How can we turn legal anarchy into harmonious pluralism? Why intergration is the key to legal pluralism in Northern Uganda.

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Making land work for us all

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We had a case recently of a man who used to beat his wife when he got drunk. One night, things were worse than usual and the woman couldn't take it anymore. Where should she run? Remember that in Uganda, as in most of Africa, when a woman marries she leaves her village and her family and goes to live with her husband, joining her husband's family and clan. She ran to the person who was supposed to protect her, her father-in-law. But her husband, drunk, decided to follow her to force her home, and went to the house of his father in the middle of the night. This is culturally unacceptable behaviour, because he is supposed to be called by his father the next day for the matter to be talked over. His father, who happened to be also a clan leader, took his responsibility to protect his daughter-in-law seriously and also wanted to teach his son a lesson for coming to disturb them all in the middle of the night. He had his drunk son physically thrown off the homestead. He assumed that the son would go back to his home, chastened, and would appear the next day sober and contrite for a family meeting on his marriage. Instead, the son, annoyed at having been physically man-handled, went to the police to make a complaint against his father and those who had ejected him from his father's home. The police simply arrested the subject of the complaint and locked him in the cell overnight, without any kind of formal charge (or warrant). It is quite possible that the complainant made a small payment to ensure this happened "to cover the transport costs of the police". It was the father who returned home after his time in police custody a chastened man. Any thoughts of protecting his daughter-in-law had been put well in check.

It's a simple story, repeated many times with some variations across the country, and it's an important one, because it is a very typical depiction of what legal pluralism really means for Ugandans, stripped of the theory. We had at play two normative codes. According to the old man's code (i.e. the local culture) it was his responsibility as family and clan head to protect his daughter-in-law from his own son, and to punish his son for his behaviour in pursuing the young wife to his home drunk and in the middle of the night. The son knew perfectly well that his behaviour was unacceptable in his own culture and that in any meeting with the family he would be shamed and in the wrong. So, he chose to 'move code' and bring the dispute into the realm of State law, focusing not on his own behaviour, but on the rights of his father to use physical force in ejecting him from the compound. As a young man, he knew better how to manage this code, and he knew the workings in practice of the 'law' – or rather of the "State justice system" that may have little connection with actual written law. The old man is now confused: he has acted perfectly correctly by his code, but finds himself in gaol.

Neither code is supposed to reward wife beating. Both codes are in fact supposed to protect the poor woman. What happened in practice? The State system is so dysfunctional it can't actually do its job. But worse, its existence and very dysfunctionality undermines the other code. Instead of adding a further layer of protection, the State justice system is used to combat the local normative code so as to reward the wife-beater. Legal pluralism is legal anarchy – and lawlessness never favours the vulnerable.

It shouldn't have to be this way. So what's going wrong? The case of land justice is the most accessible way into the problem for two reasons. First, because in Uganda, cultural normative codes or 'customary law' are given full legal recognition. The opposition – or disconnect – between two legal codes is therefore most clearly seen for what is in this area. Secondly, land disputes are the most common 'legal' problem that is found, perhaps after marriage problems, which are usually regarded as a private matter rather than one for scrutiny by legal theorists. Land justice is therefore the most important one for Ugandans and also the area where there is the most

evidence for coming to a verdict on the failings of legal pluralism.

Legal pluralism sounds as though it is about people seeing two (or more) legal codes, and having to work out which one applies to them in which circumstances. In practice this is a completely erroneous picture. People don't see two legal codes at all. The 'customary[1]' legal framework is not seen as law at all, but as a way of life, how people live – State Law on the other hand is something imposed and foreign. It is remote, in a foreign language and has little to do with most people's lives. It must be appreciated to what extent the situation is different from that in Europe, where statutory law is the outcome of a very long process of codifying people's own cultural rules. This is simply more explicit, of course, in countries where common law – another name for 'customary law' – is a part of the same legal code. In Europe or America, law is not only derived from the culture, but it is also a part of the culture: people are socialised from birth into accepting the law as an important reference point for behaviour. This is simply not the case in a country such as Uganda where even those supposed to make and uphold the law treat it as something largely irrelevant to their own lives.
Three culture clashes are thus created. The first is between the citizens and the State – the remote, foreign entity imposing its arbitrary and opaque rulings on communities. The second is between the majority of the population, and especially the rural population, and the educated elite, who are to some extent familiar with State law, at least in concept. Since these are the people who speak for 'the people' – they are the politicians, the NGOs, the civil servants, the academics – the people's own perceptions have been doubly silenced, for even their silence is unnoticed. The third is within the minds of the elite who adhere to the supremacy of State law. Even for them, statutory law is a foreign language that they have learned, and like non-native speakers of all languages, they speak more by learned rote than from an internalisation of the natural rhythms of language. Even when land law gives full recognition to customary law, this is not internalised, but instead they search for examples where customary law is 'repugnant to natural justice'. The importance of understanding this cultural mess will be discussed in more detail below, but it should be obvious that the widespread belief that 'sensitisation' will bring everyone to take on board State law as the governing principles of their lives is, at best, hopelessly naïve.

Let us return to land law. The Land Act says clearly that all disputes on land held under customary tenure should be resolved according to customary law, and that the customary authorities have the power to determine and mediate in those disputes. In Northern and Eastern Uganda, customary land law and land administration are with the clan. What can be seen in the State system as different functions are all combined in clan authority. The clan has the duty to protect the land and its integrity for the future; it protects the rights of the clan members, including future generations; it sets the rules for the transfers of rights and responsibilities; and they adjudicated or mediated on land disputes. Each family head is responsible for protecting the rights of all the family members, but it is the clan's responsibility to hold them to account and to ensure that the rights of the vulnerable are protected.

In giving recognition to customary law, the State gave recognition to an existing system of rules, institutions and authorities that were already working to administer land, to respect rights and to solve disputes – an opportunity too good to be missed for a State that had no

[1]The term 'customary law' is often criticised, but it is the one used by Uganda's Land Act (1998) in extending its legal recognition, and so the one we use here.

effective administration or judicial presence at the grass roots and which had either the resources nor the personnel to establish such systems capable of handling the work involved in administering land across the country. Too good to miss, perhaps, but rather than take it on board, the State simply ignored it. The administration of customary land has been simply ignored by the State (despite provisions in the law) and State law created a completely parallel justice system, so that the same Act gave power to determine disputes to customary authorities using customary law, and also made the (State) Local Council Courts the first courts.

Legal pluralism isn't about different laws: it's about different world views

Customary land law and state land law are not substantively different in northern Uganda, because Parliament decided that customary land law should be binding. Why then is it so difficult to find points of contact between the two? And why have State administrative and judicial structures not replaced the struggling customary ones? Part of the explanation is that the State tries to deal with legal pluralism as though it were about different laws, when in fact it touches much deeper and more profound differences in people's basic world view.

justice: Justice in Statutory courts is about determining who is in the right (winners and losers) according to laws that have to be 'certain'. Customary courts believe that justice is about finding a way forward that allows everyone to live together in harmony in the future whilst respecting fairness – which may involve compromises.

laws and procedures: State courts follow rules designed to ensure that the process is fair. These rules have to be fixed to be certain and to prevent abuse. Customary courts follow more flexible rules, which are not based on an attempt to follow the letter of any (unwritten) laws. it is impossible to win a case in a customary court on a technicality. This possibility in State courts makes them completely foreign to local conceptions of justice.

rights: "Formal" (or western based) law grants specific rights to individuals, which are defined and absolute. Customary rights go with responsibilities (the word for 'rights' and 'responsibilities' is the same in N Uganda), they are situational dependant, subject to compromise and are derived from one's position in the family or society.

land rights: State legal systems grant rights **of** ownership – those who own land, have rights. Customary law grants rights **to** ownership – the basic rule is that no-one can be denied land rights, and substantive customary law defines where and from whom you claim these rights.

Neither world view is inherently superior to the other. It has proved counter-productive, though, to bring awareness of people's legal rights under State law without an appreciation of the differences.

It is easy to imagine legal pluralism as a supermarket shelf of added choice – more choice always being better. Such an analysis would ignore two key features of legal pluralism as it currently exists. First, 'products' do not exist in isolation. The mere existence of one legal forum has a profound impact on others. The fact that people have parallel judicial pathways erodes the power of customary courts, whose only power comes from their authority which comes from the respect they command. it is a vicious circle. As powerless old men, they command less respect, less authority and so less power. Although his reality is not specific to a post-conflict context, the conflict and the mass forced displacement that went with it, changed the equation. The customary authorities were lining up in the same queues for food aid as everyone else for a decade: how can they re-don their figurative wigs and gowns and expect their verdicts to be respected with no power of enforcement? Second, the phenomenon of 'forum shopping' is well known and does not need further discussion. It is merely important to remember that in any dispute, it is the 'stronger' party that has the upper hand in choosing the forum that will determine the outcome[2]. We have analysed the outcome of this interplay of forces elsewhere[3], and described how the "weak" (and in particular women) lose from having two parallel systems both of which are supposed to protect their rights, in what we have called 'falling between two stools'. The existence of State forums undermines the customary forum, but they cannot replace it: they cannot command allegiance and yet the State simply does not have the capacity to make them work. Again, this is not a phenomenon specific to post-war situations, but a long war and the displacement of almost the entire rural population have made sure that the numbers of the 'weak' are very high indeed. (You are far weaker when you are trying to **reclaim** your land from an IDP camp than when you are on your land to defend it.) The results are plain for all to see in Northern Uganda: customary protection is dysfunctional and State justice non-existent; the Magistrate's Courts have backlogs of land cases going back several years and growing every year; in a judicial vacuum, people take the law into their own hands. Port-war societies have been socialised to violence, and it is therefore little surprise that violence is a frequently used tool for advancing or defending claims to land.

The Land and Equity Movement in Uganda has spent several years studying the workings of land rights and the process by which land disputes are 'managed' in practice in Northern and Eastern Uganda. Our theoretical conclusions, as we have presented them above, have led us to a clear course of action that – with guarded optimism – we hope is increasingly being taken up by State and non-State actors.

The first action is that land disputes are not a problem requiring ad hoc or individual case-by-case solutions (e.g. legal advice to victims), just as the problem of women's land rights cannot be solved by "raising awareness about the need for gender equality" in individual men and/or women. What we are faced with is a system problem and that means we need a system solution. The solution does not lie in the justice system (i.e. winning cases in courts for victims) because a major part of the problem is the very architecture (or lack of it) of justice system, or, rather, systems. So, we have started with widespread advocacy at local and national level to change the way we see the problem.

Second, we have to bring some harmony between the two systems. Currently, the weak lose out to forum shopping, whilst each "system" blames the other for consequences. The truth is that neither is particularly responsible for the legal jungle (of "survival of the strongest"):

[2] From a great deal of field research we have documented in detail how 'strength' works in land disputes and the fault lines on each system that allow land grabbers to move from one forum to another at will. See Lets face upto to Land grabbing pack by LEMU (on www.landinuganda.org)

[3] "Falling between two stools" published by James Currey in a book: "Women's land rights and privatisation in E.A.

the “blame” lies in the fact that they operate independently rather than harnessing the combination of their powers and authorities. We need a situation where everyone knows the roles of the State judicial system and of the customary system, and where there are clear rules about how protection issues move from one to another.

But if, as we argue, the two systems are based on inherently different world views, is it possible to bring the two into a single ‘legal meta-system’? We believe that it is and we have been working to achieve precisely this end, though certain compromises have to be made.

a) the customary system has to be made to look a bit more like a legal system that the State can recognise. This means, for example, we need clarity in its rules and have to curtail some of the room for flexibility that it used to enjoy. (Since this flexibility is nowadays exploited shamelessly by the ‘strong’, this is a step worth taking on its own merits.) Clarity and certainty can only be achieved by writing down customary land codes (or “customary land law”, as we take great care not to call it). This has proved a complex process. Because cultural normative codes are so much a part of people’s way of life, they are hard for people to see in isolation. On the other side, academics and activists have both refused to accept the idea that customary law exists at all. They continue to equate customary law with “whatever people do”, meaning that there is no normative function at all (e.g. rules that people often break). It has taken us several years to expose the underlying principles that people tacitly know they ought to follow – even when they don’t. These ‘principles, practices, rights and responsibilities’ (PPRR) as they have been called have now been written down for most of northern and eastern Uganda, and have been accepted by the customary authorities and, we believe, by the majority of the population in question. This has been a step of enormous importance for several reasons. It means that, for the first time, State courts and customary courts alike know what the rules are supposed to be; it means that they can now uphold the same rules; and it means that customary courts can be held to account, including by the State courts, for applying their own rules properly. (Of course, this is the beginning and not the end, and for example, we still need to work out how we will get authoritative case law through recognised precedents – simple in theory, but very complicated in practice – or the mechanisms that people will accept for amending customary law in the future.)

As well as having an authorised code, the customary system also has to have recognised authorities or courts. It has taken us a long time to work with the customary institutions to build up, village by village, a register of the people who are ‘genuine’ authorities. Without this rather tedious type of work, we can talk about accountability, but no-one will know whom to scrutinise or whom to hold to account.

b) We are now working to establish a single judicial pathway through the legal jungle. This will mean if State courts receive fresh cases that have not been to customary authorities they have agreed in principle to hear them, to send them back or to demand the records of the customary hearing that probably did take place but was not in favour of the one bringing the new case. The State courts are now very much in favour of the idea that all cases should begin in customary courts because they are simply overwhelmed otherwise, and they recognise that customary courts do at a cheaper cost free what the State will never be able to afford. Customary courts are very much in favour of the idea that State courts can hold them to account and can be used as appeal courts, because otherwise they have no powers at all to enforce their decisions. Becoming subject to judicial review by Magistrate’s Courts increases their importance, because the case would now start with their decisions and not with a fresh hearing of the evidence; and because it opens up the

possibility that they themselves can apply to a Magistrate's Court for enforcement of their verdicts. (Customary authorities have shown that they do not mind their verdicts being over-turned by Magistrates. What they resent is their verdicts being ignored.) The exact pathways from court to court have yet to be fixed, but there is now an emerging consensus that this needs to happen – though it has taken us several years to persuade the State system to take the customary system seriously.

On another level, the boundaries of each set of laws needs to be clear to all. Everyone knows that customary law is subject to State law and the Constitution. If everyone – customary authorities and disputants – knows which customary laws are binding and where they can be challenged, we can reduce the ability of the 'strong' to manipulate systems in their favour against weaker victims.

c) Whatever local agreements are made, we need official support from the top. National Land Policy has been formulated in Uganda. We have worked hard to ensure that respect for the principles for customary law has been entrenched and this is now the case in the National land policy (in strategy 41(v)[4]. This has meant overcoming hostility to customary tenure as backward", "primitive", "an impediment to economic growth and investment", "repugnant to natural justice", "discriminatory against women" which are the phrases that we have heard time and again. It has been time away from the grassroots, but we remain convinced that local level solutions only work when they are strategically sound. Getting the legal strategy right has been crucial.

d) We now need harmony in land administration and not just in land justice. Land administration just means systems for ensuring that everyone knows who has what rights to which pieces of land, and for facilitating changes in those rights (e.g. through allocation/inheritance, land transactions, etc.). The State cannot run such a system – especially at the current pace of surveying and titling 'new' land. It will take the State a very long time to register the rest of the country in the formal system. The customary system used to rely on the fact that everyone knew whose land was whose, but the increasing commercial value of land means that this is no longer a viable way forward. The customary system can, though, provide new solutions, getting villages or a group of neighbours to draw maps of their land, planting specific tree species as boundary markers, making sure the maps get mutually signed by neighbours and customary authorities, getting the maps and transactions recorded by the government recorders, etc. The State courts need to become familiar with such papers so that they will give them the status as evidence of rights that they deserve. (We also need to make sure that they know how to interpret them – e.g. that land is not owned as the personal property of a household head but is the property of the family as whole, even of children born after the drawing of maps. Formal 'titling' cannot accommodate this last principle of open-ended ownership, which is largely foreign to the world view of the State system.) LEMU has been advocating for such measures for a long time, and the difficulties that it has encountered – in what would appear to be an uncontentious area – are a sign of just how complicated land work can be in Uganda, and how much patience is needed.

In conclusion, we ask, can an end point where different legal codes work in harmony be called "legal pluralism"? We leave such thorny problems to others. We are convinced that only such an outcome can bring justice of any kind at all to the citizens of N Uganda.

[4] Also NLP statement 115 on land disputes caters for traditional institutions in land dispute management.

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