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## Challenges in the implementation of Women's Human Rights: Field Perspectives

Conference Paper: The Winners and  
Losers from Rights-Based Approaches to  
Development

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## Introduction

The paper hereby presented is extracted from a research currently undertaken on the linkages between Women's Human Rights, Domestic Violence and HIV/AIDS from a socio-legal and anthropological perspective in Uganda. The study's scope is to critically assess the "formal" and "informal" judicial institutions and bodies that are accessed by women living in poor urban neighbourhoods to resolve conflicts related to domestic violence.

This paper shows the complexities related to the implementation of women's human rights with regard to 1) substantive legal issues: the application of international human rights law in national legislation and 2) structural challenges: access to justice and the legitimacy of "formal" judicial institutions.

The paper is thus structured as follows:

- Chapter 1** focuses on key and fundamental violations of Women's Human rights in two intrinsically related categories: 1) violations related to women's right to dignity and life focusing on SGBV and HIV/AIDS and 2) violations related to women's socio-economic rights. Based on the statistics available, the chapter seeks to provide an overview of the extent of the problem in Uganda.
- Chapter 2** provides an analysis of developments in National Legislation in relation to key women's human rights issues discussed in Chapter 1 above. It examines the extent to which, the content of present and pending national legislation provides an adequate response to current violations of women's human rights in Uganda.
- Chapter 3** assesses the structural challenges related to the low access to one "formal" institution by the poorest section of the population in relation to women's human rights abuses described in Chapters 1 and 2 and highlights the set of "informal" institutions that are currently accessed. On this basis the chapter seeks to address the problem of institutional legitimacy.
- Chapter 4** concludes with thought provoking questions for further reflection and debate.

## 1 Fundamental violations of Women's Human Rights

This chapter focuses on fundamental violations of Women's Human rights in two intrinsically related categories: 1) violations related to women's right to dignity and life focusing on SGBV and HIV/AIDS and 2) violations related to women's socio-economic rights. Based on the statistics available the chapter seeks to provide an overview of the extent of the problem in Uganda. These two categories were selected because of their fundamental nature. Without the protection of these two central categories of rights, it is difficult to foresee how any prospective sustainable development is likely to be achieved.

### 1.1 Violations of women's right to dignity and life: SGBV and HIV/AIDS

"Sexual violence", "gender-based violence" and "violence against women" are all terms that are used interchangeably.

*"All three terms refer to violations of fundamental human rights that perpetuate sex-stereotyped roles, that deny human dignity and the self-determination of the individual and hamper human development. They refer to physical, sexual, and psychological harm that reinforces female subordination and perpetuate male power control".*

The CEDAW Committee has further defined Gender-Based violence as *"violence that is directed at a person on the basis of gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threat of such acts, coercion and other deprivation of liberty"*.

It is widely acknowledged<sup>2</sup>, that most cases of sexual and gender-based violence involve a female victim and a male perpetrator, although the opposite is also possible. Most acts of Sexual and Gender based-violence against boys and men are also committed by male perpetrators. Sexual and Gender-based violence is a global human rights issue as it keeps occurring in all continents, cutting across all socio-economic classes, age group and ethnic groups.

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<sup>1</sup> UNHCR : 2003 Guidelines for Prevention and Response to Sexual and Gender- Based Violence against Refugees, Returnees and IDPs.

<sup>2</sup> Ibid Note 1.

The main forms and contexts of Sexual and Gender-based violence remains pervasive, yet each forms has been the subject of international treaty provisions, resolutions of intergovernmental organisations, studies, or debate at national, regional and international level, thereby recognising the nature of this violence as a rights issue<sup>3</sup>.

Determining the extent of domestic violence in Uganda as elsewhere meets several challenges. Whilst the number of workshop reports and research analyses on the issue are often illustrated with the strength of powerful personal accounts, they often lack statistical data at regional and national levels to show, with accuracy, the actual extent of the problem. Evidence showing increase in cases of domestic violence can be found in specific reports, mini-surveys, media reports and articles addressing the issue. Whereas such evidence often shows the depth of seriousness of the problem and impact on women's physical and psychological well being, it fails to show the extent of the problem across the different regions, ethnic group, socio-economic sector of society and age group.

**Table 1**<sup>4</sup> below summarises data from some surveys undertaken in sub-Saharan Africa on the prevalence of sexual assault over the preceding 5 years. It is important to note that the statistics below do not make any distinction between sexual assault by strangers and by intimate partners. Without such distinction or by only focusing on rape by strangers, surveys usually underestimate substantially the prevalence of sexual violence and may actually only show the "tip" of the iceberg as illustrated in **Figure 2** below.

Country	Study population	Year	Sample size	Percentage of women aged 16 and older, sexually assaulted in the previous 5 years (%)
<b>Africa</b>	<b>Average</b>	<b>1992-1997</b>	<b>990</b>	<b>2.3</b>
Uganda	Kampala	1996	1197	4.5
South Africa	Johannesburg	1996	1006	2.3
Zimbabwe	Harare	1996	1006	2.2
Botswana	Gaborone	1997	644	0.8

<sup>3</sup> The final document of the 1993 United Nations World Conference on Human Rights stresses "the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism." U.N.Doc. A/CONF.157/DC/1/Add.1 at 22-23, 1993.

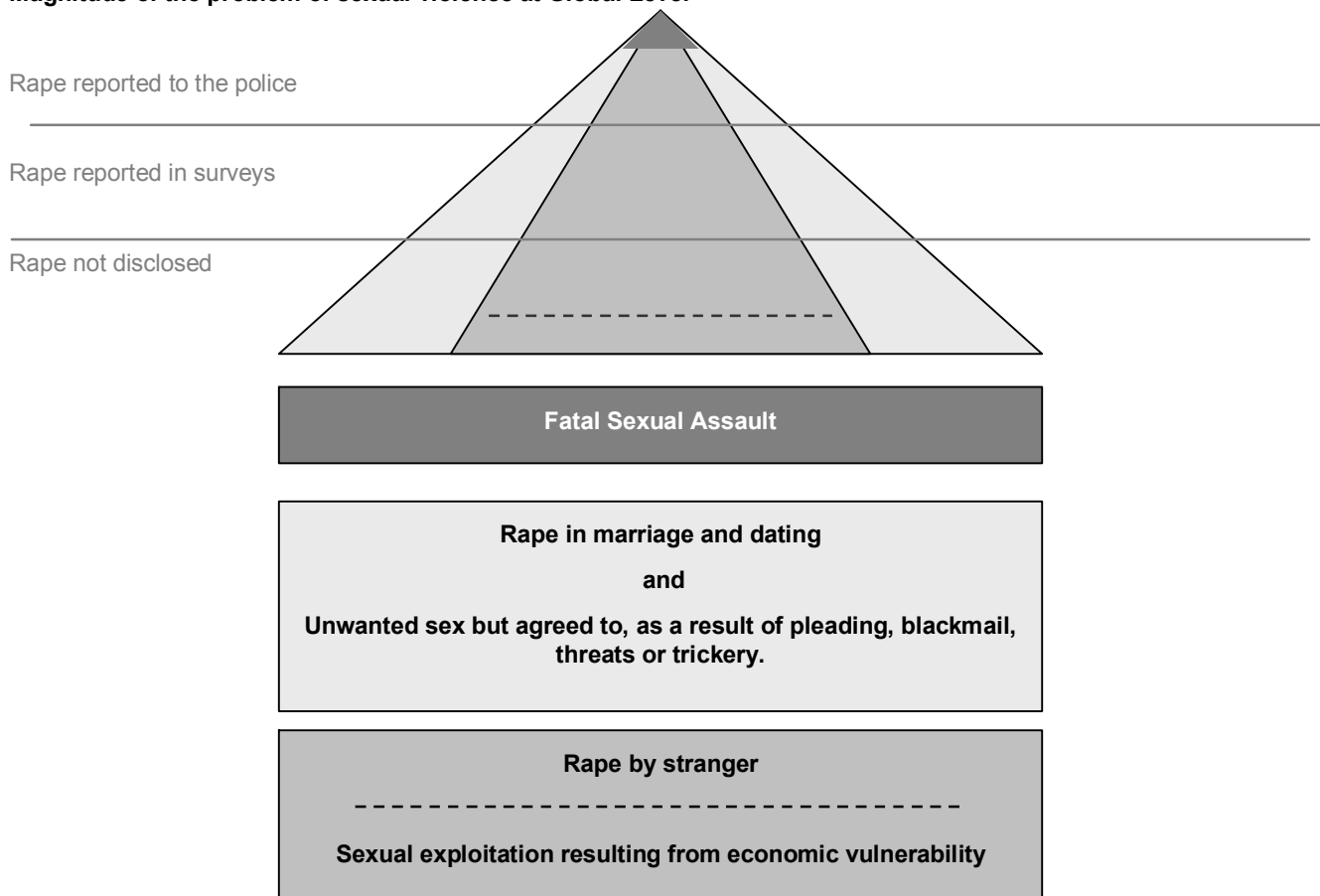
<sup>4</sup> World Health Report on Violence and Health, WHO 2002, Chapter 6 Sexual Violence, Table 6.1 p.151- carried out in the international crime victim survey in countries in transition: national report and victims of crime in the developing world, 1998, Rome, United Nations Interregional Crime and Justice Research Institute.

Uganda's prevalence rate of **4.5 percent** is the highest rate amongst the African countries surveyed. Compared with regional level statistics, it is double the rate of South Africa and Zimbabwe where violence is generally known to be high, and double the average rate of African countries surveyed. At global level, the Ugandan prevalence rate further equals the average rate of Latin American countries surveyed where the rates of sexual violence are known to be the highest in the world (with 8% in Brazil), almost triples the average rate for Asia and largely surpasses that of Eastern Europe.

Given the statistics presented do not distinguish between rape by strangers and by intimate partners and given that it is not known whether surveys focused on rape by strangers only, if anything, the 4.5 % rate prevalence rate in Uganda could be substantially lower than reality because of the general lack of reporting or systematic withdrawal of complaints as shown in **Figure 2** below.

**Figure 2<sup>5</sup>**

**Magnitude of the problem of sexual violence at Global Level**



<sup>5</sup> World Health Report on Violence and Health, WHO 2002, Chapter 6 Sexual Violence, Figure 6.1 p.150 - Jewkes R. and Abraham N. The epidemiology of rape and sexual coercion in South Africa: an overview. Social Science and Medicine 1998.

**Figure 2** above shows at global level the proportion of data on sexual violence coming from different sources such as police reports and survey research. The relationship between these sources and the global magnitude of the problem of sexual violence may be viewed as corresponding to an iceberg floating in water. The small visible tip represents cases reported to the police. A larger section beneath maybe elucidated through survey research and the works of NGOs and beneath the visible surface remains a substantial although non-quantifiable component of the problem.

In Uganda, the circle of domestic violence, marital rape and HIV/AIDS infection is a spiral of breaches of fundamental human rights that leaves women often with little self-esteem to reveal them and least to report them before any public or judicial institutions. Based on 120 interviews conducted in Uganda in 2002 /2003, the Human Rights Watch Report<sup>6</sup> establishes a systematic correlation between domestic violence, marital rape and HIV/AIDS infection.

Violations of the right to dignity in this context soon slip into violations of the fundamental right to life. Many of the women interviewed by the Human Rights Watch team, in its report "Just die Quietly"<sup>7</sup> were "afraid to introduce the subject of prophylactic protection (to their husband) for fear of being beaten, either for suspecting their husbands of having extramarital affairs, or because they might be accused of adultery<sup>8</sup> themselves. If they raised the subject of condom use, violence and/or forced unprotected sex, typically ensued." Marital rape and indeed forced unprotected sex within marriage seem to be common in practice but does not exist as a legal concept in Uganda. 34 out of 50 women interviewed by the Human Rights Watch team, confirmed that their husbands physically forced them to have sex without protection.

According to another community-based study on domestic violence in rural Uganda<sup>9</sup>, out of "5109 women of reproductive age in the Rakai District of Uganda, 30% had experienced physical threats or physical abuse from their current partner. Analyses of risk factors highlight the pivotal role of male partners' alcohol consumption and HIV/AIDS infection in increasing the risk of male against female domestic violence. 70% of men and 90% of women interviewed- viewed beating wife or female partner as justifiable in some circumstances. This certainly poses a central challenge to preventing domestic violence.

The extent of the particular vulnerability of women to SGBV, is further quantifiable on a massive scale in war situations world-wide<sup>10</sup>.

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<sup>6</sup> Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda, Human Rights Watch Report August 2003, Vol.15. No.15 (A).

<sup>7</sup> Ibid. Note 3 p.23

<sup>8</sup> Adultery under the Penal Code Act 1998 is punishable with imprisonment.

<sup>9</sup> Domestic violence in rural Uganda: evidence from community- based study, Bulletin of the World Health Organisation 2003, 81 (1) p:53-60.

<sup>10</sup> UN Press Conference and UN Security Council in October 2002 A fact sheet on women and armed conflict by Anne Walker. IWTC Women's Global Net, October 2003

- During the 1994 Genocide in Rwanda, approximately 500,000 women were raped and an estimated 5000 pregnancy resulted from those rapes.
- During the 1999 conflict in Sierra Leone, over 50% of women experienced some form of sexual violence.
- In only 5 months of conflict in Bosnia in 1992, an estimated 20,000 to 50,000 women were raped.

Although statistics are blatantly lacking with regard to the quantitative extent of women's human rights violations in the context of Northern Uganda conflict situation, an increasing number of reports and literature are focusing on experiences women face in Northern Uganda as a direct result of the conflict.

Isis-Women's International cross-cultural Exchange (Isis-WICCE) has published a two-part report on Women's experiences of Armed Conflict situations in Uganda: The case of Gulu District 1986-1999 (Part I) and Medical Interventional study of War Affected Gulu District (Part II).

Part I of the Report, examines the effects of one of the longest civil conflict in the history of Uganda on women and girls in particular. Part I of the report provides details, mostly orally reported, of women's abduction and rape, forced marriages and mutilation. Women, who survived abductions by rebel forces, reveal the cruelty of government soldiers in tales of individual and gang rapes, forced prostitution, unwanted pregnancies and a life of extreme deprivation in IDP camps and supposedly "protected villages".

Part II of the Report details a plethora of war-related physical, mental and psychological disorders encountered in Awer, an IDP Camp close to Gulu. Nearly all women interviewees had experience at least one event of torture and only a quarter of women survivors that experienced effects such as infertility, chronic pelvic pain, sexual transmitted infections and vaginal tears, actually gained access to qualified health workers.

The authors of the reports conclude that the war in Northern Uganda has "*debilitated the whole population living in the Region.*" Indeed, the perpetuation on a massive scale of systematic violations of individual women's human rights inevitably leads to traumas that incapacitate whole communities from even hoping to break free from the circle of violence, poverty and eventually enjoy their rights to sustainable development.

## **1.2 Violations related to women's socio-economic rights**

The lack of socio-economic rights further constitutes in the cases of victims of conflict and/or domestic violence, the main impeachment to self-determination and the enjoyment of any other basic human rights.

### 1.2.1 Right of access and control over resources

Lack of access to and control over resources by women in sub-Saharan Africa has been identified by numerous studies as the single recurrent cause of gender inequality across the African continent. As in many countries, land in Uganda is the most important factor of production and Ugandan women play a central role in the agricultural output. While women are responsible for 60 % of cash crop production and 80% of food crops, only 7 % of registered landowners in Uganda are women<sup>11</sup>.

The statistics bluntly speak for themselves in terms of gender inequalities and economic related power inequalities at household level. These inequalities substantially limit the opportunity women would otherwise have to independently guarantee basic elements of their livelihood. Women's economic dependency on their husbands or male counterpart not only limits their choices and access to their socio-economic rights but in situations of domestic violence and abuse seriously impairs the opportunity that women might have had to break free from the circle of violence and the imminent threat of HIV/AIDS infection. Without property rights and economic power, women simply cannot afford to reach a safer environment.

The economic situation generated by this lack of economic independence is crucial to the invocation of rights and to finding immediate recourse and effective response to such problematic. Indeed, many local NGOs working with women's issues are in a situation in which the most effective "immediate" solution to offer is to direct women victims of domestic violence to income generating activities, as a way to break free and if so wished, to bring forward the case before justice.

Beyond women's immediate need to access income-generating activities, long-term changes need to take place in the possibility of land co-ownership by both spouses and equal access and control to the fruits of labour. Legislative changes at National Level in this field are further discussed in the sections 2.2 and 2.3 below.

### 1.2.2 Right of access to Education and Human Rights Education

In 2000, the literacy rate of females as percentage of male in Uganda was 74 %. The gross enrolment ratios of females as percentage of males was 88% for primary school for the years 1995-1999 and 60% for secondary school 1995-1999. Progresses are thus visible in terms of increased enrolment statistics since the Government UPE (almost) free education for primary level. The substantial reduction in school fees essentially provides an effective response to the most important factor of female dropouts (76%) at primary level, the cost of school fees in 1995. However, at secondary level, the scenario changes as the factors for school dropouts substantially change. The school fees factor substantially reduces at secondary level down to 56% and is compensated by the increased pregnancy and early marriage factor of 30% which increases the total female

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<sup>11</sup> Gender Trauma in Africa: enhancing women's links to resources by Sylvia Tamale 2002.

drop-out rate to 86% according to the 1995 Demographic and Health National Survey.

The gender gap therefore increases almost by four times from primary to secondary and increases even further in tertiary cycles. Although Ugandan Government through the 1.5 bonus points programme for the enrolment in tertiary education of women has attempted to address the problem of gender inequalities in education, at Makerere University, the result of this is limited to a minimal increase in female intake by an average of 2,5% in the years 1990-1993<sup>12</sup>.

Whereas the almost "free" primary school has certainly helped increase the number of girls' attendance, it does not ensure that such attendance is sustained through secondary cycles. This is mainly due to the fact that reduction of school fees alone cannot address fundamental gender inequalities in traditional settings whereby a girl's education, especially in rural areas is not understood as an immediate useful or meaningful investment to the livelihood of the family unit. A more attractive and immediate gain for poor households is bride price collected through early marriages of young daughters.

Thus girl child's future is more envisaged "as synonymous to domestic life - childbearing, rearing, cooking, subsistence, farming, scrubbing cleaning and other household chores - an almost "inescapable destiny"<sup>13</sup>". Perhaps, this statement does reflect to a large extent the reality of destinies of thousands of girls in rural Uganda. However, the term - almost- is crucial as it provides a slight hope - if only girls had access to knowledge about their rights would that incite them to chose a different type of "destiny"? Certainly the economic element is key for parents to afford education but even stronger can be the informed will to struggle for a different path in life.

Human Rights and Civic Education is not currently part of the national curricula or part of any reforms of the Education system in Uganda. If Human Rights are not included in curricula, the likelihood of Women's Human Rights being explicitly mentioned is even scarcer. Despite several attempts by the Uganda Human Rights Commission (UHRC) to include Human Rights education in National Curricula, the commonly obtained response was that "curricula were already overcrowded".

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<sup>12</sup> Uganda's Age of Reforms: a Critical Overview, Justus Mugaju 1999.

<sup>13</sup> Sylvia Tamale, Gender Trauma in Africa: Enhancing women's link to resources, 2002.

## 2 Substantive legal challenges : the implementation of international human rights in national legislation

This Chapter provides an analysis of National Legislation in relation to key women's human rights issues discussed in Chapter 1 above. It examines the extent to which, the content of present and pending national legislation provides an adequate response to current violations of women's human rights in Uganda.

### 2.1 The "gender sensitive" 1995 Constitution

This Section identifies and analyses key provisions in the 1995 Constitution that explicitly protect women's human rights and assesses any visible impacts stemming from these provisions.

#### 2.1.1 The Ugandan Constitution's key provisions related to the protection of women's human rights

Uganda's Constitution of 1995 is known as one of the most progressive in Africa with regard to the explicit promotion and protection of women's human rights. The Constitutional Commission established in 1989 for a period of six years declared that the "whole document should be viewed as a Human Rights instrument conveying rights and obligations to the ordinary Ugandan Citizens. The Bill of Rights of the 1995 Constitution is enshrined in Chapter 4 of the Ugandan Constitution and comprises 38 articles that covers both substantive Human Rights and their procedural enforcement.

Under Chapter 4, Article 33, explicitly mentions the Rights of Women in the following terms:

- *Art. 33 (1) Women shall be accorded **full and equal dignity of the person with men.***
- *Art.33 (2) The State shall provide the facilities and opportunities necessary to **enhance the welfare of women** to enable them to realise their full potential and advancement.*

- *Art. 33 (4) Women shall have the right to **equal treatment** with men and that right shall include equal opportunities in **political, economic and social activities**.*
- *Art. 33 (5) [...] Women shall have the **right to affirmative action** for the purpose of redressing the imbalances created by history, traditions or customs.*
- *Art. 33 (6) **Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by the constitution.***

Prohibition of derogation from particular human rights and freedoms in Article 44 a) includes freedom from torture, **cruel, inhuman and degrading treatment** or punishment.

Although the Constitution may not *prima facie* enumerate the list of prohibited violations of women's human rights, the concepts enshrined in the articles as highlighted in bold above, are broad enough to encompass all forms of violence and discrimination against women. Upon thorough interpretation of the Constitution, several existing legislation discussed in the sections below and acts of violence against women mentioned in Chapter 1 could be regarded therefore both as unconstitutional and breach of fundamental human rights.

Criticisms have voiced two major concerns over the Uganda Constitution. Firstly, the lack of questioning over the overwhelming presence of civil and political rights in contrast with economic and social rights. It should be noted however, that gender equality with regard to economic and social sphere is explicitly mentioned with the concept of women's welfare as highlighted above. Nevertheless, the criticism remains valid and it is a surprisingly interesting one.

In the current debates on Rights Based Approaches and Human Rights implementation, it is often strongly criticised that Western societies are keener to provide support to Civil and Political Rights whereas the strong concerns of developing countries are more focused on ensuring Social, Economic and Cultural rights, as a priority before Civil and Political Rights.

Uganda, through its Constitution appears therefore as a startling exception or prominent counter example to this discourse. It would be interesting to further analyse why economic and social rights have been sidelined, when it is well known that these are precisely the ones addressing the immediate basic needs of the Ugandan population and supposedly constituting the core values of African culture and society, especially at community level. It is somewhat surprising that socio-economic rights related to health, shelter, food and adequate standards of living were relegated to the non-justifiable portion of the Constitution, namely the National Objectives section.

Further, civil and Political rights for women in the Constitution were translated mainly in terms of participation of women (*quantitative participation*) through affirmative actions rather than specific partaking in power-sharing and decision

making processes (*qualitative or substantive participation*). Several articles call for women's quantitative participation, for instance Art. 78 (1) make provision for constitutional Quota for National Parliament that there be one woman representative for every district.

The second criticism relates to the fact that despite and besides the impressive Chapter 4 of the Constitution, the general typology of the whole document remains generally biased against women. This is explained by the fact that besides particular women's NGOs (who supported the inclusion of Article 33), the majority of Ugandan Human Rights/Political Rights NGOs and other Civil Society organisation were at the time of the Constitution process, led by men with a predominant tendency to support an androgynous concept of Human Rights and broader Civil Society concerns<sup>14</sup>.

Whilst having women's human rights provisions explicitly addressed in the Constitution was without denial, a major corner stone for the recognition and development of women's human rights in Uganda, the key expectation that this momentum created, was their implementation and application in practice: the expectation to see one day the emergence of a tangible impact in relevant national legislation and in the lives of ordinary Ugandan citizens.

### 2.1.2 Visible impacts of the constitution's principles?

The constitutionally-based affirmative action policy has mainly resulted in visible quantitative gains for women in terms of their increased participation in the political sphere. In 2003, out of the 304 parliamentary seats 75 were held by women a total of 24.7%<sup>15</sup> and one-third of the seats in Local Government are guaranteed for women<sup>16</sup>. However, the absence of Political Party Quota for Electoral Candidates meant that inequalities in terms of women's participation in multi-party politics continued to be limited.

Although the increase in terms of quantitative participation of women in high profile positions is an encouraging and necessary step towards the advancement of women in Ugandan high or middle-upper society, it does not *per se* guarantee that the needs, concerns and interests of women from the poorest section of society in Uganda are *effectively* addressed in the political agenda. If participation is increasing in numbers, so is the expectation that it will eventually produce changes in the daily lives of Ugandan women living in poor rural and urban areas.

Research by FOWODE has shown that although 6 women ministers were appointed in the 1996-2001 Cabinet, none of them was close to core decision-making processes, and mainly in charge of small budgets. Whilst many women MPs are not necessarily concerned with advancing and advocating for women's

<sup>14</sup> Civil Society on the barricades: the Role of Human Rights and women's organisations in the formulation of the Bill of Rights of Uganda's 1995 Constitution, Oloka-Onyango, 2000.

<sup>15</sup> Global Database of Quotas for Women, Institute for Democracy and Electoral Assistance (IDEA), 19.02.2003

<sup>16</sup> Aili Tripp, 1998 p.93

rights and defending women's interests just for the mere fact of being women themselves, those that have courageously voiced pertinent women's rights issues have often been professionally under pressure to silence down on disturbing issues such as the co-ownership of land and the enactment of the Domestic Relations Bill.

## 2.2 The 1998 Land Act and the "Lost" Clause

In 1997, Ugandan Women's movement organisations joined the Uganda Land Alliance (a civil society coalition) and conducted a research<sup>17</sup> nation-wide on women's land ownership patterns. They demonstrated the prevalence of the tragedy of widows being forced off their homesteads by their husband's families. They also argued in favour of what became known as the spousal co-ownership amendment - that without the wife's consent or financial gain in the transaction, husbands could no longer sell family land.

The relentless lobbying of women's civil society organisations gained the support of some women MPs who championed the amendment in Parliament. The amended clause on spousal co-ownership and land used for daily sustenance of the family was tabled and passed before Parliament on 25 June 1998 as follows:

*"Where land is occupied as a home, where land is used, it should belong to husband and wife. In a polygamous situation [...] where the wives work on the same piece of land, they shall hold the land jointly with the husband. "*

The amended and watered down clause was unanimously accepted during parliamentary debate.

However, on the day of publication, to the astonishment of all, the co-ownership clause had mysteriously "disappeared" altogether from the Land Act. After months, official records justified the omission on the basis of procedural irregularities in the way the amendment to the clause had been tabled in Parliament which disqualified it from appearing in the Act. Eventually, President Yoweri Museveni admitted that he had to personally intervene to delete the amendment, justifying that the clause would more appropriately belong under the pending DRB<sup>18</sup>. In light of the current thin likelihood that the DRB was even going to be tabled in Parliament and despite several attempts to reintroduce the clause in subsequent amendments of the Land Act in 2003, the co-ownership clause was as good as "lost"<sup>19</sup>. Finally, it was even explicitly brought forward by high government officials, that the clause would be an impeachment to the development of the private sector in Uganda and to speedy transaction over the selling of land, and ultimately to the "detriment of the country's development". Such conclusion, confirms, if anything at all, that as long as national laws and law reforms are in line with capitalist and ultra-liberalist thinking then

<sup>17</sup> UWONET, Women and Land Rights in Uganda, FES, 1997.

<sup>18</sup> A.M. Tripp, Conflicting Visions of Community and Citizenship: Women's Rights and Cultural Diversity in Uganda 2002.

<sup>19</sup> The Problem with Patronage: Constraints on Women's Political Effectiveness in Uganda, Anne Marie Goetz 2003.

indeed the process of implementation is smoothly enacted and effectively enforced, but as soon as any social oriented concept, with concrete implications for questioning power structures and social inequalities, is trying to make its way through the national legislative process, it is promptly and effectively rejected.

### 2.3 The (pending) Domestic Relations Bill

Various drafts of the Domestic Relations Bill (DRB) have been debated since 1964. Since 1995, the need for legislation to bring family laws in Uganda in conformity with the guarantee of gender equality laid in the Constitution became urgent also in light of the momentum generated by Fourth World Conference on Women, in Beijing in 1995 and international political mobilisation on gender issues. However, to date the DRB has not yet been tabled before parliament.

In October 2002, President Yoweri Museveni wrote to Hon. Janet Mukwaya, Minister of Justice and Constitutional Affairs a ten-page statement expressing his views on the DRB. The President took personal responsibility for delaying the enactment of the family law when he caused the Ministry of Gender Affairs to withdraw the DRB under his administration 1996-2001. In essence, the President argues that the Bill is "*rather shallow and cannot address the issues of Ugandan society*"<sup>20</sup> and further warns the Ugandan population against the trends of "*copying Westerns ways of life which have caused enormous damage to humanity and thousands of broken families [... ] the stampede for self-destruction by the human species by imbibing everything Western.*"<sup>21</sup>

"Uganda inherited most of its general law<sup>22</sup> from Britain in 1902<sup>23</sup>. Apart from the law of succession, which was amended in 1972 during the Idi Amin regime and the law relating to children, which was amended and consolidated in 1996, the rest of family laws in Uganda are basically the same as they were at the date of reception in 1902.<sup>24</sup>" However, the date of reception does not correspond to the date of inception. The inception of these laws date back to the second half of the 19<sup>th</sup> Century and would therefore necessarily capture and base themselves on 19<sup>th</sup> Century Victorian values, ideology, customs and traditions. In other words what is being challenged by the DRB is not so much customary Ugandan ideology but "19<sup>th</sup> Century Western" capitalistic and discriminatory ideology that still forms the moral and ideological basis of current Ugandan

<sup>20</sup> Response to President Yoweri Museveni's view on the reform of the Domestic Relations Bill by Hon. Sheila Kawamara Mishambi, Member, East African Legislative, Assembly, April 2003. [www.wougnet.org/Alerts/drbrresponseSKM.html](http://www.wougnet.org/Alerts/drbrresponseSKM.html)

<sup>21</sup> Ibid. Note 28. The term "Western" is presumably to be construed as referring to a combined European and American history into a unique socio-cultural concept and phenomenon.

<sup>22</sup> General law in Uganda as in other East and Southern Africa's jurisdiction is supposed to apply to all persons regardless of their ethnic origins.

<sup>23</sup> Uganda Order in Council 1902.

<sup>24</sup> Family Law Reform in Uganda: a tale of petty issues, bitterness and crocodile tears by Irene Mulyagonja 2001. Paper presented at the South African Constitutional Litigation and Legal Development Project.

General Law today. It took Europe more than hundred years and a few revolutions to challenge such ideology thriving with inequalities related to socio-economic classes, race, ethnic group, sex and religion and still, the achievements are not quite so complete. It remains to be hoped that where such ideology still subsists, it will not take so much time and conflicts for it to be challenged.

The pending Domestic Relation Bill is "nothing short of an ideological revolution" as it aims at protecting social justice and equity as well as women's rights in relation to polygamy, bride wealth, child custody, divorce, inheritance, consent in sexual relations, and property co-ownership. DRB poses three major controversial challenges to any patriarchal ideology: namely 1) the proposed new grounds for divorce 2) the criminalisation of marital rape and 3) the concept of land co-ownership. These issues challenge current Ugandan ideologies and practices related to these particular issues as well as 19<sup>th</sup> Century Victorian ideology on paradoxically, very similar moral grounds.

Further, the Bill's controversial character also derives from the fact that it attempts to set common standards for a multi-cultural population whose private lives are governed by not only by the General Law but also by a multiplicity of customary laws. DRB seeks to consolidate 6 different statutes that cover all types of marriages and divorces in Uganda<sup>25</sup> into one.

The following subsections highlight the major elements of the Bill, as particularly relevant to the protection of Women's Human Rights in Uganda.

### **2.3.1 Widow inheritance**

Originally designed, as a social and economically oriented institution for men to take responsibility for their deceased brother's children and household, the practice of widow inheritance whereby men inherit the wives of their deceased brother, in practice contributes to women's economic subordination<sup>26</sup>. The customary practice of widow inheritance hold the same stereotyped conception in the status of women as the bride price discussed below. This is why DRB recognises widow inheritance as an offence.

### **2.3.2 Bride Price**

The status of married women in customary law, through the bride price has now become akin to the purchase of wives and a justification for the subjugation of women. Sylvia Tamale, a Lawyer and Academic, emphasised that "The customary payment of bride-wealth now gives the husband proprietary rights over his wife, allowing him to treat her more or less like a chattel. This is especially so because it equates a woman's status in marriage with the amount of

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<sup>25</sup> Namely, the Marriage Ordinance, the Marriage of Africans Ordinance, the Marriage and Divorce of Mohammedan's Ordinance and the Hindu Marriage and Divorce Ordinance.

<sup>26</sup> Ibid. Note 23.

bride-wealth exchanged and not with her skills and abilities<sup>27</sup>." DRB fell short of abolishing dowry altogether but made it only illegal to demand its return on dissolution of marriage thereby doing away with the traditional form of customary divorce which can only be declared upon return of the dowry.

It must be noted that the concept of dowry is not particular to Uganda nor indeed an exotic African custom. The widespread of dowry or equivalence covers all continents, as marriage has always constituted the major vehicle for the circulation of assets, capitals, titles and wealth. Even in countries where the custom of dowry has disappeared in its visible form, one can still notice that some form of symbolism may still prevail. This indeed raises the question of double standards. Why penalise the exchange of a bride for 20 pieces of cattle in a developing country and not the merging of stocks on the market through the marriage of a wealthy couple in a non-developing country, free do execute their own contractual arrangement under the law?

The concept of bride price in its most visible form, such as the exchange of cattle is perhaps more disturbing because it increases the stereotyped idea that a woman can be bought for the worth of a certain number of animals. This in turns entrenches the idea that the bride is not quite a full human being, deserving equal rights, equal respect and equal dignity as her male counterparts. This often creates a pre-condition for the commonly accepted concept of the use of force and abuse against a female spouse, as her status does not carry the necessary importance to grant and guarantee the due respect.

### **2.3.3 Marital rape as a criminal offence**

The DRB further recognises marital rape as an offence, which is not currently recognised under the Penal Act, as the act of entering into marriage is taken as an irretrievable and unconditional consent to sexual intercourse.

This is one of the most controversial clause in DRB, as to many the concept of rape within marriage is still incomprehensible since essentially constituting one of the core and incontestable prerogatives of the husband within the context of marriage. To be actually effective this clause would have to provide a broad definition of rape and also deal with the difficult issue of providing evidence and witnesses of violations that mainly occur within the privacy of the home and are rarely witnessed by third parties.

It is important to highlight that the concept of marital rape is also relatively new in many western societies. Male sexual prerogative and female implied consent to sexual relations through the act of marriage is a regressive concept that was well entrenched in Common Law based on 19<sup>th</sup> Century Victorian moral values until surprisingly not so long ago.

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<sup>27</sup> Law Reform and Women's Rights in Uganda by Sylvia Tamale, East African Journal of Peace and Human Rights p.177

### **2.3.4 New grounds for Divorce**

The proposed DRB abolishes the traditional grounds for divorce mainly adultery, introducing the broader concept of "irretrievable breakdown of marriage". DRB challenges therefore the present inequitable status of women and men to prove grounds for divorce.

This clause would provide women with an effective possibility of obtaining a speedy divorce. This is particularly important in emergency cases of domestic violence, as it would remove the evidentiary burden of proof, save precious time and costs usually involved in the cumbersome procedure of proving adultery and abandonment of the household.

This clause would do away with the concept of "adultery" as ground for divorce law, a direct inheritance of Common Law again based on 19<sup>th</sup> Century Victorian moral values that subsisted also in the UK until recently and were replaced by the more neutral divorce grounds of "incompatibility of characters". The clause would also do away with the implicit discriminatory stereotypes of women's and men's roles in marriage.

### **2.3.5 Equity in Polygamous marriages**

The DRB further attempts to limit inequalities that may arise in polygamous setting by requiring a man who wishes to take a subsequent wife to prove to a court of law that he is capable of making material provisions for the new wife and family. There must also be evidence that the first wife has been consulted and that she has consented to her husband taking another wife.

In essence, this clause seeks to protect the social and economic rights of women and children in polygamous contexts in which inequalities with regard to the sharing of household resources may often arise. The clause therefore does not do away with the Ugandan popular custom and tradition of polygamy but merely seek to ensure that it is done in an equitable manner for all parties involved.

### **2.3.6 Co-ownership of Land and Equitable Property rights**

The DRB deals with property rights of married persons during marriage and in the event of marriage breakdown by introducing pre and post-nuptial agreements and laying down criteria for the equitable redistribution of marital property on divorce in all the different types of marriages including polygamous unions. DRB therefore seek to reintroduce the concept of co-ownership of property which was suppose to appear in the 1998 amended Land Act.

In this clause DRB reflects the current social reality in Uganda of many families and extended family members living together and sharing livelihood and assets to face hardship conditions. By reflecting such reality the DRB seek to provide an equitable opportunity for "co-habitants" to participate and share in the family property. The clause addresses the key issue that female spouses have no rights or decision-making powers over the sale and benefits of family

assets and are often under threats of being left destitute in cases of disputes or divorces as shown in Figure 1 below.

Interestingly, DRB challenges again through this clause the legal concept inherited by colonialism and long enshrined in the title ownership of lands by Landlords in Victorian England which was subsequently challenged with the concept of beneficiaries' rights, equity and co-ownership of non-title beneficiaries such as female spouses and children. It is important to note that in the pre-colonial era, land in Uganda was by and large communally owned and its use and control were guided by customs, which had the effect of protecting women's land use rights<sup>28</sup>. Elders, usually male, were custodians of land without power of sale but held the land in trust for the next generation. Men, women and children had, then, equal access and users rights to the land.

The effect of colonial rule and influence of Common law in Uganda Society and Legislation was to transform the custodial role of the male elders into an ownership power of male adults and transformed the once equitable relations between family members and other parties who lived and shared the same land into inequitable land ownership. The current Ugandan Land Act - without the co-ownership rights clause - therefore consistently upholds colonial and patriarchal concepts of land ownership whilst DRB on the other hand attempts to restore social equity of land ownership not only between spouses but also with various users of land who have vested interest in it.

In conclusion, the pending DRB as proposed in its early draft would provide an overall comprehensive response to key issues of women's human rights in Uganda. The question remains whether it is ever going to be tabled through parliament and if it is, to what extent will it be watered down and which clause will "disappear" all together. Even in the unlikely event of the DRB being tabled before Parliament, adopted and approved as it is, this would not constitute by itself a sufficient change in Ugandan national legislation to fully protect Women's Human Rights. Several pieces of legislation would need to be amended and refined in line with DRB such as the Penal Code Act and the Land Act as well as any other legislation or customary practices that would contravene provisions in the DRB.

Nevertheless, and given the degree of controversy, even the simple tabling of the DRB in parliament, in its most watered-down form, after almost forty years of struggle to emerge, will probably represent a historical achievement.

The question that remains is however what difference would it make in practice and who would benefit most from its full application?

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<sup>28</sup> Kharono E. "Feminist Challenge to the land Question: Options for meaningful action - a Concept Paper", presented at the African Gender Institute, University of Cape Town, 1998.

### **3 Structural challenges: access to justice and the legitimacy of formal judicial institutions**

This Chapter assesses the structural challenges related to the low access to one "formal" institution - the Uganda Human Rights Commission (UHRC) - by the poorest section of the population in relation to women's human rights abuses described in Chapters 1 and 2 and highlights the set of "informal" institutions that are currently accessed by the poor. On this basis the chapter seeks to address the problem of institutional legitimacy.

#### **3.1 Overview of complaints received by the Uganda Human Rights Commission related to women's human rights**

The Uganda Human Rights Commission (UHRC) was selected for its strong visibility in Human Rights protection that would be easily known by people from different socio-economic classes, a clear mandate and a decentralised approach with offices and functioning tribunals receiving human rights related complaints in different geographic locations of the country.

A great majority of complaints 70%, received by UHRC is lodged by men and a clear minority of 30% is lodged by women<sup>29</sup>. Out of these 30%, 75% focus on maintenance of children and the rights of children. These cases are largely treated through mediation in the presence of all the family members. Issues such as school fees related to the right of Education, and child support for cloth, housing and feeding are dealt with. Out of the remaining 25%, only 30% relate to Domestic violence, right to property claimed by women. Out of these 30%, only 50% relate to sexual harassment.

The number of women's human rights complaints brought forward before the tribunal of UHRC specifically mandated to solve human rights related issues is thus extremely low compared with the seriousness of the problematic at hand. The number of women's human rights cases brought before UHRC in regional offices is even lower and sometimes non-existent. It is particularly surprising to find only two women's human rights complaints brought before the UHRC in

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<sup>29</sup> Interviews with UHRC Officials.

Gulu, when it is well-known that abuses against women in Northern Ugandan conflict-ridden regions are rampant and are amounting to tens of thousands.

The total number of complaints received by the UHRC on grounds of Domestic Violence in **2001** were:

- **Headquarters:** 2 complaints out of 805 complaints received.
- **Soroti Regional Office:** 4 complaints out of 274 complaints received.
- **Gulu Regional Office:** 0 complaints out of 345 complaints received

The total number of complaints received by UHRC on grounds of Domestic Violence in **2002** were:

- **Headquarters:** 7 out of 575 complaints received.
- **Soroti Regional Office:** 10 out of 160 complaints received.
- **Mbarara Regional Office:** 0 complaints out of 49 complaints received.
- **Fort Portal Regional Office:** 0 complaints out of 28 complaints received.
- **Gulu Regional Office:** No numbers available.

According to the latest Annual Report both the 2 complaints on Domestic violence in 2001 and the 7 complaints on Domestic Violence in 2002, lodged before the UHRC Headquarters were referred to mediation. Further, UHRC officials noted that Domestic Violence complainants were generally in fear of speaking about HIV/AIDS as this would result in an increase of verbal and physical abuse from their spouse and jeopardising their personal security and that of their children

It can be said that the Commission has been dealing to an unrealistically limited extent with key women's rights issues in Uganda. Without mandate to punish the perpetrators of violence, "battery" and "assault" there is effectively limits as to what the Commission can do, beyond denouncing the problem loud and clear and recognising it as a violation of fundamental human rights and dignity enshrined in the Constitution.

### **3.2 Access to formal judicial institutions: an effective and legitimate means for human rights protection?**

The following individual cases were taken from two local NGOs that specialised in providing free psychological counselling and legal aid for women suffering from domestic violence, rape and often infected with HIV/AIDS as a re-

sult<sup>30</sup>. Both organisations are situated in poor suburbs of Kampala. Overall both organisation found that 2/3 of their total cases on domestic violence included sex without consent. They found that women were usually unwilling to expose their domestic problems before an external "formal" institution and in particular to comment whether they had become infected with HIV/AIDS as a result of SGBV. Most women, contrary to what could be expected, did not come to seek advice for themselves, to cure their own psychological or physical trauma but to enquire with regard to the maintenance of their children and what remedy if any could they be able to claim.

A recurrent and standard almost "cliché" scenario of cases presented before NGOs' councillors begins with a request by the female partner/spouse to her male partner /husband for payment of household bills and children's school fees. The husband/ male partner would then refuse and prefer to spend the money either on drinking or on the "acquisition" of another woman with potential to become a new female partner or wife. Verbal and physical violence would then ensue. In those situations, the wife is being reminded that she is expected to fulfil the husband's demand as part of her marital obligations, and may often be forced to unprotected sex.

The central question in such cases is: *how do women themselves go about finding solution to their problems? Which institutions/individuals, formal or informal, do they turn to and why?*<sup>31</sup>.

Most women are reluctant to use formal judicial institutions such as the police, Local Council Courts (LCs) and other courts to solve domestic violence cases for several reasons:

- A lack of legitimacy of these "formal" institutions in the eyes of the population, to be empowered to solve such type of private /family conflicts.
- A lack of trust among the population with regard to the objectiveness of "highly corruptible judicial" officials.
- A clear tendency to push for mediation and reconciliation (the harmony approach) of these "formal" institutions such as the police, the Local Council courts and even the UHRC so as not to be "blamed" for the breaking up of family union and to the detriment of the defence of women's human rights. Observations undertaken in several police stations<sup>32</sup> in Kampala's poor suburban areas showed that this institution despite its organised family units did not want to take the responsibility for leading the family towards the judiciary and are therefore reluctant to incite people in general

<sup>30</sup> Desk study of cases in the archive libraries as well as in depth interviews with psycho-social and legal councillors were undertaken in Kampala, in July 2004.

<sup>31</sup> Findings emanate from individual interviews held with women suffering from domestic violence that were either NGOs clients, ordinary citizens in the poor neighbourhood of kampala or sex-workers in the street of kampala. Interviews were held in July 2004.

<sup>32</sup> Observations of Domestic Violence cases were undertaken in 3 different police stations in Kampala, followed by interviews of the victims and the perpetrator as well as police officers in charge, in July 2004

and women in particular to defend their rights pushing them on the contrary towards respecting their husband as a "dutiful" and "obedient" wife instead. Observations of LC courts proceedings<sup>33</sup> in Kampala's suburbs also showed that despite the presence of women's affairs officers, the court will also adopt the "harmony approach" for fear of being accused of breaking up marriages and challenging the commonly accepted and inequitable gender roles within the family unit.

- To seek advice and counselling, women do tend to visit primarily their aunts, their parents and the parents of the spouse that have direct patrilineage authority on the couple's life. For resolution of conflicts the elders of the village or the communities, the chief of village, clan leaders and/or religious leaders will be consulted and their advice are highly regarded.
- Women often visit in addition to the above, the traditional healers that concoct special portions and devices to "effectively" change their situations. Following a focus group discussions with the main traditional healers in Kampala<sup>34</sup>, they are not themselves free of charge, but in the eyes of the large majority of the population they carry more "effective" powers than a high court judge and are therefore more legitimate "informal" institutions than the "formal" judiciary in resolving domestic violence issues.

If the implementation of Human rights is to become meaningful, effective and useful not only to the elite, in the position to afford and possibly corrupt the judiciary, but also to restore a sense of justice amongst the poorest population, then the so-called "informal" system of conflict resolution listed above and currently widely utilised need to be recognised and further considered. Seeking to understand how human rights, indeed women's rights can be best protected within the legitimate institutions in the eyes of the population is an essential process which has been to date much under-utilised beyond academic circles. This understanding may be gained through grounded research methodologies, "excavating" rights from customary practices rather than imposing them from top down approaches with "formal" institutions that do not carry sufficient legitimacy in the eyes and custom of the ordinary citizens they are suppose to serve.

The picture that is emerging so far seem to support the view that failing to address and analyse the sub-adjacent system of multiple norms and values in a given society (that often lies beneath the formal "imported legal system") inevitably lead to an approximate understanding of the complexities and challenges with which democratic processes and the implementation of human rights are being vigorously carried forward in a given society.

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<sup>33</sup> LC Court cases relating to domestic violence and witchcraft were observed, followed by interviews with the respective defendants and plaintiffs, the Chairperson and Secretary for women affairs in July 2004.

<sup>34</sup> Workshop Traditional Healers, held with the special permission of the police in July 2004.

The assumption that the implementation of Human Rights, Women's Human Rights in this particular case, can contribute to poverty reduction, needs to be analysed and assessed in light of the specific targeted beneficiaries' view (e.g. the poor section of a population). Grounded research in the field reveals a complex puzzle of intertwined norms and values that have mixed through time with different political, religious and cultural influences. In some cases, informal/traditional institutions are indeed violating and perpetrating gross human rights violations but in other cases, they might actually provide a more effective and accessible protection of Human Rights to the poor than a formal judicial institution and to a large extent "illegitimate" institution would do.

## 4 Questions for debate and further reflection

This chapter concludes with key questions for further debate and/or further reflection.

If Democracy and Human Rights are not to invariably become double standards consumer items for export to the rich elite of developing countries, if indeed it is not a two-lane democracy with an increasing gap between the "winners" and the "losers" that is being targeted then the following basic questions need to be addressed:

- What are the implications of this analysis in the full application of Rights-based approach to development assistance?
- What are the necessary pre-conditions that need to be addressed in order for the assumed link between the implementation of human rights and poverty reduction to succeed
- "Formal" v. "informal" means and institutions to protect women's human rights: are there any alternatives in between?