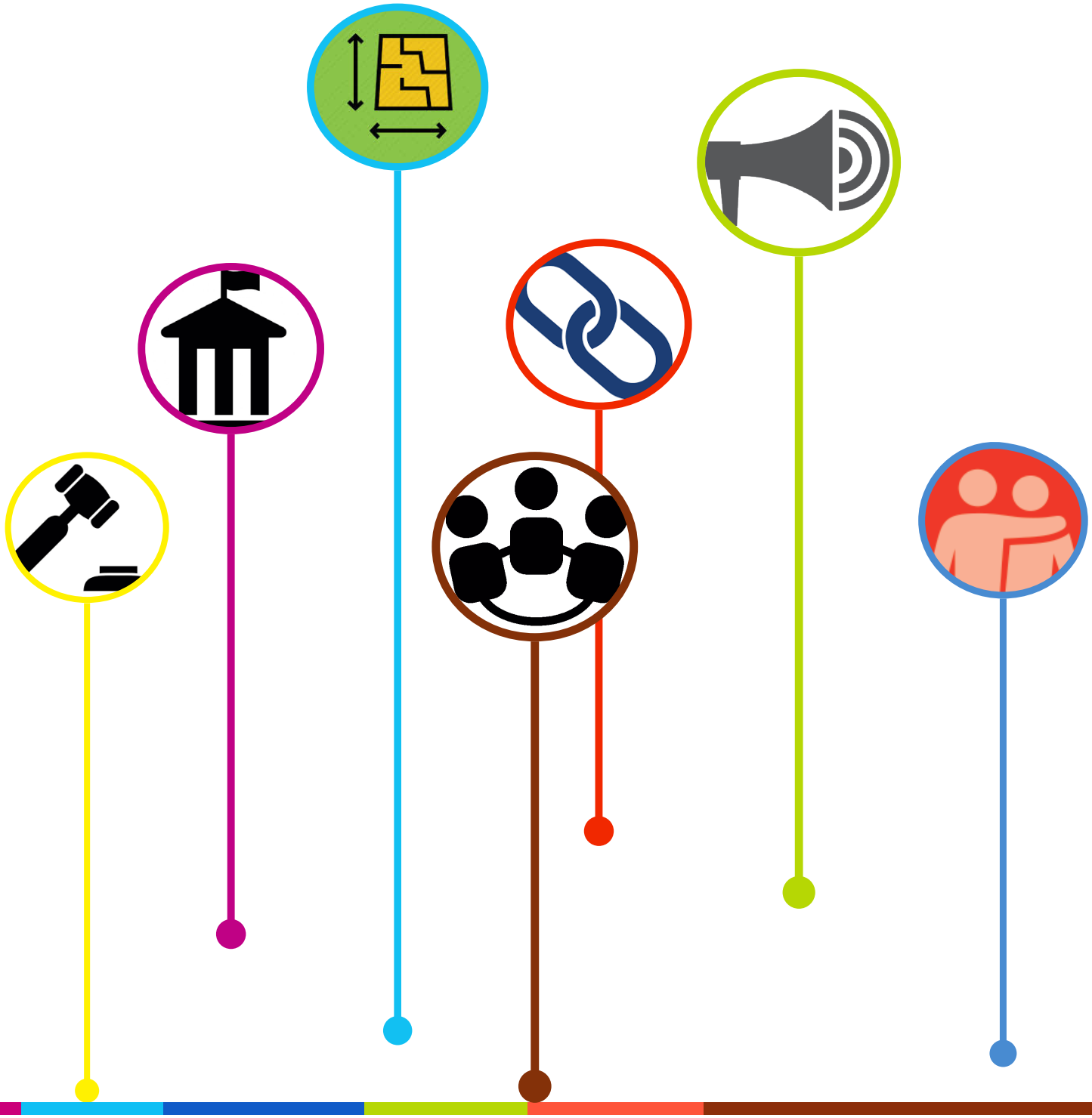
Policy brief comparing state and traditional land justice systems in Uganda



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International Development Research Centre
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Land and Equity Movement in Uganda (LEMU)
Making land work for us all

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Explanatory note: This is the Final Technical Report of the research written according to the IDRC guidelines for preparing final technical reports. A more comprehensive report prepared using a more conventional research report format with the sub-title "Final Research Report" is available in LEMU's website at http://land-in-uganda.org/lemu/document-archive/ and can also be found in the IDRC Digital Library. It can be referred to for more details, including statistics to back the findings synthesized here.

1. Introduction

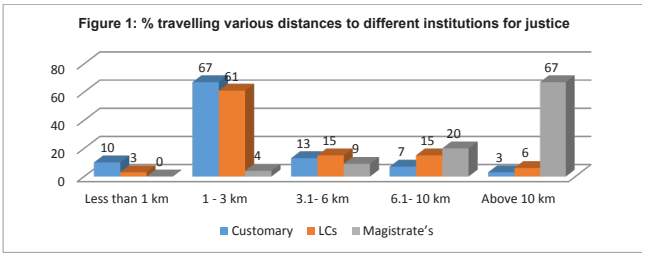
Since 2009, Land and Equity Movement in Uganda (LEMU) has in several papers and through various forums addressed the challenges posed by the state and traditional land justice systems operating in a parallel manner and by the weaknesses found in both systems. The research by LEMU comparing the state and traditional land justice systems in Uganda, financed by the International Development Research Centre (IDRC)(2014-2017) has confirmed several of the challenges LEMU had raised and added new perspectives to them. This policy brief presents strengths and weaknesses of state and traditional institutions in relation to access, costs and speed in concluding the process of resolving land cases and the challenges the two institutions face. The policy brief then re-examines the solutions that have been tried out and proposes some options for the way forward towards ensuring fast and equitable access to justice in land matters.

2. Strengths and weaknesses of the justice systems in access, costs and speed.

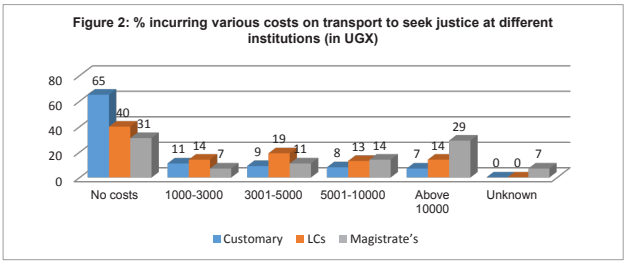
Access and costs

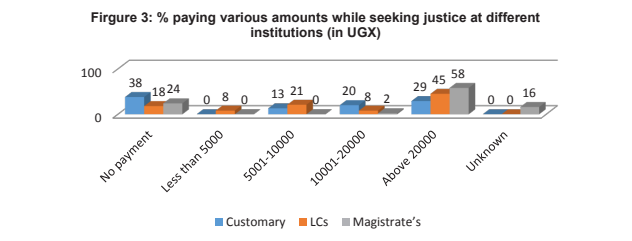
The customary justice system offers a big advantage over the state judicial system in terms of physical access and costs. Indeed, long distances and high cost of seeking justice in the state judicial system make it unaffordable to many.

Distances travelled: Rights holders do not usually travel long distances to access both the LC and customary justice systems. As Figure 1 below shows, three-quarters travel only between some metres and 3 kilometres to the customary institution while two-thirds have to travel over 10 kilometres to the magistrates' courts. These long distances are compounded by the15 times on average that parties to a case had to follow up the cases in the magistrate's court compared to only 3 in the LC and customary systems.



Costs: The customary justice system is much cheaper than the state judicial system, both in transport costs as implied above and in terms of fees, where prescribed, and other payments. Figure 2 shows the transport costs while Figure 3 shows the costs incurred in fees and other payments. Almost 40% of those who go to clan courts make no payments at all, compared to18% who go to LCs and 24% who go to the magistrate's court. Apart from the prescribed fees and costs of courts, there are also other costs, some official, others unofficial and even hidden. In the state system complainants are often asked for transport to enable the police to carry out investigations and to travel to the Resident State Attorney (RSA) or to court. The hidden costs may even include paying something to speed up the hearing of one's case or even to increase one's chances of a favourable ruling. Justice becomes even less affordable for many when they have to hire the services of lawyers.





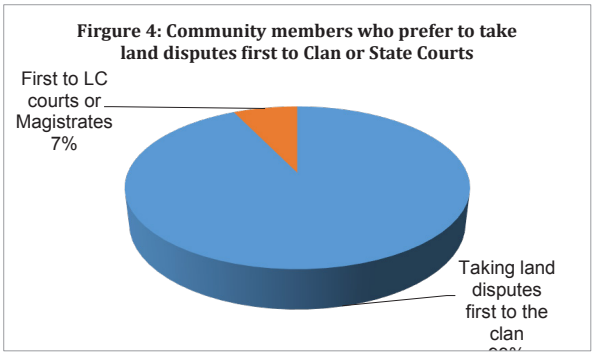
Speed in concluding the process of resolving land cases.

The research found that the delays are much longer in the magistrates' courts, averaging 38 months, than in the customary system where the duration averages 5 months and the LC system where the average is 6.5 months. Earlier, LEMU research on

police records on land related criminal cases in Lango and Teso sub-regions had also found cases that were still being handled after three years in court. Some community members mention that some land cases never end.

3. Challenge of the customary system: lack of state support– a big opportunity missed

With 93% of land in the Northern and Eastern regions under customary tenure, the most important institution is the clan, with its leaders and committees. Research by LEMU, including the IDRC funded and the earlier police records research in Lango and Teso, have revealed that there is inadequate respect for clan authorities, manifested by ignoring clan rulings and by-passing the clan structures to go straight to the LCs, and yet apart from being easier to access, faster and cheaper, there are several other advantages of the customary justice system recognised by the people, as exemplified by the finding from an assessment in February 2017of LEMU's Community Land Protection Programme presented in Figure 4.



The majority of community members explained their preference for taking land disputes first to the clan mainly because the clan leaders know the land and the people involved much better than the state courts. Many also explained that with the clan the disputes can be resolved peacefully without creating enmity and the clan is easy to access and saves money.

4. Challenge of the State judicial system being overloaded with land cases.

A significant weakness of the state justice system is that it has a heavy backlog of cases in courts, many of them land cases or land related cases. Case backlog, by the Ugandan Judiciary's definition, refers to court cases not resolved within two years. In 2015, the National Court Case Census had revealed that 114,809 cases had not been disposed of, with one in every four pending for more than a decade!1 Early in 2017 a report by Case Backlog Reduction Committee appointed by the judiciary revealed that as of 31st January 2017 the courts had 155,400 cases pending: 44% criminal cases, 33% civil cases,14% land cases,3% family cases and 2% commercial cases2. In addition to the 14% recorded as land cases, there were probably more land related cases recorded as criminal cases. Research on police records on land-related criminal cases in Lango and Teso in 2011 and 2013 had found that land-related crimes constituted about 3% of the reported criminal cases and were not classified as land cases. The Case Backlog Reduction Committee report cited incompetence and corruption as some of the reasons for the backlog. Other reasons given were overstaffing and insufficient funding.

5. Challenges affecting both institutions

High rate of forum shopping as a result of the weaknesses in the justice systems.

Of the cases analysed in the IDRC funded research, 34% had previously moved between clans and LCs before coming to LEMU – 71% of them from the clans to the LCs then to LEMU and 19% from the LCs to the clans then to LEMU while the order of movement of the remaining 10% was not clear but the cases had been to more than one institution. Forum shopping is the result of the existence of the parallel justice systems and the insufficient state recognition and support of the customary system

1 The Judiciary, Uganda, (2016) The Report of the Judiciary National Court Case Census downloaded on 05-12-2017 from http://www.judiciary.go.ug/files/downloads/Census%20Report%202015.pdf

2 Daily Monitor Newspaper, Kampala, March 30, 2017

that renders the system too weak to enforce its resolutions and rulings.

The main issue of concern in forum shopping is that cases are very often taken up in the new institution without reference to what took place in the institution that handled the case earlier. This often serves to weaken the authority of the institution that first handled the case, particularly the customary system. It also leads to much duplicated work since the evidence that may already have been received is ignored and the hearing is started afresh. It also opens up opportunities for people who want to confuse and frustrate justice, especially when they move from one institution to another to delay the process and make it more difficult and expensive for those who cannot afford to make multiple follow ups.

Perceptions of corruption.

According to a 2015 Global Corruption Barometer report3, nearly half of Ugandans perceived the judiciary as corrupt and 44% of those who had come into contact with the courts in the previous twelve months reported having paid a bribe. It was reported that bribery and political influence in the judiciary was mainly prevalent in the lower courts. The judiciary and the Government of Uganda has of late acknowledged the existence of corruption among judicial officials and have started taking some corrective action, including disciplining some judicial officers. In the Snapshot of the Uganda Corruption Report updated in August 2017,the Chief Justice of Uganda, Bart Katureebe, is quoted as having indicated that in several cases corrupt judicial officers have been found guilty by the courts, but were ultimately set free by the same corrupt system4.

While in the state judiciary the officials are paid salaries and there is provision for various fees and payments, for the cultural courts, costs of fees have not been specified in either the Land Act, Institution of Traditional or Cultural Leaders Act, 2011 or the PPRR. From LEMU's experiences in the field, it appears to be traditionally assumed that clan leaders are supposed to execute their duties without expectation of payment and be rewarded in kind and with respect. But with the changing socio-economic trends, clan leaders have been known to ask for payments.

The performance in the customary justice system is also adversely influenced by people with political or administrative power or with high education status. Because of the low state recognition and support of the customary system, such people tend to look down on the customary system that is largely run by people with low education and waning respect from the increasingly educated population. Powerful and educated individuals who may also not have land rights to the land they are laying claims to because of the power they have may as a result simply ignore the system and its rulings and proceed to the state system that they respect more or want to exploit to defeat justice.

6. Some solutions that have been tried out and their achievements.

Several solutions have been advocated for and tried out to address the weaknesses, particularly by seeking to harmonise the state and customary justice systems and to implement the 2013 National Land Policy and so provide power to the clans and a unified pathway for land justice.

6.1 Harmonisation of the two systems.

The first category of solutions has been initiatives to link the justice systems and strengthen their performance as they operate within the prevailing legal provisions and practice. The expected outcome of those initiatives has been that the state and customary justice systems would, as they are, work together to ensure better access to fair, equitable and speedy justice to all. This category of solutions is based on the realisation that there is much opportunity for beneficial collaboration and mutual support even without change in the legal or practice set up.

Promoting mutual understanding and support between the state and customary institutions of land justice

3 Transparency International and Afrobarometer, People and Corruption: Africa Survey 2015 - Global Corruption Barometer, downloaded on 05-12-2017 from https://www.transparency.org/whatwedo/publication/people_and_corruption_africa_survey_2015

4 Found at http://www.business-anti-corruption.com/country-profiles/uganda last accessed on 05-12-2017

- This comprised initiatives to enable actors on either side to:

- understand the laws, principles and procedures that govern the systems on both sides;

- become aware of areas in which their work could benefit from support by the other side and

- establish linkages in their work for mutual support and avoidance of wasteful duplication.

The National Land Policy 2013, in paragraph 114, recognises that, *"The land dispute management system does not recognize the inherent differences between disputes over land under customary tenure and those held under other tenure regimes"*. Failure by the state systems to administer fair and prompt justice in customary tenure land cases often arises from the insufficient understanding and application of customary land principles in handling the cases. With a better understanding of customary tenure laws the police investigating the cases are better able to handle customary land cases faster and fairer; to determine those most likely to have the land rights and the kind of evidence that could be used to determine the cases, and would also enable the magistrates to leave the cases to the appropriate institutions. This would also help to reduce the large number of land cases that end up in the magistrates' courts increasing the case backlog.

Support to strengthening the capacity and practice of the customary justice system.

- Even in the current legal and institutional framework, much advantage could be taken of the benefits of the customary justice system, which were already presented in Section 2 above, among the strengths of the system.

- To maximize those advantages of the customary system, efforts have been made to strengthen its capacity and practice, and to fill gaps that hinder or weaken its performance by developing procedures and devising and promoting tools. These efforts should be adopted by other stakeholders and should continue:

- Documentation and distribution of customary laws: seven traditional institutions in Northern, Eastern Uganda, West Nile and Bunyoro regions have, with support from LEMU, published their Principles, Practices Rights and Responsibilities (PPRR) documenting their land rights and land management structures. The courts could purchase these books and take judicial notice of them in any customary land case or work with others to follow the legal procedure that can lead to this.

- Demarcation of land boundaries and documenting the land maps certified by interested parties: Boundary tree planting and sketch land map drawing is used both as a proactive measure to show and protect land rights and as a measure to conclude the resolution of land disputes.

- Registration and streamlining of customary structures is an important step towards establishing the institutional leaders mandated to manage land and handle land dispute cases in customary tenure. Such registration and streamlining has been completed in Lango and Teso.

- Training clan land committee members in principles of natural justice, state laws and how to document the procedures in handling cases. Clans have also been trained in the use of the tool called Family Land Rights and Lineage Tree (FLRLT) which is documenting family names of family members, age, status, sex, etc. This allows analysis of land rights, power and vulnerability within families.

Other administrative ways to harmonise the way the state and traditional institutions work together include:

- Taking advantage of scheduling conferences to find out which forums the cases have been to before coming to court, what decisions were made and the reasons for bringing the case to court afresh;

- Appointing clan leaders as mediators as provided for by Section 89 of the land Act 1998 (as amended 2004); and including members

of the cultural institutions as members of the District Coordination Committee (DCC) meetings in all districts since the DCC is the lowest JLOS institution headed by the Chief Magistrates. JLOS could document and recognise the traditional institutions for the number of land cases they receive and resolve in a year.

- These practical ways could be agreed by all stakeholders and could be strengthened by the Rules Committee with a Practice Directive, as it was done to transfer land cases from Land Tribunals to the Magistrates Court when the Tribunals ran out of money. If the above are adopted as a way of work by state and cultural institutions managing land justice, this would:

- prevent parties from filing cases already heard by other forums afresh and would thus prevent delays, backlogs and forum shopping, leading to reduced land grabbing.

- provide an opportunity for both the courts to learn the ways of customary land tenure and for the clans to learn the ways of the state – without finding fault with each other

- give the Chief Magistrate an oversight of how the clans work and simultaneously expose discriminatory clans and give power to clans who uphold land justice.

- establish partnership of Chief Magistrate and the cultural institution, NGOs, land justice centre and the JLOS.

6.2 Lobby for the Implementation of the 2013 National Land Policy to provide power to the Clans and provide unified pathway for land justice.

The 2013 National Land Policy (NLP) explains that there is no specific recognition given to traditional mechanisms for dispute processing or customary law as a normative framework for the processing of disputes under customary tenure. Statement 115 of the NLP then promises that "Land disputes resolution mechanisms will be reformed to facilitate speedy and affordable resolution of land disputes". The reforms are to include according precedence to indigenous principles and practice in dispute management institutions in respect of disputes over land held under customary land tenure; and defining a clear hierarchy for dispute resolution structures to guarantee the finality and authoritativeness of decisions, subject to appeal to higher levels of jurisdiction. The reform is to provide for one justice pathway, with land cases under customary tenure first taken to the traditional system. These policy statements still remain policy statements, not law, and efforts should be made to turn this into laws. Stakeholders need to lobby for fast tracking these provisions. LEMU and all other stakeholders must now continue lobbying and advocating for the necessary legislation to be put in place.

7. Conclusion

This research and others that LEMU and other stakeholders have carried out or been engaged in earlier have shown that the systems that were supposed to protect land rights were still failing to do so in the Northern and Eastern regions, despite all the work LEMU and others have done. The researches have revealed some of the reasons why they are failing to do so. One of the reasons is that the state and traditional land justice systems have been operating in a parallel manner. The researches have revealed or confirmed other reasons for the failure, many of which have also been directly or indirectly addressed.

With the passing of the National Land Policy, many amendments are required of the Constitution and the Land Act. The proposed amendment of the land laws is therefore likely to take long. In the meantime, it is proposed that stakeholders think of other options to streamline the practical way of work between state and clan systems, linking them and strengthening their performance as they operate within the prevailing legal provisions and practice and to make the most of existing policies and laws through adjustments in the practice, setting up supportive structures and institutions and having Practice Directives issued by the Rules Committee.

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