

Debi Chatterjee

HUMAN RIGHTS Theory and Practice

DEBI CHATTERJEE
SUCHETA GHOSH
SUMITA SEN

*Department of International Relations
Jadavpur University, Kolkata 700032*

SOUTH ASIAN PUBLISHERS | New Delhi 110014

Copyright © 2002, South Asian Publishers, New Delhi 110014

All rights reserved.
No part of this publication may be
reproduced or transmitted in any
form or by any means without the
written permission of the publishers.

SOUTH ASIAN PUBLISHERS PVT. LTD.

50 Sidharth Enclave, P.O. Jangpura, New Delhi 110014
e.mail: sapub@ndb.vsnl.net.in

ISBN 81-7003-247-4

Typeset at

ANJALI COMPUTER TYPESETTING

50 Sidharth Enclave, P.O. Jangpura, New Delhi 110014
[Phones: 6925315, 6835713]

Published by

South Asian Publishers Pvt Ltd.

50 Sidharth Enclave, P.O. Jangpura, New Delhi 110014

and printed at

Rangmahal

Pataudi House, Daryaganj, New Delhi 110002

Printed in India

Contents

Foreword	ix
Preface	xi
Contributors	xiii
Introduction	xv

PART ONE | Human Rights and Conceptual Issues

1. Dalits, Women and Environmentalists: Crisis Escalation and Resolution <i>V.R. Krishna Iyer</i>	2
2. Human Rights, Market and the Third World <i>Gautam Kumar Bhat</i>	11
3. Stratified Societies, States' Sovereignty and Human Rights <i>Debi Chatterjee</i>	18

PART TWO | Human Rights and the Legal System

4. Human Rights and the Theory and Practice of Law (International and National) <i>Nazrul Islam</i>	30
5. Constitutional Safeguards for the Dalits: The Myth and the Reality <i>Anuradha Mukherjee</i>	33

PART THREE | Human Rights and Women and Children

6. Children's Rights and Human Right <i>Bela Duttagupta</i>	44
----------------------------------------------------------------	----

that the whole of the state has been declared a "disturbed area". *The Hindustan Times* (New Delhi), 23 June 1999, Supplement p.2.

72. It should be noted that International Humanitarian Law (IHL) does not seek to end war, but calls for the non-subjection of civilian population to the violence of war, seeks the care of the wounded and protection of prisoners of war, and espouses moderation in the manner in which the war is fought. See Langelier, "Children as subjects of International Law: The Conquest of the Ideology of Care-Taking", n. 26, p. 45.

8. Struggles for Rights in the

Great Lakes Region

The Case of Women and Children
in South Western Uganda

MURINDWA RUTANGA

Introduction

Though women constitute the physical majority in the Great Lakes Region, they are political and economic minorities. This marginality has to be understood historically and sociologically. Chanoock (1991) and Mamdani (1996) link it to colonial policy over land ownership. They explain that colonialism engendered inequalities in customary ownership of land, deliberately and systematically destroyed the traditional matrilineal system while condemning it as backward. In their efforts to privilege dominance of patriarchy in the colonies, the colonialists forcefully argued that men would not have incentives to improve land which they did not own and had no powers to bequeath it to their sons. Colonialism therefore systematically tilted the balance in favour of men by transferring the pre-colonial land rights from women exclusively to men. It is this historical explanation which largely accounts for the gender inequalities and the dependency of married women on the goodwill of their husbands for land.

The societies in the Great Lakes region are highly patriarchal, in which new relations are increasingly constructed and shaped for exploitative and oppressive purposes. These have been informing and guiding social and legal practice and they tend to weigh heavily on the women and the children. In some cases they have tended to transform women into custodians of the self-oppressive constructs and praxes, sites of struggle or social actors as struggle and defenders of the rights of their children. These struggles take various forms and courses, ranging from grumbling, quarrels, poisoning, witchcraft, *kibwa nkurata* (love potion), quitting the man's home till her relatives have settled the dispute between her and her husband. Others include intervention, arbitrations, litigations and separations. Arbitration and litigation within the legal terrain bring out women as the main contestants and litigants over agrarian property and as its custodians. This paper focuses on one aspect

of struggle by women and children for rights within the judicial domain.

While Chanock exposes the colonial roots of these gender inequalities he does not bring out the struggle that they generated at the various levels. Mamdani explains the complexity of Indirect Rule — customary law in colonies — and how its main victims were migrants and women. The litigations demonstrate that the judicial domain constitutes an open arena where the aggrieved subalterns have been struggling for their rights. This needs qualification. The legal sphere is open only to those who can afford the costs involved in suing, and pursuing the cases. An alternative to this is the Local Council (LC) court system which was devised ten years ago by the National Resistance Movement government (NRM).

Court cases include sharp-gendered struggles, litigations over property rights, marital rights and maternity rights. These rights are in most cases jumbled up with rights of their children. This normally applies to conditions where children are still physically dependent on the parents. These cases bring out women as the custodians and defenders of children's rights while men are exposed as the violators of these rights. What is most disconcerting is the consistent pattern of men violating the rights of women and children in these cases. Logically it would be the men in such patriarchal societies to offer the highest protection to the children and their rights. The question then, though not answered in this paper is one on the functionality, specificity and parameters of patriarchy within the family. Contrary to this expectation mothers and grandmothers defend them legally *an item*. They are these cases which explain the propinquity of mothers and their children versus men's oppression at household level. This is best demonstrated in situations of polygamy where a man in the process of disinheriting the old wife of agrarian property also disinherits her children.

This view however cannot be generalized. There are cases where women mistreat their own children with a resultant abuse of the children's rights. This may occur in conditions of widowhood wherein the widow engages in extramarital sex affairs and produces children outside wedlock. Other conditions include poverty or selective liking of some children or where daughters marry and their mothers deprive them of the land that their late fathers bequeathed to them.

In trying to understand these issues, this paper focuses on the court cases in Kigezi in southwestern Uganda. Kigezi comprises of the districts of Kabale, Kisoro and Rukungiri. It has a population of over one million people. The people in Kigezi share much in common with the peoples across the internal and international borders, including Rwanda and Burundi in the South and the Democratic Republic of Congo in the West. The paper begins by reviewing one of the oldest court cases of 1960, it then analyses the current cases and it ends with a discussion.

Women Struggles for Their Rights Within the Judicial Domain

The oldest case is between Kakekuru versus her stepbrother Ntomize over forty-six strips of land.¹ This case traces way back in 1960, two years before independence. It was resolved in 1963 and it resurfaced twenty-eight years later. The facts of the case were that when Kakekuru's mother went with her daughter to stay with her stepson, Ntomize. This practice is known as *Okungura*. This customary practice should not be narrowly confined to the Christian imposed definition in its conflict with the customs, culture and local religions. The District Commissioner [DC] had raised this issue in his assessment of the Church Missionary Society in Kigezi. He argued that the new convents were finding difficulty in adjusting their new faith to the old traditions and customs, especially as regards so-called 'inheritance' of women. He explained that under the pagan regime, when a man died it was an obligation on his family to assume responsibility for the widow and the children. The DC hailed this traditional system as a sound system that ensured a roof and position for the dead man's family. He criticized Christianity for trying to upset this system. As he explained, when a widow became baptized, this system became stigmatized as "inheritance" and the women thereby [according to missionary ideas] became a chattel. He reported that the administration was meeting hostility in trying to adjust these matters and that they were occurring in frequency in proportion to the religious zeal.²

In a sinisterly and schematic way, Ntomize chased away Kakekuru and later chased away her mother. Interestingly enough, he retained their forty six strips of land and denied them the right to cultivate them for their subsistence. Kakekuru got married and she took up the responsibility of looking after her mother. She then sued him in court over that land.

During the Court proceedings, the defendant denied having any relationship with the plaintiff and her mother, let alone ever staying with them. He claimed that he had acquired the land in dispute from his father. He however lost the case, appealed to the Kigezi District African Court. He still lost the appeal with costs.³ In passing judgment, Court noted that in Kikiga custom, when a man died, his property was always left to his wife for maintenance. Court noted that Ntomize had the mother of Kakekuru to look after her. He then sent her away but he retained her land. Court ordered him to surrender the land to Kakekuru, so that she uses it to look after her mother. Court further declared that given that Kakekuru's mother did not produce a boy, it would be the daughter, Kakekuru, who would inherit the family property.

Kakekuru resurrected this case twenty-eight years later, suing Ntomize, his brother and fifteen other peasants over land covering two and half villages. After hearing the case the Chief Magistrate went to the locus in quo to investi-

gate this because of the sensitivity of land disputes in this part of the country. At the locus in quo, Court unearthed several problems with this case. First both Kakikuru and Nionize were over sixty years old and Nionize was on his deathbed. Secondly the plaintiff was claiming land covering two entire villages and part of a third village. Thirdly whereas she had litigated with Nionize over land, the land that she was claiming included that of other people with whom she had never litigated. Court therefore ruled that she could not sue them because of the law of limitation as they had been occupying it for over twenty years. Fourthly the plaintiff was using her land undisturbed. This was buttressed by her son's astonishment to the visiting Court of his mother's motive to claim other people's land. Fifthly Court noted that even if the plaintiff's version was to be believed that she did not get all her strips of land that she won twenty-eight years before, she could not get it because execution was time barred. Lastly Court concluded that granting her claim would cause a lot of confusion, chaos and mass suffering as all people being sued in the three villages and their families would be pushed out of the land without anywhere to go or to cultivate. Court therefore dismissed the case.

This case helps in understanding the local custom in regard to women's rights, gender issues and agrarian property rights in pre-colonial and colonial periods. It demonstrates that the property allocated to the household remained the property of that household. It would not revert to the other parties in the community in case of demise or separation. The property rights would pass on to the surviving members of the household.

This case brings out the fighting spirit of women for their rights through Court. It brings out the role of Courts in the restitution of these rights. It also brings out the customary notion of rights of individuals and families and its mechanism for protecting them. It further elucidates on the social and property relation in polygamous families. The resurrection of this case nearly three decades later demonstrates the inability of courts to resolve the land question and agrarian struggle. It also reflects ways in which some people see the courts as mechanism through which they can take advantages to dispossess the weak of their property. In here lies the complexity of Kakikuru's motive. These include the drive for accumulation of property through litigation and using Courts to hit back at Nionize for retributive purposes. The dismissal of this case brings out the humanitarian consideration of Courts of refusing to deprive the masses of people of their means of subsistence for the sake of an individual.

The next judicial dispute over agrarian property was between J. Bandeda versus her brother D. Tisastana.⁴ In this case the plaintiff had lived with her mother all her life while her brother had got married and received his share of land from their mother. He then sold it, together with land still under the con-

tract of his mother and he migrated to Toro. His mother sued those persons that had fraudulently bought her land, won the case and they were ordered to vacate her land. She however died before the order was enforced. On her death, her property was passed on to J. Bandeda. Tisastana refused to come for her burial but he later returned to take over her property. In this society refusing to bury a parent is a very grave offence. In the process of taking over the land he even allotted some land to his son for performing the custom of burying his grandmother. Yet neither had the son attended the burial, nor had he buried the grandmother. It is all these which constituted the background to the suit. Bandeda sued him in the LC courts over her property rights. Tisastana's defence was that he came late and found the burial over. He told Court that he assumed ownership of the land as his mother was already dead, irrespective of the presence of his sister. He told court that it was his mother who had given him all the land that he sold before migrating.

The LC III Court was consternated by Tisastana's land grabbing moves. It noted that he had got his share, sold it including some land still under the contract of his mother. Court deplored as repugnant his grabbing of the land adjoining the residential holding as it contravened the known custom of Bakiga. Court also condemned the grabbing of the other land in other locations without the permission of his sister. Court held that the appellant being a dependent and unmarried was entitled to a share of the estate left behind by her parents until when she married. Court denounced the respondent's practice of giving his son land for imaginably burying his grandmother. Court clarified that had his son participated in burying his grandmother he would by custom be entitled to a token piece of land in appreciation. Court therefore upheld the appeal with costs. Court then contradicted its observation by granting the respondent two strips of land and part of the residential holding - the current home of the appellant - to sell it and transport fare back to Toro. The appellant was to retain the rest. Court also ordered the persons whom he had sold the land fraudulently to quit it so that it reverts to the appellant. J. Bandeda appealed to the Chief Magistrate court against Court orders.

In reviewing the case on August 18, 1992 the Chief Magistrate noted that the respondent had received his share of land and sold it. He returned on learning of his mother's death but failed to go back due to lack of transport fare. Court further observed that the respondent had decided to use part of the land left by their mother to the appellant as she should not use it alone because she was a girl. Court found this reasoning of the respondent very absurd and indefensible. "Having sold his share and migrated he cannot be heard to return to grab that of the appellant simply because she is a woman. That is discriminatory and not allowed in law." Court could not understand why the lower Court had decided to dish away the appellant's land after observing that

the appellant was also entitled to a share of the estate. "Those are double standards which this court cannot condone. The respondent clearly states that he was only waiting for transport back to Toro. He cannot therefore be entitled to take part of the appellant's land simply because the appellant is a woman." Court found that the Lower Court had erred to dish away part of the appellant's land to the respondent. Court therefore allowed the appeal with costs there and below, and decreed all the land to the respondent.

This case reinforces our earlier observation of women's spirited efforts to fight for their rights at all levels and the locus of women in property acquisition. It also exposes the efforts by individuals and groups to deprive the weaker sections of society of their rights and the progressive application of the law to defend the subalterns.

It would be erroneous to hold that it is only the women who sue for rights. The case between Rutabareeba versus his first wife E. Bakazenga demonstrates that men also dispute against their wives over agrarian property, rights and obligations. In this particular case, the plaintiff had married the defendant in church thirty years before and they had four issues. Marriage problems arose in their eighth year of marriage when the plaintiff married a second wife. By the time of the case, he had eight wives. The matter was first put before the Abataka (Elders) and the LCs. His case was that the defendant had deprived him of three pieces of land. He accused her of absconding from her wifely obligation and neglecting him as her husband since their eighth year in marriage. Other charges included her threatening him with violence, failing to feed him and his parents, and refusing to go and see him at hospital when certain people had beaten him.

In her defence the defendant recounted how their marriage was characterized by turbulence, ruptures and struggles from the time the plaintiff married a second wife. She accused him of abandoning her while they were still young in marriage and of denying her conjugal rights. She had first put the matter before her father-in-law and she was instructed to perform the fine of *okuhong'ê* so as to appease her husband. She performed it but it did not alter the situation as the husband continued to jilt her and abandon her house. It is this jilting which explained why she produced only five children, one of whom had died. She told Court that it was her father-in-law who prevailed upon her not to abandon her children but to stay and look after them. She therefore stayed and continued drudging for her husband in different ways including grazing cows. This is a role by men, youths and juveniles. She contended that both litigants worked for the entire dowry that her husband paid for the other seven wives. She accused him of depriving her of three strips of land, two of which were her marriage gifts while the third was her share as a wife. She rebutted his accusations by attesting to court that she had been feed-

ing her husband and that she had sent him food at hospital through their son. The plaintiff conceded to this after their son had testified to this. Court also learnt that the plaintiff had bought land for his seven wives and that he had deprived the defendant of the land so as to penalize her for not working for him in his *engaragazi* [private garden].

The plaintiff won the case at LC I Court and the defendant was ordered to continue working for him and feeding him. She appealed and won the case at LC II and LC III courts. In its judgment on January 27, 1990, the LC III Court established that the land in dispute was the respondent's share of land as a wife, and that it belonged to both parties in exclusion of the other seven co-wives. Court observed that customarily, it was prestigious for a husband to stay with the wife in her house, converse together, feed together and discuss issues pertaining to the welfare of their family. Yet, the respondent had been feeding her husband from outside her house. It went on to disprove and dismiss the charge that the respondent was threatening him with violence and dismissed the appeal with costs. It ordered that the land had to remain for the litigating couple as before. Court asked the appellant to begin treating him with like her co-wives. The appellant appealed to the Chief Magistrate court accusing the trial Court of ordering that his wife takes control of his land, with powers to distribute it among her sons as she wished whereas he had given them their share of land. He accused it of ordering him to chase away his seven wives who were outside wedlock so that he stays with the respondent, his legal wife. These concocted grounds of appeal reflected patriarchal subterfuges which men resort to while litigating with their wives. The appellant court dismissed these grounds as false since there was no evidence on record to support them.

In reviewing this case on April 18, 1991, the appellate Court observed that this case concerned a family feud and that the matter was the problem between the appellant and his eight wives. Court wondered how the respondent could cook for the appellant when he had abandoned her in favour of the other seven wives. While upholding the judgment of the lower Court, Court found it practically impossible to force a man who had seven other wives and probably younger, to have time for the respondent whom he had deserted twenty years ago. Court however ruled out the appellant taking the disputed land to his seven wives. It stressed that he had to look for ways and means to cater for them. Court therefore ordered that the land in dispute be shared into two so that each of the litigants takes one and half strips of land to ensure harmony and amicable coexistence.

The foregoing case demonstrates the tensions, conflicts, ruptures, exploitation and deprivation stemming from polygamous marriages. In this particular case, the gendered drudgery and servitude is deeply rooted in customs and

perpetuated by hierarchy, ideology and motherly attachment to the children. It is within this matrix that the respondent had complied with the request of her father-in-law to stay for the sake of the children. Such a marriage in which a spouse is denied her/his rights yet continues to shoulder the social and economic obligations of the family and society becomes a social prison. As she attested in court, she had resolved to break free from the bondage of this shattered marriage. Her stay thereafter could not be termed as complete marriage as her husband denied her conjugal and other espousal rights, mistreated and exploited her. This case puts into question a custom which shapes women into nuclei of families in patriarchal societies, as bearers of children, while excluding the men of all forms of work and allowing them unrestrained freedom from family obligation with right to contract additional marriages. This calls for a serious reflection on the restraints, responsibilities and obligations of couples within households. It can no longer remain an exclusive monopoly of men to engage in polygamy without any challenge. A man who participates in household activities is despised as being the wife in the family. The ideological import of such social construction needs critical re-examination with the object of correcting them through political and legal mechanisms.

Another important question stems from the extent to which a woman can continue drudging for a man who has jilted her. A custom, which gives platform for hearing such a case by a husband becomes an irresponsible and oppressive custom. There is need to reflect on whether custom is static or whether it can move at a slower pace than society, to which it is one of the ideological and institutionalizing tools. Another question is at what point does the law replace the custom in the definition of justice?

The case between F. Karimawaki and her husband I. Karimawaki over agrarian property enriches our understanding of the land and property struggle in the agrarian setting, and especially in polygamous families. In this case, the plaintiff sued her husband in LCs but she lost the case. Her case was that she purchased land with him in good faith but that he decided to grant the same to his second wife without her consent. She accused him of breaking his promise to her during their agreement that she swore before the Welfare Officer at Kileleshwa. This agreement recognized her as the only person entitled to take over her husband's property in the event of his death. She contended that the defendant was violating these two agreements. These two agreements were never revoked and he was therefore violating them. Their marriage had duly consummated and they had eight issues. She was heavy with the ninth pregnancy. In her appeal to the High Court, she challenged the evaluation of the LC Courts. She contended that they had not written whatever she and her witnesses had stated.

She explicated to Court that when she married the defendant, he did not

have any property. She contended that they had acquired the property together through their combined efforts. From her account her mother-in-law gave her twelve pieces of land as marriage gifts. The plaintiff got two cows and two goats from her father and uncle. She grew sorghum on this land and on the land that she borrowed from her relatives. She used the proceeds from the sorghum sales to buy twelve pieces of land in her father's home area. When her husband returned from Kileleshwa he convinced her to sell those pieces of land and buy land in their home area. She complied, sold the land and the livestock and they used the proceeds as planned. They bought twelve pieces of land and used the rest of the money to build an iron sheet house. This was the land in dispute. She declared to Court that it belonged to the litigants and their children only. She accused the defendant of harvesting bunches of bananas from their garden for his second wife without the plaintiff's knowledge and consent, accused him of stealthily selling their goats, hens and charcoal from their trees and taking the proceeds to his second wife. She told court her ordeals which included redeeming one piece of land, which her husband had sold at Shs. 5,000/=. She informed Court that her husband abandoned her as soon as she raised these issues.

The defendant denied these allegations and attested that he alone had bought the land. He claimed that he did not know where she put the money from the sorghum sales. He accused her of denying his parents food, of refusing to sleep with him as his wife, and of conspiring with her children to assault him. He concluded that this was the reason why he wanted his share of property to feed his second wife. He further accused her of trying to send their children to their uncle's home. Here he was transforming the children into a site of struggle. He alleged that the LCs had ruled that he uses the banana plantation as head of the family before he married the second wife. His parents were their main witnesses. His father supported his second marriage and accused the plaintiff of bad manners. On the other hand, the mother of the defendant testified that she was the one who had given the litigating couple the land as marriage gift. She ruled that they should continue using that land together. What is interesting with her testimony is that she refused to recognize her son's second marriage. What emerges from their testimonies is the tension within the marriage of this witnessing couple. Being subjected to the same crisis in polygamy, the mother was siding with her daughter-in-law while the father was supporting the son. The marriage of the litigating couple seemed a replica the marriage of the defendant's parents.

At the locus in quo Court found that the disputed land and the land as a whole were too small to support the family without additional means. Court failed to comprehend how the defendant could share it between two wives. In passing judgement in September 1990, Court underlined that this land was got

from the combined efforts of both parties minus the second wife and it had to be used by the two minus the second wife. Court went on to cite church marriage as voluntary monogamous marriage for life. Court concluded that the defendant betrayed the plaintiff since he did not divorce her before remarrying. Court accordingly declared the second marriage illegal. Court urged the defendant to start afresh and work very hard with his second wife to acquire property as he did with his first wife. Court rejected the defendant's argument that he had a separate land for himself after his wife had drained property from her father and uncle to buy land. Being aggrieved and dissatisfied by this judgment and orders, the defendant appealed to the Chief Magistrate's Court.

In reviewing this appeal on May 30, 1991, the appellate Court concurred with the lower Court that this property in dispute had been acquired jointly by the litigants. Court reiterated the findings of the lower Court at the locus in quo that the land in dispute was too small to support the family. Court expressed concern that the respondent was likely to face rough time in looking after the eight children alone since the applicant had abandoned her and was caring for the second wife. Court deemed it unfair to remove any inch of land from her. Court concluded warning men against marriages at old age especially when they had had so many children who needed upbringing and land in future when they grew up. Court therefore dismissed the appeal and decreed the land in dispute to the respondent for cultivating for the children.

The case between M. Bashemza and her husband Nzira, over restitution of her matrimonial rights agrarian property brings out women's ceaseless struggles for their rights. It also brings out the contradictory character of the law, having both oppressive and liberating possibilities. The litigant had married in church in 1949, lived together and produced children. Then, serious problems began to arise when the husband married a second wife in 1966. In this suit the plaintiff was accusing her husband of depriving her of two strips of land and household property and taking them to his second wife and of stealthily taking away five goats. She also accused him of denying her conjugal rights and of failing to repair her collapsed house. She averred that she had been forced to seek refuge in a dilapidated cottage put up by her son.

The defendant denied these charges. He attested that he had worked with their sons to build her a reasonable house in which she was residing. He denied the charge that he had used property from the plaintiff on the second wife. He claimed that he had paid dowry for the second wife using wages that he earned from Kigali and that he had acquired land for her through annexation and purchasing. He claimed innocence to the charge of denying conjugal rights to the plaintiff by accusing the plaintiff and her sons of threatening him with violence and chasing him away. It would be beneficial at this point to see similar charges made in the other suits. These include inter alia F. Karimawaki versus and I. Karimawaki, Rutabaretha versus Bakazunga and Nyiransabimana versus Semasaka. Despite their differences in geographical locations, court settings and periodization, all the defendants absolve themselves of this particular charge and transfer it to their jilted wives and children. There is a sort of gender pattern of accusation and counter-accusation over denial of conjugal rights. The men try to blame it on violence by women and their offspring.

In passing judgment on May 30, 1979 the trial Court found that the plaintiff failed to establish her claim upon the two strips of land and that she had also failed to prove her claim that the defendant took the goats. Court rejected her plea to order the defendant to build for her a house. Court held that the defendant and his sons had built her a reasonably good house. He noted that the plaintiff had old sons. He explained that when sons built a house for their mother they would, according to customs, be building it on behalf of their father. Within this logic when a wife had old sons, she could not depend on her husband to build her house in a polygamous society of the Bakiga. Court therefore found it an arduous and impossible task to compel the defendants to build a house for the plaintiff with whom he no longer cohabited and who no longer fed him. Court further absolved the defendant from his spousal obligation and responsibilities by arguing that the defendant might build the house so dangerously that it falls on the claimant. He ordered that since the claimant had able-bodied sons, they should continue to shelter her and build her a house. Court accepted that the defendant could have taken the alleged items from the plaintiff house to the second wife and he valued them at Shs 1,285/=. She therefore appealed to Chief Magistrate's Court challenging the lower Court for failing to evaluate evidence by her and her witness. She challenged the court's holding that the husband had no legal obligation to construct a residential house for his lawful wedded wife. She also contended the courts holding that the defendant could not have taken the goats from the plaintiff while Court had not considered the evidence on this matter.

The subsequent development of this case reveal that filing suit is merely the first step of a long tedious legal process. The events that followed seem to suggest very strongly that the respondent could have reached some mutual understanding with the court clerk to confuse the appellant. Among other things the Court clerk misinformed the appellant of the court schedules for the case. Even Court did not give her summons for hearing to serve on the respondent. In this deliberately created confusion the appeal was heard ex-parte and dismissed with costs on January 14, 1981 for her non-attendance. She received Court order of eviction the same month ordering her to vacate the land in dispute so that her husband occupies it. This was followed by a court warrant to the Court Brokers at the end of March to give possession of ten strips of land

in her possession to her husband. She immediately hired legal services, filed an application in the Chief Magistrate's Court praying Court to set aside the ex-parte judgment, stay the execution of the warrant of eviction and hear appeal. She confessed her unwillingness to this case and explained that the Court clerk had misinformed her of the court schedules for the case. She attested that she frequented the Court to check on the status of the case but that Court had never given her summons for hearing to serve on the respondent. Court granted her application in April 1981.

In reviewing the appeal, Court found inconsistencies and lack of information on the pieces of land which the respondent had given the appellant and which ones she was retaining. Court therefore allowed the appeal and ordered a retrial at the locus in quo by a Magistrate from Kabale. Court declared the appellant as the one to possess the five or six strips of land. The trial magistrate would establish the exact number at the locus in quo Court awarded her total costs of Shs. 6,285/=.

This case brings out inconsistencies and irregularities that characterized some cases. The obvious one was that the lower Court was siding with the defendant with the motive of excusing him of the charges and of his espousal obligation and responsibilities. On the question of building a house for his legal wife, Court first noted that the defendant had built a house for the plaintiff. He then transferred the defendant's responsibilities and obligation to the plaintiff's sons. Court relied heavily on custom but he did not cite any aspect of that custom which allowed a husband to jilt his wife and abscond from his marital obligations. Court went on to justify why it could not order the defendant to build a house for a wife he no longer lived with and who no longer fed him. The Court's one-sided reasoning demonstrated his sympathies for the defendant.

There are ceaseless struggles over agrarian property rights, conjugal and maternity rights and rescuing marriages in polygamous families. The case between J. Nyendahimana versus D. Bareeba and another between B. Bwakuna versus S. Asimwe demonstrate this very clearly. We shall review the first case hereinafter and the second one will come later. In this case, Bareeba had married Nyendahimana as his second wife and he sent away his lawfully wedded wife. They duly consummated this marriage and had six issues. He then sent her away in 1985 and brought back his first wife, Nyendahimana began by seeking mediation of the go-between for their marriage and of the Abaika to restore her rights. The husband refused their mediation and she took the matter to court. She filed in the area Court for the restitution of her marital and property rights, dignity and the rights of the children of motherly care and maternity. The main case was for the salvaging of her marriage which was under threat of obliteration by her husband.

During the court hearing she attested that she and the defendant had worked hard and purchased twenty strips of land and two bars. On his part the defendant attested that no marriage ever occurred between them. He bragged that he had all along been using her as a prostitute and that the litigants had in fact led a happy life. He alleged that he had sent her away because she stole his money. The language of the defendant needs understanding. His language is not peasants' language. It is boastful, derogatory, negativistic and offensive. Denouncing one's spouse in public sphere is offensive to the peasant culture. Even such notions like happy life are not part of peasants' language. They belong to the nouveau riche class in Uganda or those who are aspiring to be in that class and those who are initiating it. Indeed, he was landowner, owned two bars and he brewed beer and sold it. He was actively engaged in capital accumulation from below.

In passing judgment on January 2, 1987, Court held that both litigants were married customarily and that the defendants had satisfied the customary requirement of paying dowry. Court observed that the defendant chased away his first wife from the matrimonial home and stayed with what he termed a prostitute in the same home for a period of roughly twenty years and they had six issues together. Court underlined how this itself reinforced the fact that the litigants had been staying together as husband and wife otherwise no reasonable man would believe the defendants' contention that he brought the prostitute to replace the monogamous wife for such a long time. Court underlined that there was a presumption of marriage since both litigants cohabited and had six children together. Court asserted that a legal maxim *if volenti non fit injuria* was applicable to the defendant's version that he chose to stay with the so-called prostitute. Court held that the litigants had been and were still legally married and that the defendant was a polygamist. Court ruled that the children of the plaintiff could not be regarded as children whose mother was of loose morals.

Court dismissed the defendant's story of theft as concocted since it had not been supported by any of the defendant's witnesses. Court opined that the plaintiff could have kept the money in a safe place from damage by vermin. Court stressed the importance of this view as law looked at both spouses as one person, with all rights to the property in their home. Court explained that in marriage each spouse had moral and legal obligations to the other which conferred status, rights and remedies. Court accepted the assessors' view that under the Kikiga custom, the defendant could not divorce the plaintiff at that stage when they had lived together for a long time and had six issues in their marriage. Court concurred with the prosecution that the defendant was unable to look after the plaintiff children which was evidenced by the fact that their first born was staying with one of the witnesses for the respondent. Court

therefore entered judgment in favour of the plaintiff and ordered for her rejoining her family. Court ordered that she was to be given back a house and land as before. The defendant appealed to the Chief Magistrate's court against this judgment and orders but the appeal was dismissed in February 1994.

The above cases demonstrate that the transition from monogamy to polygamy in contemporary Kigezi is not smooth sailing as projected by the polygamists but is rather conflictual. It puts into question the usefulness of polygamy in present day agrarian economies. After entering the institution of polygamy men fail to achieve the happiness and pleasure that they were aspiring for. Though the physical distance between the houses of the co-wives is too short, the social distances has repetitively proved the furthest and most tedious. The journey of carrying away property from the old wife's home to the newly established one has been proving to be the farthest, most turbulent tumultuous and belligerent. These cases also bring out the different interpretation of the law and ways through which the dispensers of justice can salvage or deny rights to individuals.

Social reality is contradictory and can be cynical, ironical or farcical. Whereas customary law and modern law recognize the men as principally the owners of land in this region, women have proved to be the custodians and protectors of land. This is buttressed by the numerous cases that are filed by women to protect land from the individualized men's interest. The question is why it should be the women with more concern, vigilance and stake in the land than the men should, whereas both parties need products of land for their subsistence. Why should it be the women that value and defend the land from men's mortgaging *okukwaitira* or selling of land surreptitiously for money to buy alcohol? The numerous recurrent cases by wives versus their husband over stealth selling of land and other property reveal a profound problem in this region. The case between J. Sebannya and Nakanyimana, W/o Kazoya, demonstrates this crisis very clearly.

In this case, Kazoya agreed with his wife to mortgage their piece of land containing a banana plantation to Sebannya the appellant in 1988 for one year. They needed the money to treat their sick family members. Then Sebannya and Kazoya connived and concluded a secret deal in which Kazoya made an outright sale of that land to Sebannya. Kazoya spent all the proceeds on buying alcohol. When the appellant later made it known publicly that Kazoya had made an outright sale of the same, Kazoya's wife objected on the ground that there was no compelling reason to sell the land. Another reason was that Kazoya did not inform her about it and she did not consent to it. He had not consulted her and she could not have allowed him to sell it, as it was her customary marriage gift. She therefore confronted Kazoya over this alleged sale and he fled to Buganda, as he did not have anything to do, having con-

sumed all the money in booze. She therefore tried to refund Sebannya's money and get back the land. She sued in the LC system but lost the case in the LC I and LC II courts. She won the appeal at LC III but Sebannya appealed to the Chief Magistrate's court.

In reviewing the case on August 25, 1994, the appellate court pointed out the illegality and clandestinity of this land sale. Court noted that both the seller and the buyer knew that the wife would object to the outright sale of this land. As such the land sale was never done openly and the Bataka did not witness it, as was the custom. No sale beer for the Bataka was taken and the sale agreement was never witnessed by anyone. Court further noted that when the respondent rejected the outright sale, her husband Kazoya fled to Buganda. This was because he had consumed the money and he did not have anything to do. Then when he tried to refund Sebannya's money, Sebannya insisted that the only way to get the land back would be to buy it from him on the on-going market price. Court therefore concurred with the lower Court that the appellant was not entitled to occupy the land as it was a marriage gift and the husband had no right whatsoever to sell it without the wife's knowledge and consent. Court underlined that the wife being a co-sharer in the land had a *locus standi* to object to the husband selling the marriage gift without her consent, and a right to sue the appellant and redeem the mortgage as she did try to do. Court held that the sale was incomplete when she stopped it. Court underlined that equity dictated that the women and her children having lived off that plantation should not duly be deprived of the same by an unscrupulous father who after gluttonously consuming what he secretly could from the appellant had abandoned the family and run to Buganda to hide. Court emphasized that Courts would not be doing justice if they failed to protect such interest in the land by a spouse over marriage gifts which are communal and not exclusively vested in the man. Court deemed this transaction a nullity *ab initio* as Kazoya had consumed all the money surreptitiously before the sale because of fearing that the sale would be resisted outright. Court thus declared that the appellant was not a bona fide purchaser of value since he never cared to investigate the title of the land. Court held that Kazoya's secret deal with the appellant never matured as Kazoya's wife objected to the outright sale in time. Court accordingly dismissed the appeal with costs.

Struggles Over Children's Rights within the Legal Domain

The violation of the children's rights and the resultant struggle over them is deeply embedded in most of the struggle over agrarian property. This is mainly because the children like adults depend on this property for their existence. Thus any tampering with such property whether by human beings, natural or human-made disasters or animals are a direct threat to all the members

of the household including the children. It is the children in such situations who become the most vulnerable. The futuristic threat relates to inheritance. This stems from the fact that it is this agrarian property which the offspring hope to inherit. Thus, effecting such agrarian property implies disinheritance of the children. It is this agrarian property that the members hope to reproduce themselves on. This will be demonstrated by examining some cases.

In the first cited case between Kakekuru versus Ntomize, the plaintiff had lost her father while she was still a minor. When she and her mother went to stay with Ntomize, he abused her rights by chasing her and her mother away while retaining all their land. Kakekuru had to wrest it from him through court action. In a different case, L. Kamashura sued her elder sister M. Nyirakarubye over agrarian property of their late father and late brother.⁸ Among this property was some land which their late father had bequeathed to the young son of Nyirakarubye. The case moved from the area Court up to the High Court. The High Court Judge on December 9, 1996 reinstated this boy's property rights. Another similar case was between two co-widows: S. Byangaba versus D. Byangaba.⁹ In this case, the legal wife was threatening the property rights of child whom the late Byangaba had produced with D. Byangaba.

On the demise of their husband in 1994, the legal wife applied for Letters of Administration of late Byangaba's estate. As soon as she received them, she began legal battles to dispossess the second wife and her household of the fourteen strips of land that she was occupying and utilizing. She lost the case in the LC courts on the ground that the defendant was recognized customarily as a widow of the late Byangaba and not a prostitute. The proof was the son whom they had produced together. The legal wife appealed to the Chief Magistrate's court and won the case. Court ordered her as the legal Administration of the late Byangaba's estate to apportion some land for the son whom the late Byangaba produced with D. Byangaba and give it to the child, mother as caretaker of the same for him. She however did not execute this order by the court. D. Byangaba therefore appealed to court for the restitution of her son's property rights. Court immediately directed S. Byangaba in April 1997 to earmark the share of the child and hand it to the child's mother as earlier ordered.

In the case between G. Nyiransabimana versus J. Semaska,¹⁰ the accusations against the defendant included gross violation of the rights of his orphaned grand children. These four children were under the care of their grandmother the plaintiff. The defendant was accused of depriving them of their three strips of land which had been passed on to them by their late parents. He had put that land to his personal use. She also accused him of abandoning the orphans, not caring for them not taking them to hospital and not

educating them. She also accused him of failing to repair the fallen house in which the plaintiff and the orphans were living, of not providing them with food and other necessities and of refusing to give them bananas from the banana plantation. She also accused them of recounting a crusade to dispossess them of their property.

Despite the defendant's spirited denials of these charges, the trial Court held that the defendant was not caring for the orphans. He was not educating them, not taking them to hospital and he had deprived them of their land. Court condemned his grabbing of the orphans land as "too bad and absurd that orphans without any parents could be abused in such a manner." Court therefore reinstated their land rights and decreed it to them under the guardianship of their grandmother. The defendant appealed to the Chief Magistrate's court and won the case. The wife rejected this judgment, appealed to the High Court and won there in June 1994.¹¹ Frustrated by this loss of property and by the fact that a woman had defeated him in courts he resorted to domestic violence. This lasted until when court put the decree-holder in possession of the land.

The case between Karimurwaki and his wife brought out interesting facts. The litigants had bought twelve strips of land. They had produced eight children and the plaintiff was pregnant with the ninth. The family would soon have eleven people all requiring food, dressing mainly from the wife. What was interesting was that the defendant married a second wife and he abandoned the first wife and her household. He went on to deprive them of one twelve strips of land, stealthily sold goats and hens, sold charcoal from their shambo plantation of trees and took the proceeds to his second wife. He did the same with the banana from the household plantation. He then decided to abandon the house having impoverished them. It is not surprising therefore that she won both the cases and the appeal. It is of interest to note that the defendant could not see the food crisis in his family. Yet it was nakedly visible, as the land in dispute was too small to support the family without other means. Court envisioned a crisis for the respondent, as she was likely to face rough time, looking after all the children alone especially after her husband had abandoned her for the second wife. It was in this ground that court deemed it unfair to remove anything from her. Court took off time to warn men against marriages at old age especially when they would grow up.

The violation of the children's rights and the resultant struggles over them are very elaborate in the case between J. Sebanywa versus Nyakarubimana. Kazoya had deprived his family of the land and banana plantation by clandestinely selling it to Sebanywa and he then spent the money on alcohol. When his wife objected to the sale, Kazoya made no efforts to solve the situation. He instead fled to Buganda to escape the shame, humiliation and family pressures over the land. In reinstating this family's property rights, Court

stressed that equity dictated that the woman and her children having lived off that palmation should not be unduly deprived of the same by an unscrupulous father, who after gluttonously consuming what he secretly could from the appellant had abandoned the family and ran to Buganda to hide. He underlined that Courts would not be doing justice if they failed to protect such interests in the land by a spouse over marriage gifts, which were communal and not exclusively vested in the man.

The case between J. Ngyendhimana versus D. Bareeba partly aimed to restore the rights of her children. Unlike the other cases of poor and middle peasants, this case demonstrated a form of class struggle. Bareeba was a land-owning businessman. This explains why he could easily toss his wives around and describe them with derogatory clichés of being prostitute for his sexual pleasure. When he sent away the plaintiff, he failed to look after them. Some began to stay with other families as Court clearly noted. The trial Court denounced the defendant's absurd claim that he had used the plaintiff as his prostitute for about twenty years. Court upheld that they were legally married and that their children could not be regarded as children of a prostitute. Court also protected their social status and respect by disproving and dismissing as false the defendant's allegations that his wife was a thief. Court also agreed with the assessors that customarily, the defendant could not divorce the plaintiff when they had lived together for a long time and had six issues in their marriage. It was on those grounds that Court reinstated her rights and correspondingly the rights of the children.

The case between B. Bwakumu versus S. Asimwe¹² reflects situations where children's rights have been trampled upon and the children transformed into sites of espousal struggles. The two litigants had been married since 1980 and they had five issues. Then, Bwakumu sent her away on the allegation that she stole his money. He deprived her of the children and put them under the custody of his mother in the village. Bwakumu married another wife and they went to stay in Kabale Municipality. His mother fell ill, and she later died in hospital. Thus the children were all this time without anyone to look after them. It was in these circumstances that Asimwe came back and took them away in 1997. Bwakumu then attempted different methods to get them back, including hiring the police to harass them and their mother. He finally took court action seeking their custody. In his complaint he lamented that these children were staying in town without proper care and schooling. He prayed Court to put them under his custody so that he would provide them with these necessities as required by law and natural justice. He also prayed court to refrain the defendant from influencing them to misbehave.

In response to this, Asimwe filed her "Defence of Intended defendant" in March 1997, accusing the plaintiff of various serious counts. These included

his failing to provide necessities for life to the children since 1993 and selling all the household land including the toilet at the home where the children were residing. She accused him of allowing those who bought the land to destroy crops that the defendant had planted to feed the children chasing her away and then abandoning the children alone in the village while he went to live in Kabale Municipality with a second wife. Other charges included his failing to put up with the children and chasing them away even in the absence of their mother, depriving them of their personal cows and goats and using them to pay bride price for his second wife. She accused him of abusing "the human rights" of these children, "still of tender age and cannot provide for themselves and therefore is deemed to be against the dignity, welfare and interest of the defendant to be deprived of her children." She accused him of violating their daily life trend by depriving them of their shelter and property that were assisting the defendant to look after them evidenced by hiring armed Police to shoot at and scare the defendant and the children. She accused him of constantly harassing the children everywhere.

She prayed court to order the plaintiff to respect the children's rights, desist from harassing them, reimburse them in their residence at Shooko, annual the land sales so that they repossess it for the maintenance of the children. She prayed court to order the illegal purchasers of that land to pay compensation for the damaged crops of the defendant and the food which they harvested as a result of the illegal land sale. She prayed Court to order the plaintiff to maintain Shs. 50,000/= monthly payment to the defendant and provide for liability to its increase where need arose. She concluded appealing to court that as the intending plaintiff was liable for the abuse of human rights of both the defendant and the children the situation on their human rights abuse would improve if only court could address these issues rather than the oppressed and the justice to pine when the oppressor was feasting and the children were weeping. The case was finally dismissed on June 4, 1997.

While the preceding cases bring out mothers and grandmothers as the natural defenders and custodians of their children's rights especially versus the polygamous men, the question still is whether the children rights are an integral part of women's rights. What is it that makes children rivals of their fathers and what is it that makes the women take sides with the children? What is it that makes mothers become more inclined to their children and their rights than the fathers? Is it a natural maternity or social obligation for mothers to protect their children's rights which therefore would be a basis for recognition of their interwovenness and inseparability? To what extent can it be held that all mothers protect the rights of all their children? Aren't there situations where mothers abuse and violate their children's rights? In what circumstances do children dispute with their mothers over rights? The case between

Nyiamushwa and her son Katekamu will shed light on some of these issues. This is a case in which a mother abused the rights of her children after the demise of her husband. It also sheds light on some social problems that stem from early widowhood.

Nyiamushwa was married to Katekamu's father and they had three issues together, Katekamu and two daughters. Her husband died intestate. Nyiamushwa then engaged in extra-marital affairs and produced another son and two daughters out of wedlock. In this society, her engagement in extra-marital affairs was in itself a stigma to the children. Problems began to emerge when she abused the rights of the first three children by neglecting them. She put her care on the children born out of wedlock. The daughters got married and she used the dowry from the first two daughters to purchase land. Katekamu also wanted to marry and he asked her for cows to pay dowry. She told him that the cows were not from the daughters of Katekamu's father but from her other daughters born out of wedlock. This embittered Katekamu and he embarked on selling his late father's estate. He also tried to deprive Nyiamushwa of the land that she bought with the dowry from Katekamu's sisters. It is this that constituted the background to her court action seeking to stop him from selling the land.

In passing judgment, Court held that the defendant was heir to his late father's estate to the exclusion of any subsequent issues by his mother. Court held that these had no *locus standi* to participate in his late father's property. Court held that the defendant had a right to sell off any of his father's property but leaving his mother with the matrimonial home and some land for her subsistence. Court ruled out the defendant's claim over the land, which the plaintiff bought with the dowry from the defendant's sisters. This land was not acquired using the defendant's father's money or other property. The plaintiff rejected this judgment and orders and she appealed to Chief Magistrate's Court. In reviewing this appeal, Court observed that the appellant and the first three children were the only ones who had survived the deceased alone. Court ruled that these were the only ones entitled to his estate. Court noted that while the appellant was correct in principle to refuse to give the respondent anything from the dowry, he in charity ought to have received something since the girls must have grown on the estate of the respondent's late father. Court concluded that after the appellant denied the respondent a share of his step-sisters' dowries, they should not share on his father's estate.

It would be erroneous and a misrepresentation of social reality to assume that children have not been struggling for their rights on their own terms. The case of Musime, a minor against her two uncles, J. Tibenderana and V. Byaburo¹³ brings out some of the ways through which rights of orphaned minors are violated and the process through which the minors may struggle and win

them back. It also brings out ways through which the law helps in reinstating the rights of minors.

In this case, her father had bought three strips of land from one Kayogoza in 1984. Upon his death the land passed on to Musime. As the saying goes, there cannot be a stupid dog when death strikes a cow. Kayogoza's mother fraudulently resold the same to the two defendants in 1989. Musime therefore took action in LC courts for trespass over her land. In entering judgment in favour of the plaintiff, the LC I Court found Kayogoza's mother guilty of stealthily selling land that her son had already sold. She was also found guilty of getting some people who had witnessed the original sale to witness her fraudulent land sale. The other two defendants were found guilty of land trespass, taking possession of it and utilizing it in defiance of instruction by the LC Court to stop all activities on it. The two defendants rejected this judgment and orders, appealed to LC II Court and they won the case. Musime then appealed to LC III Court and won the case. The two respondents appealed to the Chief Magistrate's Court, challenging the lower court for deciding the case in favour of the respondent without testimony by the trial court for refusing evidence by the person that sold the land to them. They contended that the person who sold the land to her was young and unmarried, and that the respondent was a minor who could not file suit in her name.¹⁴

Meanwhile, the appellants continued to use the suit land in defiance of the LC court injunction to halt all the activities on the same till the case was disposed of. Musime therefore took two steps backwards. She referred the matter to the LCC. The LC III communicated the matter to the Chief Magistrate's Court underscoring the potential dangers of his insolent trespass. Court responded by ordering an immediate injunction on the suit land. Musime also filed suit in the area court against the wife of the first appellant and the mother of the second appellant for trespass on her land. On learning of that in a lower court, the lawyers of the appellant wrote to the area Court asking him not to entertain that case as it was already before a higher court.

Having litigated as a minor, Court appointed one of Musime's uncles as her guardian *ad litem* on June 21, 1995 for purposes of defending this appeal. In the subsequent court hearing the Chief Magistrate rebutted the argument by Counsel for the appellants that the respondent had no *locus standi* to use in her own names because she was still a minor. Court explained that minority in proceedings was a procedural requirement founded under the Order 29 Civil Procedure Rules but not on substantive law. Court ruled that minority was a non-issue in LC courts. This smashed the cornerstone of the appellants' case. They lost interest in the case and it was therefore dismissed on April 4, 1996.

These cases show that the women play crucial roles in articulating the rights of children. They also bring to light how men are the main violators of

children's rights. This increases with the movement from monogamous to polygamous marriage. In the process of resolving their marital disputes, the parents sometimes transform children into sites of their struggle. In such situations, both litigants present their cases in the name and interest of the children. They purport to defend their children's rights. These cases show how deprivation of parenthood through death or marriage breakage¹⁵ creates conditions where children's rights are easily violated. These conditions increase the children's suffering, destitution and subalternity. Children who lose one of the parents have high chances of having their rights abused especially if the surviving parents remarry or engage in extra-marital sex and even produce children out of wedlock. There are many cases that reveal ways through which the rights of the orphans are violated in case the widower remarries. These include property rights, feeding, healthcare, parental care and welfare, education and clothing.

Relatives tend to take advantage of the demise of their deceased relatives to deprive the surviving orphans of their rights. The children may stand up to defend their rights through various means ranging from fights to litigation in different form. Their efforts or situations may invoke help from members of the community and the administrators of justice. The above cases reveal how customs and the courts of law have safeguards for protecting the rights of children. They demonstrate how polygamy is a vice to children's right. They further reveal that any struggle between parents will impinge on their children's rights. They also demonstrate the destabilization impact on the children's right. Their import is that rights are not freely given by anybody but are rather fought for, that though children's rights may not be clearly defined and disregarded from the parents rights still they are not intertwined and inseparable. They also underline that though parents try to defend their children rights still the children's rights cannot be subsumed under the rights of their parents. Doing that would be giving the parents leeway to encroach on the children's rights.

Concluding Discussion on These Struggles for Rights of Women and Children

The foregoing cases bring out struggle for rights of women and children. They demonstrate that there have been numerous social and legal struggles by women against men over property rights, conjugal rights, maternity rights, responsibilities and obligation and irresponsible property sales. Most marital disputes are bedrocked in polygamous families. One explanation for this is that the husbands take on other wives without making prior arrangement for them. They do not have additional wherewithal, shelter and property for the incoming woman. They therefore find a solution being in dispossessing the

old households as the few family possessions are transferred to the new marriage. It also results in intricate feuds between spouses, co-wives and children and families.

Thus, additional marriages have been creating insurmountable problems. First, the men are not ready to discuss with their old wives their intended marriages. They instead assume belligerent stances and they usurp and monopolize power over the rest of the family members. Such men's actions and utterances become unquestionable law in their homes. After taking on additional wives, they embark on coercing the old wives with the aim of depriving them of agrarian property in their possession. Even some men send away their wives so as to get room to marry other wives and access the property without any hindrances. To their shock, the wives move straight to court for judicial recourse instead of going to their father's homes. Thus while the men speak tough their wives have been proving stronger actors than the weak women that their husbands imagined them to be. They have been putting up formidable, successful struggle, for their rights and rights of their children. The cases reviewed in this paper and the unspoken cases filed in courts annually demonstrate this. This is notwithstanding the costs and the long, tedious litigation processes. Their prompt appeals to the higher courts in the pursuit of these rights reflect their awareness about their rights and their seriousness about them, the methods to struggle for them and their vigilance in defending them.

The state, churches and schools have not tried to preach the virtues of monogamous marriages and the evils of polygamy. The state and its related organs went further and enacted laws against polygamy. Scholarships, NGOs and associations like the Family Planning Programme and Mothers Union have been doing the same. The court cases show that polygamy opens up new arenas and methods of struggle. What is worth noting is that while polygamy does not add wealth and property to the family other than increasing population and socio-economic problems, it has continued to flourish in these poorest circumstances. At the same time the rise of unspoken litigations seem to question the appropriateness of Western Christian marriages in the contemporary societies. Are they a sham, pretentious pseudo or mere fashion? Why do people engage in them and priests administer vows to the wedding couples while knowing very well that it will not be long before the men go in for more wives?

The litigations bring to light the various forms of injustices to which women and their offspring are subjected and the high vulnerability of their marriage, property and espousal rights in the rise of polygamy. This is buttressed by the final court judgments that are entered in favour of the litigating women. The persistent struggles that emerge as soon as the husbands marry second wives, coupled with raging agrarian crisis in the region put into ques-

tion the usefulness of polygamy in these societies. They also question the tenability of pre-colonial social constructs whose roles have been replaced or overtaken by capitalist development and the modern state. Another issue is how these struggles and mechanisms for defence of the rights of women and children can be strengthened. These cases do not reflect the litigiousness of women but rather constitute a critique to the forces that continue to violate the rights of women and children.

The contestation normally begins from their families. These may be in form of quarrels, grumbling and disagreements. They may begin by seeking interventions by family members, elders and relatives and close family friends. Others may develop into actual fights and bodily harm. This politics soon leaves the internal domain for the external domain. The contestation from their families and locales shifts from the internal arbitration mechanisms to the judicial domains. It has to be noted that though the local arbitrators and the courts have been interceding to restore these rights, the initiative has to be taken by the individuals whose rights are threatened or violated. Another point to note is that these institutions sometimes play contradictory conflictual roles and injustices. These cases bring out the different interpretations of the law and how the dispensers of justice can apply the law to salvage or damn the individuals' rights.

While the local interventions and courts have been assisting to resolve these struggles, some have knowingly or unknowingly, willingly or unwillingly passed judgments in favour of the oppressive forces engaged in the violation of the human rights. This has had negative consequences for muzzling justice, the rights of the women and the children. Some dispensers of justice sometimes deliberately misinterpret or manipulate the law or a judgment so as to arrive at a certain conclusion. The cases between Rutabareba versus E. Bakazenga Semasaka versus G. Nyiransabimana, F. Karimurwaki versus I. Karimurwaki, Bashemeza versus Nzira, Sebanyanya versus Ntakurumana, and Musime versus Tibenderana and Biyaburo are very demonstrative. All these reveal the imperativity of vigilance of individuals in the defence of their rights. The lesson from these contradictory and ambivalent judgments is that the onus of defending one's rights is on the individual himself/herself. Other people and institutions can only offer complementary support but the onus is on the individual's vigilance. This is further demonstrated by the cases over children's rights. Even parents can not be faithful custodians of their children's rights. There are many struggles between children and their parents over their rights. Another important lesson from these litigations is that struggle for rights is a continuous process.

As already shown some men chase away their wives so as to gain unrestrained freedom to sell the available agrarian property. One such case oc-

curred in July 1996 when a man sent away his legal wife because of her objection to his intended sale of the courtyard of their homestead. The wife appealed to the Abataka [Elders] but failed. She took the matter to the area Court and successfully got an order barring the land sale and reinstating her marriage. In another case, a man bequeathed land to his daughters *inter vivos*. After his demise, their mother conspired with her sons to defraud the daughters of the land. She sold it and the daughters came to claim it. They sued her in LC court and won the case. She appealed claiming that her husband had died intestate. Her daughters produced supportive evidence to their property claim. She lost the case and Court ordered her to give back her daughter's land. It also needs to be noted that in mortgaging land men place their families in conditions of deprivation. The families have therefore to try and retrieve the land while also seeking other means of survival. The case Ntakurumana versus Sebanyanya is very demonstrative of these crises.

The case of Kakekuru versus Ntomozo sheds light on the local custom in regard to relation, property relation, inheritance, and relation between households in polygamous families, and how they have been changing over time. This case shows that property of a woman remained distinctively under household for the upkeep of the members of her household. This reveals the mechanism that society had put in place to ensure continuity, social reproduction of the families and society. Society put primal importance on the family and its social and biological reproduction. The case also brings out the fighting spirit of women for their rights. It further sheds light on the agrarian property relations in polygamous families. The resurrection of the case twenty-eight years later demonstrates the limitation of judicial solution. Court by nature cannot address the socio-economic and political sources of these struggles over agrarian property. As such, they solve the individual cases that are filed in courts rather than solving the actual causes. That is beyond the limits of the courts. The solutions for the cases of these social and economic disparities and struggles lie within the politico-legislative domain and can only be addressed through a profound agrarian reform.

The case of Kakekuru versus Ntomozo brought out the rights of women in inheriting agrarian property in this region. Kakekuru won back the land when she was already married in another clan. This illustrates that property was not strictly confined to any society. It could and did move with the women to the society of marriage. Thus, femaleness or marriage was not a condition for preclusion of women from inheritance of agrarian property in their parents' homes. Their share of property would become unquestionably theirs. They had unrestrained rights to do whatever they wished with it. This is further buttressed by the case between Kamashura versus Nyirakaruhije. While this case brings out the intense struggle between sisters over inher-

lance of agrarian property, it also brings out two other important aspects. The first is that marriage does not efface the women's position and rights in her parental home and that maternal relatives may bequeath property to the offspring of their daughters.

It is this property right that the nine petitioners in the *Kamashara versus Nyrakuntile* case were challenging. They petitioned the High Court on July 8, 1997, challenging its decision to give the decree-holder the land which was feeding seven orphans of the late brother of the litigant sisters. The petitioners argued that the decree-holder had got married thirty years before and that they had her own family of eight children in her area of marriage. They argued that she was trying to disinherit the orphans so that her children could take over the land. Their expressed view was that property cannot and should not move with women on marriage. This form of argumentation was contrary to custom and law. It is this notion that is increasingly gaining currency in this region. The poorer people become, the more they seek to hold on to whatever minuscule agrarian property that is available. This retention of property constitutes the main politics at household level. The sons are increasingly becoming preferred in sharing this agrarian property. The facts of that case were that the land belonged to the decree-holder by right. She had got part of it from her late father while another part of land belonged to her late brother. He had given her written authority to take care of his share of the land. Her late father had given another piece of land to her son *inter vivos*. The late father of the orphans had received his share of land and sold it. It was part of this land the respondent had redeemed.

These cases demonstrate the ceaseless struggles by women and children for their rights. They expose the men as the main threats to their rights. After receiving their due share of property from their parents, some men wait for the demise of their parents to get opportunity and grab the remaining property from the sisters. Even some of them grab land from the parents and fraudulently sell it or use it. Agrarian property relation have over time developed stronger ties and in the process have unloosened the old social and biological bonds. If blood was thicker than water in non-commodity production times, private property has become the solvent to blood. The judgments of these have been exposing the masculinized property aggrandisement. One magistrate denounces it as "sheer male chauvinism of medieval years to imagine that a woman cannot hold land and that she cannot pass on title to another party".¹⁰ These cases bring out the growing male infringement on the women's property rights in this region. These agrarian struggles bring out fundamental relations that are always missing or muffled up in many cases and in scholarship on property relations in the agrarian economies. Thus these cases help to broaden the understanding of agrarian property relation beyond the

celebrated patriarchal claims and deprivations.

The litigation between sisters and their brothers unravel the growing machismo consciousness and praxis that aim at disinherit female relatives. The female relatives have been battling this out in different arbitration and legal fora. This is buttressed by the fact that the court actions are taken by the females for their rights against encroachment of their property rights by their relatives and other members of society.

Many women normally resort to Courts after exhausting all the other available channels of appeal for conflict resolution. Addressing their grievances becomes most urgent and imperative as the women require this property for the reproduction of their households. It needs to be noted that men in this region are abstracted from the household production processes. The responsibility of feeding the members of the household is socially and customarily on the women. This becomes more problematic when husbands take on other wives or when they embark on alcoholism and concubinage with a corresponding resultant of transference of property from the old households to the new or to the market for sale. This is perilous to the household economies that are already confronted with the raging agrarian crisis.

Suffice it to note that the peasant household economy is defined by the agricultural production on the available land and the developments of it, the harvested crops, livestock and fowls in household, the homestead and the instruments of production. They are these assets which the women's offspring will inherit. Any threat to this economy is a danger to the household and the children's future inheritance rights. At the same time it is this household economy and the woman's children that define the *locus standi* and legitimacy of the woman in the society. These assets and the woman's security in marriage explain the growing importance of marriage gifts. Marriage gifts are increasingly gaining socio-political and judicial significance in this region. While the gift is aimed at providing the married couple with a base for establishing their independent home, they also manifest the whole family's recognition of the recipient woman as its member. Wherefore the persistent bitter battles by women against their husbands' deprivation of this agrarian property through sale, mortgage or transference to the other wives. These women's bitter struggles for their rights are in effect also a struggle for power. The persistent loss of cases in courts and arbitration centres over agrarian property and other rights is a clear manifestation of loss of power over property and implicitly over all those who depend on it. It reflects the new shifts from taking women as chattel to new realizations of their being legal, social and political entities in the society. It is loss of power that frustrates the men and leads many of them to resort to domestic violence. The case of *Nyiransabimana versus Semaska* demonstrates this very clearly. It needs to be noted in passing

that this domestic violence is gradually frustrated as many women in Kigezi respond to the challenge of physical violence with appropriately. Though not brought out clearly, it should be noted that women in Kigezi defend themselves in different ways, and such conflicts do not normally end until when the women have won the battles. As the local saying goes, you do not call a child who is not yours to come and you beat him/her but call it so that he/she comes and you fight. Unfortunately as it may appear, it is this form of balance of forces that has been checking the upsurge of domestic violence in Kigezi. It is this fear of being beaten and humiliated by women that partly explain why many of the young men from Kigezi prefer to marry women from other nationalities and tribes other than marrying women from Kigezi.

Women have increasingly become inseparably interlinked with agrarian property in the Great Lakes Region. It is this that makes agrarian struggles appear *prima facie* as gender struggles. In separating themselves from household production processes and taking to permanent alcoholism and lousing, men have unknowingly lost their effective control over agrarian property to those who work on it. The legal struggles between sisters versus brothers and/or other relatives over agrarian property also bolster the customary and legal rights of women over their parent's property. Women's successive successful litigation versus the men are demonstrative enough of the legal recognition of women's rights and their focus in the utilization of this property. Both custom and the law are not blind to the indispensability of women in the feeding and maintenance of the household and more equally so, their dependence on the available household property to provide these requirements, regardless of their quantum and quality. The successful legal struggles for the children's rights by their relatives and guardians or by the children themselves confirm the indelible fact that rights are not given but are fought for by the affected persons themselves regardless of age, gender and relationships. They also underscore the imperativity of vigilance in the defence of these rights.

The paper has gone in detail to demonstrate that the victims themselves were the guarantors, guarantors and protectors of their rights. All these cases are clear manifestations of the ongoing struggles against machismo and all its vice in the Great Lakes Region. They demonstrate how human rights are a product of struggles and how they be separated from the people. They are not transplantable or exportable commodities as the West would like the world to believe. This is because human rights are not merely ideas, which can be preached or even smart bombs, which can be targeted at other societies. Rather they are a cumulative of long historical, socio-political, economic and legal struggles. Societies have been ensuring their upholding and strengthening through custom, laws and practice. Western impositions and conditionalities for human rights on Third World countries are a mere reflection of the

relationship and economic transactions between the west and the local leadership. All that the west demands is that these individual countries disguise or they remove from public view their brutalities and clumping down of the opposition members. Suffice it to recall that a state is essentially a negation of certain rights. It is an armed institution whose organic composition is force and whose language is coercion. Whereas a state may abuse human rights of particular sections of society, especially of those not in agreement with its rule, it does not and cannot reach all the spaces in society. What comes out clearly from the examined cases is that human rights in the agrarian setting are continuously violated by certain members of that particular society. The victims of such violations do not sit desperately in wait of external liberators. They instead struggle on their own for their rights in different fora using different means and methods. Their main forms of struggle are physical, political, judicial and quasi-legal arbitration.

It needs to be noted that despite the successful conclusion of these individual cases, all pot them reflect a search for individual solutions to social problems. It is this, which explains the limited and short-term character of these solutions. Laws and increasing efficiency of courts cannot be deterrents to the violation of human rights. The same would apply to addressing the increasing inequalities in power relations between genders, generations and nationalities. The major problems would still remain and would reproduce themselves in new forms, with new dynamics. All these point to the imperativity of profound people-centred agrarian reforms taking into account all the wherewithal for their reproduction.

Acronyms

Abataka	Elders
Engaragazi	Private gardens for private use
Kibwa Nkurata	Love potion
DC	District Commissioner
Okuhungura	A practice in which a male relative of the deceased husband takes over the roles of caring for the widow(s)
LC	Local Council
NRM	National Resistance Movement
Okuzira	The politics by the elderly in-laws of the husband to refuse to enter the house of the woman who aggrieves them
Okuhonga	Politics of abatement to an elder or husband who is practising okuzira
Okukwatiriza	Pawning or mortgaging property for a loan
Shamba	Plantation

References

- Barya, John Jean and Oloka Onyango, J. (1994) *Popular Justice and Resistance Committee Courts in Uganda*. Kampala: FES.
- Bataramba, J.J. (1981) "A study on the measurement of time spent by women on farm and non-farm activities in Nyakagye Sub-County, Rukungiri District." Special Project: Faculty of Agriculture and Forestry, Makerere University (Unpub.).
- Bernstein, Henry et al. (1992) Eds. *Rural Livelihood: Crises and Responses*. Oxford: Oxford University Press.
- Chango, Machyo (1963) *Land Ownership and Economic Progress*. London: Lumumba Memorial Publications.
- Chanock, Martin (1991) "Paradigms, Politics and Property: A Review of The Customary Law of Land Tenure," in Kristin Mann and Richard Roberts (Eds.) *Law in Colonial Africa*. London: James Currey.
- Ddungu, E. (1989) "Popular Forms and the Question of Democracy: The Case of Resistance Councils in Uganda." Kampala: CBR Publications, Working Paper No.4.
- Dennon, D. (ed.) (1973) *A History of Kigezi in South West Uganda*. Kampala, Ed. May (1957) *The Chiga of South Western Uganda*. New York: Oxford University Press.
- Fendri, I. "The Rural Question and Democracy in Uganda." *Mawazo*, Vol. 6, No.1 June 1985.
- Kafureka, B.M.L. (1992) "The Dynamics of the Land Question and its Impact on Agricultural Productivity on Mbarara District." Kampala: CBR Publications, Working Paper No.25.
- Kagambwe, E.R. (1972) "Causes and Consequences of Land Shortage in Kigezi." Geography Department, Makerere University, Occasional Paper No.23.
- Kigye, J. (1993) "Land Dispute in Unganda: An Overview of Land Disputes and the Dispute Settlement Fora." Kampala: MISR.
- Langlands, B.W. (1971) *The Population Geography of Kigezi District*. Occasional Paper No.26, Geography Department, Makerere University.
- Mateja, A. (1987) "Capitalist or Household Economy: A Profile of African Farmer." Presented for *Third Symposium of The Special Commission of Africa*, Arusha.
- Mamdani, M. (1996) *Citizen and Subject: Contemporary Africa and The Legacy of Colonialism*. Princeton: Princeton University Press.
- Mamdani, M. (1987) "Extreme But Not Exceptional: Towards an Analysis of the Agrarian Question in Unganda." *Journal of Peasant Studies*, Vol. 14, No.2.
- MCD Beckles, Hilary (1989) *Natural Rebels: A Social History of Enslaved Black Women in Barbados*. London: Zed Books Ltd.
- Meillassoux, Claude (1981) *Maidens, Meel and Money: Capitalism and The Domestic Community*. Cambridge: Cambridge University Press.
- Mugisha, Robert (1992) *Emergent Changes and Trends in Land Tenure and Land Use in Kabale and Kisoro Districts*. Kampala: CBR Publication Working paper No.26.
- Murinda, Rutanga (1994) in Mamdani M. and Oloka Onyango (Eds) *Uganda, Social Movements: Studies in Living Conditions, Popular Movements and Constitutionalism*. Kampala: Centre for Basic Research and JEP.
- Murinda, Rutanga (1989) *The Conditions of Labour Commercial Daily Farms in Kabale District*. Kampala: CBR Publications, Working Paper No.1.
- Murinda, Rutanga (1991) *Myabingi Movement: People's Anti-Colonial Struggles in Kigezi 1910-1930*. Kampala: CBR Publications, Working Paper No.18.
- Murinda Rutanga (1996) "A Historical Analysis of The Labour Question in Kigezi District," in Mamdani M. (Ed.) *Uganda: Studies in Labour*. Dakar: CODESRIA, pp. 53-135.
- Mustanga, M.T. (1970) "Polygamy in Kigezi." *Uganda Journal*, Ngwogoza, P. (1969) *Kigezi and its People*. Nairobi: East African Literature Bureau.
- Sabiti, Robert (1997) "Agricultural Extension in Kabale District." Mimeo.
- Shann, T. (ed.) (1987) *Peasants and Peasant Societies*. London: Penguin.
- Shyl, G. Issa (1985) Ed. *The State and the Working Class People in Tanzania*. Dakar: CODESRIA.
- Ssempebwa, E.F. (1977) "Recent Land Reforms in Unganda." *Makerere Law Journal*, Vol 1, No.1.
- Uganda Government "Acts Supplement No. 1 Act 1: Local Government Act 1997."
- Uganda Government, "Statute No.9. The Resistance Committees (Judicial Powers) Statute 1987."
- Uganda Government, "Statute No.9. The Resistance Council and Committees Statutes, 1988."
- Uganda Government, "Statute Supplement No. 8: The Local Governments (Resistance Council) Statute 1983."
- Turyahikayo-Rugyema (1974) "A History of Rukiga in South Western Uganda and Northern Rwanda 1500-1930." Ph.D. Thesis: University of Michigan, Ann Arbor.
- Uganda National Council for Children, 1994. *Equity and Vulnerability: A Situation Analysis of Women, Adolescents, and Children in Uganda*. Uganda Government.

Notes

1. Civil Case 49/63.
2. Report by DC, Kigezi District, 1929. One of the most recent related cases is MKA 19/96: Bizanvuga P. Versus Bilega. In this case, the plaintiff was litigating to take over the window of his late brother.
3. Civil Appeal MKA 372/63.
4. MKA 74/90.
5. Okizra-okuhonga is petty politics at household and family levels. It is mo-

nonpolitized by husbands and elderly parents. Once aggrieved by the actions or words especially of daughters-in-law, the aggrieved person severs all relations with that household. This is politics of *okuzira*. Custom demands that the one who causes these grievances has first to normalize relations by appeasing the affected party through *okuhonga*. *Okuhonga* is reconciliatory politics. It involves preparing delicacies including meat and brewing beer or porridge. Here, custom prejudices the elders in the family and the husbands as always right. This has increasingly become a political weapon in the hands of polygamous husbands. They can afford it because they will be having other wives to provide them with their requirements. Men with one wife cannot afford the luxury politics of *okuzira* as they will be hurting themselves. They instead resolve the contradiction between them and their wives through other crude methods such as assaults, fights, initially, concubinage, and refusal to grant the views material and social requests.

6. Civil Appeal MKA No. 47/79.
7. Civil Appeal 103/93.
8. Civil Appeal 37/95.
9. Civil Appeal MKA 73/94.
10. Civil Suit MKA 27A/72.
11. Civil Appeal MKA 103/.
12. Civil Suit MKA 16/97.
13. Civil Appeal MKA 62/94.
14. Civil Appeal MKA 62/94.
15. The concept "marriage breakage" is a more appropriate term here than others like "divorce" because of the various forms which failed marriage take in this region. The couple may separate but the wife stays in her marital home, regardless of whether they have children or not. The case of Rutabareeba versus Bakazenga is very demonstrative.
16. Judgment by Chief Magistrate on March 12, 1990, Case No. CA MKA 18/89. This was between Barnukwasha versus her brother M. Mburupwegamo and her sister-in-law V. Keihikirwa.

PART FOUR

HUMAN RIGHTS AND MARGINAL GROUPS/INDIGENOUS PEOPLES