of patriarchy as being responsible for the woes of Africans in regard to land and soil rights. This section builds on the momentum gained in the previous section to critique policy and legal regulation of land and soil rights as embodiments of the oppressive ideology of patriarchy. The current policy and legal norm in majority of African countries was exported to Africa during the era of colonization.⁴⁷ Land and necessarily soil are the vital aspects of the earth's physical features, which should be enjoyed by all human beings without restriction. Indeed, some of the problems associated with land tenure systems and soil rights on the African continent are closely linked to the physical and demographic features that exist in a particular country.

It is noteworthy that policies and laws governing land and soil rights in Africa were crafted within the purview of the ideology of patriarchy which potentially edges out the socially and economic weak in regard to land and soil rights. The role of these policies and laws is better understood when the role of courts, which too, are a creature of western colonial rule is made clear. In support of this view, Morris asserts:

[T]hese courts (in the British colonies) administered basically English law, that is to say the common law, the doctrines of equity and the English statutes of general application in force on a specific date, together with certain Indian Acts, which represented the nineteenth century English law in a codified, and somewhat rationalised, form.⁴⁸

Sadly, the British law as exported to Uganda and other African countries was not all in written form so that it could be understood and applied with certainty. It embodied the unwritten common law and principles of equity, hitherto unknown within the fabric of the African and specifically, the Ugandan society. The hidden impact of colonial law on land tenurial systems and their regulation of soil rights in the Africa could only be inferred from the language of the written law that incorporated them. Moreover, imported English law sought to edge out African customary law, by including a repugnancy clause in the national law. To date, this ideological legal hangover still informs the laws of many African countries including Uganda. For example the Ugandan Judicature Act provides:

‘[c]ommon law’ and ‘doctrines of equity’ mean those parts of the law of Uganda, other than the written law, the applied law or the customary law, observed and administered by the High Court as the common law and the doctrines of equity respectively.⁴⁹

In furtherance of this ideology, the Judicature Act provides:

[N]othing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom,

⁴⁷Ahmed, 1999.

⁴⁸Morris, 1970.

⁴⁹The Judicature Act, Cap. 13 (Uganda), section 14 (5).

which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.⁵⁰

It is noteworthy that within the constructs of the Judicature Act, it would be difficult for an African custom to pass the repugnancy test, and hence its operation is limited to very few circumstances. What the High Court of Uganda and other courts of Judicature apply is not the African customary law alone; they apply an amalgam of western legal principles as well as the African customary principles, all of which do not favour entrenched rights of women and to some extent non-citizens rights to land and hence soil rights. The problematique in the Ugandan land tenurial systems and their regulation of soil rights, therefore, partly lies in the simultaneous application of the English common law or doctrines of equity and the traditional norms and values of the traditional Ugandan society. Moreover, upon its introduction in the African legal regime, British law sought to subdue and annihilate African customary law, which cannot be distinguished with the way of life of Africans. In this regard, Mugambwa asserts:

[T]here, recognition of customary land rights was the exception rather than the rule. For example, in Uganda, the British protectorate administration declared most land in the territory Crown land by virtue of the protectorate. Customary land tenure was recognized but within limits. Under the Crown Lands Ordinance 1903, indigenous Ugandans had a right to occupy any land (outside the Buganda kingdom and urban areas) not granted in freehold or leasehold without prior license or consent in accordance with their customary law. However, the Governor had the power to sell or lease such land to any other person without reference to the customary occupants of the land.⁵¹

Simultaneous application of the hitherto unknown British law in Uganda together with the customary land tenure systems contemporaneously complicate the position of Ugandan women and men, citizens, and non-citizens, in regard to access to soil rights.

Indeed, land, which broadly embodies the soil, is one economically viable resource that all Ugandans, women and men, citizens and non-citizens, have an inherent right to in their individual capacities. That has, however, historically not been the case. For example, in 1845, Marx wrote:

[W]e do not set out from what men say, imagine, conceive nor from men as narrated, thought of, imagined, conceived, in order to arrive at men in the flesh. We set out from real, active men, and on the basis of their real life process we demonstrate the development of the ideological reflexes and echoes of this life process. Morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain the semblance of independence. They have no history, no development: but men, developing their material production and their material intercourse alter, along with their real existence, their thinking and the products of their thinking. Life is not determined by consciousness, but consciousness by life.⁵²

It is noteworthy that within the materialistic paradigm purview, men in Africa have historically had better access rights to land. Parpart asserts:

⁵⁰ The Judicature Act, Cap. 13 (Uganda), section 15 (1).

⁵¹ Mugambwa, 2007.

⁵² German, 1981.

[I]n the case of Zimbabwe, men continue to have easier access to property than women. In the resettlement schemes set up to provide land to liberation fighters, individual land grants were awarded to men as heads of households. A married women was, thus, prevented from owning land, and if she were divorced (for whatever reason), she lost the right to stay on the land because it was registered in her husband's name. Only widows and single women could obtain land, and even they had trouble acquiring land because officials were skeptical about their potential productivity.⁵³

The western materialistic and patriarchy ideologies have, therefore, worked hand and gloves with some traditional notions of African patriarchy ideologies to discriminate against women and non-citizens in regard to land and soil rights. This aspect is visible in the policies and laws made by contemporary African governments discussed in this chapter. The friction is now between tradition versus modernity [policies and laws] and legal pluralism, and customary versus statutory laws. Neither of these ideologies works to women's expectations and protection of their rights.⁵⁴ Legal pluralism entails various kinds of law such as state law, made by the legislature and enforced by the government. It equally includes religious law, both the written doctrines and accepted religious practice, and customary law, interpretations thereof, and in a globalized world, the project (programme) law. Indeed, in the present globalized era, land law as applied in Africa is conditioned by regulations associated with the western programme of donation.⁵⁵ Donations and other forms of foreign aid are intended to serve the interests of developed economies. Donations help to condition African economies to introduce reforms in their traditional land tenurial systems in favour of the donors. The reformed land tenurial systems do not only alienate land [and soil] from the Africans in totality, but equally, alienate the poor, women and men from the soil, which they treasure. In total, none of these legal regimes create an atmosphere of easy access to land and soil in Uganda, much as it is more disadvantageous to the women and non-citizens.

This subsection puts the foundations of land and hence soil legal regime in African into context by highlighting the socio-legal foundations of the land policies and laws as they operate today in Africa. It makes clear that the materialistic nature of the western legal paradigms is essentially at loggerheads with the African customary law, the latter being organic to the African society and hence easily understood and respected. The discussion makes it clear that colonial law and its ideological manifestations is still operational in Africa because it uses the bait of donations to condition the minds of African governments to develop policies and laws that can help maintain the flow of donations. Donations are not free gifts to African economies; they are only avenues of the neo-colonial western domination and its attendant draining channels of African resources. That trend is disadvantageous to the African economies, it makes them poorer day by day and is incapable of bring about sustainable utilisation of African land and soils. The critique made using the lenses of African feminism in this and the previous section makes this point clear and will be utilized to further discuss how difficult it is for African economies to achieve sustainable development based on African land and soils under the current land tenurial systems.

4.2 THE LINK BETWEEN SUSTAINABLE DEVELOPMENT, LAND TENURE SYSTEMS AND SOIL RIGHTS

⁵³ Parpart, Gender, 1995.

⁵⁴ Sebina-Zziwa, 1999.

⁵⁵ Ahmed, 1999.

The concept of sustainable development in regard to land and soil rights regime is fairly new. It succinctly appears first in the Brundtland Report in 1987. According to the Brundtland Report:

[S]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of ‘needs’ in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.⁵⁶

The Brundtland Report further provides:

[T]he essential needs of vast numbers of people in developing countries—food, clothing, shelter, jobs—are not being met, and beyond their basic needs these people have legitimate aspirations for an improved quality of life.

The Brundtland Report provides a basis upon which Uganda’s law base to provide for sustainable development.

In the case of Uganda, sustainable development is provided for in the Constitution in 1995 and the post-1995 constitutional reforms of policies and laws. It is noteworthy that the colonial policies and laws regulating land and soil rights did not specifically cater for sustainable development. Key colonial laws that regulated land and soil rights included: the 1884 Land Acquisition Act, the African Order in Council, 1892, the 1899 Land Acquisition Act, 1900 Buganda Agreement, the 1902 Order in Council as amended in 1920, the 1903 Ankole Agreement, the 1903 Toro Agreement and the 1933 Bunyoro Agreement. The impact of the colonial agreements on land tenure systems, and land and soil rights was expressed in the Land Acquisition Act, 1899, which *inter alia* provided:

[I]n pursuance of the powers conferred by article 3 of the Africa Order in Council, 1892—Section 1: [T]he following enactment of the Governor General of India in Council shall apply to the Protectorate (Uganda), that is to say—The Land Acquisition Act, 1894 (1 of 1894). Section 2: [I]n the application of the said enactment to the Protectorate the following modifications shall be made—(a) where the said enactment provides that any act or thing may or shall be done by the Governor General of India in Council or by a Local Government, whether with or without the sanction of the Governor General in Council, such act or thing may or shall be done, subject to any directions of the Secretary of State, by the Governor; (b) where the said enactment provides for any notification in any Gazette, such notification shall be made in the official Gazette of Uganda; (e) any land whereof possession is taken under the provisions of the said enactment shall vest absolutely in the Governor for the time being, or, in a trustee or trustees for His majesty, to be appointed by the Secretary of State, who shall have power by order to remove any trustee and appoint any new trustee or trustees.

The Protectorate laws made it clear that the land tenure regimes in the Ugandan Protectorate would be those crafted in Britain and applied first in other colonies such as India. They would then, without much modification, be transplanted into, and superimposed on the African customary laws in the Ugandan Protectorate. The transplant of laws from Britain to Uganda in the described manner created a problematic situation to Ugandans—how would they be applied contemporaneously with the traditional laws in the Protectorate? Attempts by the British colonialists to provide for the modification clause in such laws never addressed any concerns of

⁵⁶Brundtland, 1987.

the Ugandan natives. Those laws remained the oppressive and discriminatory laws crafted within the ambit of the ideology of patriarchy in Britain. Contemporary Ugandan policy and legal principles on sustainable development should, therefore, be viewed with suspicion because not so much has been done to remove the western ideology of patriarchy contestations in the Ugandan land laws as they operate today. At best, such constitutional principles should be viewed as intended to attract the attention of the Western investor communities in the country, while the situation on the ground in regard to access to land and soil rights remains more or less the same as it was more than a century ago. That situation makes it difficult for the African economies in general to receive and integrate modern economic concepts such as sustainable development and implement them with ease in their national land law regimes.

Implementation of the concept of sustainable development, however, is side-lined by the inroads of the western patriarchy ideology in Uganda's policies and its tenets cannot be specifically realized. The desired scenario remains to undo the colonial policies and laws and re-enact them using the lenses of African feminism, which has a motherly affection for the Africans. Repackaging the land policy and legislative norms in African countries is capable of perfecting the land law and hence soil rights regime, and bring about the yearned for sustainable development, which as of now remains only a paper provision. The desire to ensure that the legitimate aspirations of persons in Uganda to land and soil rights and the need to utilize them in a sustainable manner is expressed in the Constitution of Uganda, 1995. Principle XXVII of the National Objectives and Directives of State Policy provides:

- (i) [T]he State shall promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations. (ii) The utilization of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans; and, in particular, the State shall take all possible measures to prevent or minimize damage and destruction to land....

These constitutional principles provide a legitimate basis for critiquing the Ugandan land tenure regime with a view to establishing whether or not it addresses the tenets of sustainable development based on land and soil rights. A common feature of the land tenure, and hence soil rights systems in Uganda is that they are constituted by both registered and unregistered systems.⁵⁷

Apart from customary land tenure systems, which are the traditional forms of African land tenure systems, the other forms of land tenure systems were introduced in the Ugandan legal fabric by the British colonial Government under the colonial agreements and laws. The latter land tenure systems remain foreign to the African economies and their impact on the indigenous communities has been to distort the whole idea of sustainable utilization of land and hence the soils on the continent. They are commercially oriented, yet commercial interests are difficult to reconcile with life sustenance concepts. It is probable that if the African system of development of the legal processes had not been hijacked by the forceful entrenchment of the western ideology through law and colonization, the concept of sustainable development would find a fertile ground upon which to flourish. Unfortunately, that has not been the case and merely providing for the concept of

⁵⁷ See Section 2 of the Land Act, Cap. 227, which restates the constitutional provisions: [S]ubject to article 237 of the Constitution, all land in Uganda shall vest in the citizens of Uganda and shall be owned in accordance with the following land tenure systems—(a) customary; (b) freehold; (c) mailo; and (d) leasehold.

sustainable development in the Ugandan and other African policy and legal frameworks in the mentioned circumstances does not guarantee that it will be successfully implemented. Worst of all, land tenure laws in Uganda purport to provide for equity in matters of access to land, and hence soil rights, by women and men, citizens and non-citizens, which has never been the case either in fact or at law. For example, the Constitution of the Republic of Uganda, 1995 in Article 26 (1) deceptively provides: [E]very person has a right to own property either individually or in association with others. The phrase ‘every person’ is used technically, but deceptively, and within the confines of the exclusionary ideology of patriarchy to portray that all persons in Uganda are equally protected under the law and are able under the law to access the country’s land and soil rights without any visible constraints. This is of course a fallacy. The reality is known. Historical societal stratifications grant more rights of access to land and soil rights to men than to women.⁵⁸ Social stratification equally grants or recognizes the rights of the economically powerful than the poor. The dichotomy between men and women and rich and poor makes it difficult for the various strata to work in unison and hence adhere to the principle of sustainable development.

In recognition of this problem, and in a bid to address it, the Constitution under Article 33(1) provides: [W]omen shall be accorded full and equal dignity of the person with men. By providing for ‘accorded full and equal rights’ the Constitution acknowledges first and foremost that there are historical and structural imbalances in women’s right of access to soil rights under the various tenurial systems in place in Uganda. Secondly, it insinuates that women must be passive persons in the waiting room to be accorded such rights and dignity, which Ugandan women through their agency may not take with ease. Such a legal construction is intended to distort the motherism paradigm, which if well-articulated, recognizes the right of the mother to bond with the child without externally constructed constraints. Why women be granted the rights and by who? That is the desire of the ideology of patriarchy, so that they remain at the receiving, purportedly favoured end. In a vague manner, the Constitution under Article 33 (2) provides: ‘[T]he State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement’. The Constitution, however, does not put in place specific mechanisms to create opportunities for women to access the land registration services in a much easier form than men or rich, citizens and non-citizens in order to show commitment on the government’s undertaking to enhance women’s access to land and soil rights. Moreover, the land registration services in Uganda remain expensive and difficult to access largely by the poor.

Indeed, much of the literature on women and land tenure in Africa has viewed the introduction of land titling, registration, and the privatization of land under colonialism and after independence as a setback for women. It leaves women in a state of even greater insecurity with poorer prospects for accessing land [and soil].⁵⁹ Walby avers that there are two forms of patriarchy that successively influence lives of women. The first is ‘private patriarchy’ where women in the home are under the rule of the father, husband or brother. The second is ‘public patriarchy’ where women enter public spaces of politics but still remain strongly controlled by men.⁶⁰ The public patriarchy further

⁵⁸ FIDA (U), 2012.

⁵⁹ Tripp, 2004.

⁶⁰ Benhabib, 1993.

closes Ugandan women's chances to have automatic access to the country's land and soil, much as it deceptively appears to open up more avenues for them in that respect.

Other policy frameworks such as the Uganda Vision 2040 equally embody deliberately or inadvertently deceitful provisions purportedly intended to engender sustainable development in the economy based on harnessing the soil. Vision 20140 mission statement provides: '[A] transformed Ugandan society from a peasant to a modern and prosperous country within 30 years'. Transforming Uganda from a peasant to a modern and prosperous economy cannot ignore the fact that Uganda is potentially an agricultural economy that is dependent on how the country's soils are utilized, and by who. Key elements of the Vision 20140 include Uganda pursuing a planned urbanization policy that will bring about better urban systems that enhance productivity and sustainability while releasing land for commercializing agriculture; and the projection that the country's agricultural productivity will grow at an average rate of about five per cent. Uganda's Vision 2040 recognizes that agriculture is the main stay of the Ugandan economy employing 65.6 per cent of the labour force and that it contributes twenty one percent to the country's Gross Domestic Product (GDP). It is also recognized under Vision 2040 that agricultural production in Uganda is mainly dominated by smallholder farmers engaged in food and industrial crops, forestry, horticulture, fishing and livestock farming. Agriculture productivity of most crops has been reducing over the last decade mainly due to a number of factors including: high costs of inputs, poor production techniques limited extension services, over dependency on rain fed agriculture, land tenure challenges and limited application of technology and innovation. Vision 2040 equally recognizes that the fertility of Uganda's soil is declining fast and the situation needs to be reversed. Whatever the good intentions of government by coming up with this vital policy document, it remains difficult to achieve sustainable development of the country's economy based on harnessing land. The diverse interests in the ideologically constructed social strata of the rich and poor, women and men, citizens and non-citizens, necessarily cripples any government initiative to promote sustainable development because of lack of a harmonious position and understanding of the development concept by elements of each social stratum.

In such problematic environment, even other government policies, much as they are conspicuously attractive to the readers, cannot be the basis for sustainable development based on harnessing the land. Most of the activities on the land and hence the soil are extractive in nature without the ability and even desire to replenish the depleted soil fertility. For example, the Uganda Land Use Policy of 2006 whose overall objective is to achieve sustainable and equitable socio-economic development through optimal land management and utilization in Uganda is only attractive on paper but difficult to operationalise. The specific objectives of the Uganda Land Use Policy are: to adopt improved agriculture and other land use systems that will provide lasting benefits for Uganda; reverse and alleviate adverse environmental effects at local, national, regional and global levels; promote land use activities that ensure sustainable utilization and management of environmental, natural and cultural resources for national socio-economic development; ensure planned, environmentally friendly, affordable and well-distributed human settlements for both

rural and urban areas; update and harmonize all land use related policies and laws, and strengthen institutional capacity at all levels of Government.

Achievement of the aforementioned policy objectives is pegged on the understanding that land is a fixed resource and is becoming scarce in many areas, and that its ownership has a significant bearing on land use. The policy, however, uses flowery language that ignores the fact that land in Uganda is owned by the people and government has limited control over it, and hence cannot compel land owners to utilize it in a manner that they do not understand or believe would meet their individual objectives.⁶¹ Moreover, there are observable changing human needs and a growing population resulting in competition of the different uses for the same land and that the demand for land is often greater than its availability. Consequently, some present land use practices have led to severe land and hence soil degradation even with the Land Use Policy being in place. Other land policies such as the Land Policy, 2013 are equally bedeviled with similar shortfalls and problems. The Vision of the Land Policy is ‘a transformed Ugandan society through optimal use and management of land resources, for a prosperous and industrialized economy with a developed services sector’. Its goal is ‘to ensure efficient, equitable and optimal utilization and management of Uganda’s land resources for poverty reduction, wealth creation, and overall socio-economic development’. It is realised under this Policy, and in conformity with the analysis made herein that this is a postmortem initiative, which can only cure the problem if the land laws are reviewed and revised. The Policy states among others, that since the advent of colonialism, the country has never had a comprehensive land policy. What have been in place are the scattered policies and laws on land and soil conservation. Post-independence attempts to settle the land question and deal with fundamental issues in the land tenure systems and land management have been intermittent and limited in scope. For example, the Policy recognizes historical injustices, many of which have resulted in disposition and loss of ancestral access to land and soil rights by some native communities.⁶² As a stop gap measure, the government of Uganda came up with a National Gender Policy in 2007 in a bid to mainstream gender concerns in other land related policies.

The priority areas of Gender Policy are improved livelihoods, promotion and protection of rights, participation in decision-making and governance, recognition and promotion of gender in macro-economic management. It is, however, noteworthy that the provisions of the Gender Policy are difficult to read into other policies which were adopted much earlier and without specifically providing for gender concerns in any of them. The problematic situation regarding implementation of land and soil related policies is that not every policy maker in Uganda understands the ability of African feminism to perfect the imperfect situation right from the time of policy formulation through to adoption and enactment of land laws. Consequently, elements of African feminism are only glossed over in the discussions leading to adoption of key policy documents regarding land

⁶¹ The Constitution of Uganda under Article 237 (1) provides: (1) Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.

⁶² United Organisation for Batwa, 2015.

tenure systems and soil utilization in the country. Their policies and laws that are eventually adopted are, therefore, incapable of taking care of all the land and soil needs of the society. In the result, the link between sustainable development, land tenure systems and soil utilization remains loose and incapable of cementing the relationship between these key parameters.

5. CONCLUSION

The discussion in this article was based on the case of Uganda and used the African feminism perspective, particularly the motherism brand to analyze people's right to land and soil so that these resources can sustainably be utilized. The discussion makes it clear that in Uganda, the concept of land and soil are synonymous, and rights attached to either of them are acquired contemporaneously. Rights to land and hence soil are based on two principles: *jus soli* (soil rights based on birth right citizenship) and *jus sanguinius* (soil rights based on right of blood or familial lineage). Citizenship, which is one of the criteria upon which land and soil rights are based, is a construct of the legal regime informed by the ideology of patriarchy, which creates social strata of women and men, and citizens and non-citizens and accords each of them different land and soil rights. The land law regime in Africa does not specifically provide for the unconditional *jus soli* (birth right citizenship), which would grant every person born in a particular country automatic citizenship and right to land and soil. The common soil rights in Africa are based on the principle of *jus sanguinius* (right of blood or familial lineage), which must be traced to ascertain a person's right to land and hence soil. The fact that soil access rights in many of African countries are based on the principle of *jus sanguinius*, denies many persons automatic land and soil rights, and hence weakens the link between land and soil rights and sustainable development.

Land policies and laws, including constitutions, constructed within the purview of the western ideology of patriarchy ignore the rights of the African people and cannot be relied upon as the best platform to engender sustainable development in Africa based on harnessing the land and soils. Conclusively, therefore, without African governments providing an environment where persons in their countries have equal land and soil rights, it remains hypothetical and a fallacy to assume that African soils can be utilized sustainably under the current land tenure legal regime. The only avenue to rectify the situation on the ground is to use the lenses of African feminism perspective, particularly the motherism brand to re-construct policies and re-enact laws related to land ownership and soil utilization so that they laws accord equal land and soil rights to the poor and rich, women and men and citizens and non-citizens in a bid to effectively implement the principle of sustainable land and soil management.

Based on the foregoing conclusions, it is, therefore, recommended that African governments should: review their land regulatory policies and laws, including constitutions, to be able to grant land and soil rights to all Africans based on the principle of *jus soli*. In the case of Uganda, which was used as a case for this paper, the Judicature Act still requires English common law and doctrines of equity to be applied by Ugandan courts, yet these are difficult to ascertain. It should be amended so that only ascertainable statutory legal principles are applied. The Constitution should be amended to include an automatic right to Ugandan citizenship for all persons born in

Uganda. The *jus sanguinius* principle should only be adhered to where it does not disadvantage any person in regard to land and soil rights in Africa. Future researchers should build on the analysis made herein and step up their advocacy drives to persuade African governments to undertake the necessary reforms in their land regulatory policies and laws.

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