



## LOCAL JUSTICE IN SOUTHERN SUDAN

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## ABOUT THE REPORT

This study is the result of collaboration between the United States Institute of Peace and the Rift Valley Institute (RVI), leveraging the former's broader work on customary justice and legal pluralism and the latter's extensive knowledge of the region. The overall concept and methodology was developed jointly by Chery Leonardi of Durham University, Deborah Isser of USIP, and John Ryle of RVI. Dr. Leonardi was also director of the research team and lead author of the report, and she conducted field work in Wau and Jur River Counties. Dr. Leben Moro and Martina Santschi led the research in Kajokeji County and Aweil East County, respectively. Members of the Northern Bahr el Ghazal, Western Bahr el Ghazal, and Central Equatoria State governments; the Aweil East, Wau, Jur River, and Kajokeji County governments; and the state and county judiciaries permitted and assisted the research. Chiefs, judges, and court members allowed observation of their court sessions and gave extensive interviews. Garang Malong Akec, Mareng Chuor Deng, Garang Ajou Akue, Clement Morba, Silverio Abdallah, Kon Mawien, Christina Uwö, Benayi Lubang Muke, and Wilson Lubang Kwori assisted and translated for the research team. Tim Luccaro of USIP and Kit Kidner and Nick Daniels of RVI, among others, managed the logistical aspects of the project.

Photos: Martina Santschi

The views expressed in this report are those of the authors alone. They do not necessarily reflect views of the United States Institute of Peace.

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[ The content of local law cannot be isolated meaningfully from how it is applied in practice. ]

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## Summary

- Since its establishment five years ago under the Comprehensive Peace Agreement (CPA), the Government of Southern Sudan (GoSS) has struggled to create a justice system that reflects the values and requirements for justice among the people of Southern Sudan. For both political and practical reasons, chiefs' courts and customary law are central to this endeavor. A key question facing the GoSS is how to define the relationship between chiefs' courts (and the ideas about law that they embody) and the courts of Southern Sudan's judiciary, while ensuring equal access to justice and the protection of human rights.
- Policy discussions and recent interventions have focused on ascertainment, whereby the customary laws of communities (usually defined as ethnic groups) would be identified and recorded in written form, to become the basis for the direct application, harmonization, and modification of customary law.
- This report empirically analyzes the current dynamics of justice at the local level, identifying priorities for reform according to the expressed needs and perceptions of local litigants. Our findings are based on field research conducted from November 2009 to January 2010 in three locations in Southern Sudan: Aweil East, Wau, and Kajokeji.



## Key Findings

- At the local level, the boundaries between customary chiefs' courts and government courts—and between customary and statutory law—are blurred. A legacy of colonial and postcolonial government policies, the local court system functions as a loosely governed unitary system, which incorporates legal principles and practices from both statutory and customary law. It is characterized by hybridity and mutability, by an amalgamation of principles and procedures rather than a clear distinction between separate legal spheres.
- Customary law itself is not simply a set of rules and sanctions, but a contextually defined process, involving flexibility, negotiation, and reinterpretation of a dynamic body of knowledge to reflect what is considered reasonable under the circumstances. Due to historical influences, it is often conducted with reference to rules, but the application of such rules is inherently contestable. The court processes in which such contestation occurs are critical mechanisms to ensure that customary law and outcomes keep pace with local context and social change.
- People frequently express preference for just such negotiated, flexible settlements that take into account the particular social contexts of disputes, rather than any rigid application of written laws.
- Southern Sudanese tend to assert the absence of any entrenched discrimination in their courts. But they heavily criticize courts at all levels for the perceived increasing prevalence of bribery, favoritism, and excessive delays, which significantly disadvantage the poor. Such criticisms are particularly directed at the government courts; the lengthy proceedings required by due process are interpreted as deliberate corruption and blamed for escalating conflict. Additional obstacles to justice include military or government interference, police incompetence and abuse of power, weak enforcement capacity, and a perceived erosion of the power of elders, chiefs, and judges.
- Despite these expressed perceptions, in actual practice litigants make complex pragmatic calculations to identify a forum most likely to satisfy their aims. Local culture strongly favors restorative and consensual dispute resolution, but this may be overridden when the social relations between parties encourage an adversarial, retributive approach. Increased resort to police or government courts is partly a result of urbanization, but may also reflect the strong demand for protection, as the courts' power has eroded and society has become militarized.
- In light of the socially varied aims of justice, the hybridity, flexibility, and room for forum shopping in the local justice system are positive elements that increase opportunities for justice, accountability, and constructive change. Where government courts impose more rigid statutory penalties, litigants seek alternative forums in which to negotiate positive outcomes of compensation and, if appropriate, marriage.
- In a context of recent mass migrations and rapid urbanization, the local justice system has developed positive mechanisms for handling interethnic cases, demonstrating that customary justice is not restricted to discrete ethnic groups.

## Implications and Recommendations

- Current justice reform strategies to create more clarity and uniformity, at least on paper, through stricter jurisdictional limitations and the ascertainment of customary law, may reduce litigants' abilities to achieve the justice they want.
- Attempts to reduce customary law to a written set of rules and sanctions run the risks of:
  - Undermining the essence and perceived fairness of customary justice by curtailing its flexible negotiation of laws and principles in the context of individual cases, which is a constitutive feature of the existing system and has kept customary law apace with Southern Sudan's rapidly changing social and economic environment;
  - Politicizing ethnic difference by encouraging the idea that each ethnic group should have its own legal system and defend it against others;
  - Privileging certain informants and elites in the process of ascertaining a community's laws; their version of the law is then enshrined and perpetuated, diminishing the voice of women and youth, who can at present more effectively contest customary law in court than in formal community meetings.
- Alternatives to ascertainment that are more likely to improve fairness in local dispute resolution include:
  - Strengthening processes that assist government courts to apply customary law so as to preserve its contingent and discursive aspects, such as through referral to panels of elders or expert advisors;
  - Supporting dialogue among elders, judges, and civil society to establish a common understanding of local justice within the wider justice system;
  - Supporting review meetings in which chiefs, court members, and civil society can agree on scales of penalties and compensation, and improve their capacity to handle cases involving litigants from different regions and ethnic groups.
- Reform of the state criminal justice system, while needed, should respect the effective functioning of local justice and avoid restricting litigants' ability to choose chiefs' courts. This is particularly important in cases of sexual offenses and homicide, where there is frequently preference for the distinctive combinations of retributive and restorative remedies that the local courts have developed. Requiring that the government courts handle such cases under fixed laws is likely to result in underreporting of cases and potential exacerbation of local communal conflict.
- Local ideas of justice and legal rights are liable to conflict with international human rights norms, most critically regarding women and juveniles. Fundamental features of social and economic organization cannot be modified simply by legislation, prohibition of particular practices, or their removal from the sphere of local justice. Such interventions are liable, rather, to set back the cause of human rights and undermine the legitimacy of existing dispute resolution systems, leading parties to seek alternative means of redress, possibly through intercommunal violence or vigilantism.
- A more effective strategy for promoting social change needs to include long-term support for general education and access to information, so that debate can be more effectively informed by knowledge of global standards and the experiences of other societies. Where such knowledge resources are available, there is evidence that individual litigants deploy them in their disputes and cases, contributing to the gradual processes of debate and change that the flexibility of local justice engenders.



## Acknowledgments

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[ I ]  
INTRODUCTION



Regional court, Mangartong payam



# [ INTRODUCTION ]

## Project Context

The Comprehensive Peace Agreement (CPA) of 2005 between the then government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A), which ended the decades-long civil war in Sudan, created the semiautonomous government of Southern Sudan (GoSS) and the government of National Unity (GoNU). Following a six-year interim period, Southern Sudan is preparing for a referendum on full self-determination, expected to be held in 2011. Many leading southerners consider the war the SPLA fought since 1983 to be a struggle to defend the customs, languages, religions, and communal property of the southern Sudanese against projects of Arabicization, Islamization, resource extraction, and land alienation emanating from successive governments in Khartoum.<sup>1</sup> As Southern Sudan reasserts an autonomous identity, policymakers are looking to the specific heritage of the south. As one leading judge in the judiciary of Southern Sudan emphasized in a recent workshop, customary law is viewed as a promising basis for a distinct Southern Sudanese national identity.<sup>2</sup> The SPLM/A, and subsequently the GoSS, have thus given considerable prominence to customary law, traditional authority, and communal land rights in their rhetoric and legislation. The 2005 Interim Constitution of Southern Sudan (ICSS) made clear the commitment to custom and traditions as a central source of law, as well as to a role for traditional authorities (which principally means chiefs) and customary law in the local government system (Articles 5, 173). Apart from their ideological and political value, the recent government policies are also motivated by the recognition that chiefs and their courts have been, and so far remain, the only practicable and affordable form of local government and justice across Southern Sudan. However, the resilience and apparent self-sufficiency of the chiefs' courts throughout the wars presents the new government with complications as well as resources. The courts are clearly meeting a popular demand for dispute resolution and justice that the government judiciary's

limited capacity could not possibly handle. Yet limited government capacity has also ensured very little regulation of the courts, raising concerns as to what form and quality of justice they are actually providing. As they have historically, the chiefs' courts essentially function as the lower rungs of the overall judicial and appellate hierarchy, rather than as a separate customary system, and handle criminal as well as civil cases. From a local perspective, they are all part of a single judicial system. However, the chiefs' courts are administered by the executive local government offices at the county level, and thus are not considered part of the official judiciary of Southern Sudan (to avoid confusion in the report, we will use the term "chiefs' courts" to refer generally to customary courts and "government courts" to refer to those established by the judiciary).

The GoSS faces key questions as to how to formally articulate the customary courts and law within, beneath, or alongside the courts of the judiciary of Southern Sudan, and how to ensure equitable access to justice and the protection of human rights in doing so. Separate pieces of legislation—the Judiciary Act (2008), the Local Government Act (2009), and the Penal Code and Code of Criminal Procedure (2008)—have already generated some potential contradictions and uncertainties regarding the jurisdiction and supervision of local courts, which will be explained below. Nevertheless an emerging (though not unanimous) consensus among the Ministry of Legal Affairs and Constitutional Development (MOLACD), the local government board, and the judiciary has coalesced around the perceived need for some form of written ascertainment (i.e., definition and recording) of customary law, if not necessarily its formal codification. The main drivers for this have been the customary law steering committee of MOLACD, established in 2004, and the current chief justice, John Wuol Makec, who led previous codifications of customary law in the 1980s. The drive for ascertainment has most recently been elaborated in a strategy for customary law produced for MOLACD and the United Nations Development Programme (UNDP) rule-of-law unit, which was accepted at a stakeholders' meeting in October 2009.<sup>3</sup> The draft principally proposes a process of "self-statement" of customary law by "communities," together with a "soft human rights approach" to regulate and reform this law. The emphasis on ascertainment has guided much of the work on customary law in recent years, resulting in various forms of documentation of the laws of some ethnic groups or regions in Southern Sudan.<sup>4</sup>

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## **Project Objectives and Methodology**

This project is intended to contribute to policy development regarding the role of customary courts and law by moving beyond efforts to ascertain the content of local law, examining instead the actual practices of dispute resolution and litigants' perceptions of their options. The project's premise is that the content of local law cannot be isolated meaningfully from how it is applied in practice. Through detailed fieldwork, it offers an empirical and analytical basis for understanding how justice is provided, experienced, and perceived in practice at the local level. Starting from the current realities of local justice, it identifies priorities for reform tailored to the perceptions and needs of local litigants. The approach also reveals some obvious discrepancies between the practice of customary law and how policymakers define and understand it. Three different researchers took part in the qualitative fieldwork for the project—one Southern Sudanese (Moro) and two European (Leonardi and Santschi)—all of whom had substantial prior experience of local-level fieldwork in Southern Sudan. Each researcher spent between four and six weeks in a particular county: Moro in Kajokeji County; Leonardi in Wau Town and County and neighboring Jur River County; and Santschi in Aweil East County. Within

their research areas, each identified three or four courts to observe in detail, at different levels of the judicial hierarchy—from lower chiefs’ courts to county-level government courts. The researchers’ time was divided among direct observation of cases in court; recorded interviews with litigants, justice providers, and government officials; and informal interviews and discussions with a wide range of local people; all aided by local translators or research assistants. This enabled the comparison of perceptions and practices among litigants, court members, and different sections of wider society; across age groups, genders, income, and livelihood. The researchers conducted and transcribed more than one hundred interviews and observed up to fifty different court cases in around fifteen separate courts or other forums. The result was by no means a comprehensive review of all court cases in a particular area, but a reasonable sample of both cases and informants. Weaknesses include a limited number of formal interviews with women, who tended to leave immediately after court cases and were less willing to speak to the researchers, reflecting both their more pressing family commitments and that women find it more shameful to air familial issues in such contexts (see further discussion below). Where possible, researchers visited women in their homes to conduct more informal conversations than formal interviews.

## Research Sites

The three research sites were selected to cover some of the variations in local contexts across Southern Sudan. They also were chosen to ensure the comparison between urban and rural locations, monoethnic and multiethnic sites, areas controlled in the civil war by the SPLM/A and those controlled by the GoS from Khartoum, areas with predominantly pastoralist or agricultural modes of production, and areas with different directions of wartime displacement and returns. Three sites can never be representative of the great variation in local economies, cultures, and indigenous political structures across Southern Sudan, but they can at least indicate the extent of local differences, and perhaps more important, the areas of considerable similarity in judicial culture and concerns of local people.<sup>5</sup>

Kajokeji County is on the west bank of the Nile in Central Equatoria State and borders Uganda to the south.<sup>6</sup> It covers 7,200 square kilometers with a population of 196,422, according to the 2008 census. It is a predominantly agricultural area, populated by the Kuku, one of the Bari-speaking groups. Land ownership by clans and families is an important issue, linked to spiritually powerful clan leaders or land-priests, whose curses have long functioned as important indigenous sanctions, believed to be capable of bringing misfortune or even death to any who incur them through antisocial, criminal, or harmful behavior. The people of Kajokeji have always had close ties with Uganda, with many migrating there for work, trade, or education. These patterns accelerated during the war, when most of the population took refuge in Uganda. Kajokeji was chosen as a research site partly because it features a large population of returnees, who may be bringing different ideas of law and justice from Uganda or experiences in refugee camps. It is also the site of particularly strong concerns about witchcraft and accusations of poisoning, which have led to mob killings of suspects, and posed serious difficulties for the local government and judiciary. There are five *payams* (districts) in the county. Most of the data were collected in Mere Town, the county capital, and in Dwani Village (9 km from Mere), Leikor *Boma* (about 10 km from Mere; a *boma* is the smallest unit of local government), and the more remote Nyepo *Payam* (26 km from Mere). The researcher’s family connections in this county and his fluency in the local language enabled unusual access to private dispute resolution and wider discussions about poisoning accusations in particular.

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Aweil East County is one of the five counties of Northern Bahr el Ghazal (NBG) State, and one of the largest and most densely populated counties in Southern Sudan—309,921, according to the 2008 census. This population consists almost entirely of the Abiem tribe or section of the Dinka, who cultivate and fish as well as own cattle. It was heavily affected during the war by the cross-border raids of the *murahaleen* militias of neighboring pastoralists to the north, and many people were displaced to Khartoum, Ethiopia, Kenya, or elsewhere in Southern Sudan. There are seven *payams* in the county, and the research concentrated on the rural *payam* of Mangartong, the small market town of Wanyjok, and the county capital, Mabil, as well as the NBG state headquarters and high court in Aweil Town. The vast majority of disputes are about cattle and marriage, reflecting an enduring socioeconomic system centering on livestock and including polygamy. The management of cattle and obligations such as contributions to marriage or blood-compensation payments continue to be vested in extended family groups. Court cases can be extremely complicated because individual cattle paid in marriage or as loans may need to be traced through subsequent owners and exchanges so that they or their offspring can be returned.<sup>7</sup>

Wau Town straddles the counties of Wau and Jur River, in Western Bahr el Ghazal (WBG) State. Wau is a relatively large town for Southern Sudan and considerably larger than the county towns in Kajokeji or Aweil East. The latter are also populated predominantly by a single ethnic group or section, offering useful comparisons with each other owing to their different economies and directions of displacement. Wau Town is a very different site, located at the intersection of three main ethnic groups and between agricultural and cattle economies. It is on the edge of the Dinka cattle-keeping region, and some of the research was conducted among the Dinka in the town and nearby *payams* of Marial Bai and Wau Bai, which belong to Jur River County, but whose inhabitants refer to themselves as Dinka Wau. Ownership of the town is also claimed by the agropastoralist Luo (or Jur) and the many small groups known collectively as Fertit. The research focused primarily on the Balanda Viri tribe of the Fertit, in Wau Town and in their center of Bagare, twelve miles away in Wau County. Their economy has been based on cultivation as well as on hunting and forest products, such as honey. They have close connections to other Fertit groups, and also to the Zande of Western Equatoria, with whom they share practices of divination, medicine, and witchcraft. The research also focused on the town chiefs' courts and the county government courts. In the town, the courts hear the usual marriage, sexual, family, and cattle cases, but there are also many more cases of theft, monetary debt, market disputes, traffic accidents, and armed robbery than are found in the rural areas.

In general the similarities among the three research sites are more conspicuous than the differences, enabling the research findings to be amalgamated into a single report; where there are differences, these have been made clear. To ensure the anonymity of the interviewees and litigants, names are not given in the report, nor are, in many cases, the locations of interviews if this might reveal the identity of the interviewee.



[ **II** ]  
**RESEARCH FINDINGS**



Court case linked to cows. Sticks are symbols for cows. Court of Alama  
thiith Them Tong, Mangartong payam, Ajoungh Thi section

# [ RESEARCH FINDINGS ]

## Courts, Chiefs, and Customary Law

In recent years, insights from the wider field of legal pluralism have begun to affect rule-of-law programming, particularly in post-conflict situations, leading to greater awareness and recognition of customary law. Understandings of legal pluralism have also shifted from a simplistic model of the coexistence of two or more distinct, circumscribed legal or judicial systems to a focus on the intersections and overlaps among them.<sup>8</sup> In Southern Sudan, different legal systems and concepts have merged to a particularly strong degree, making it impossible to distinguish entirely which laws originated in indigenous judicial culture and social norms and which have emerged through interaction with government law and wider cultures.

A more important point, which emerges from our research and is corroborated by wider legal anthropology, is that plural legal systems can encompass principles and goals that would be considered contradictory in European and North American traditions of jurisprudence. There is no simple dichotomy between consensual and restorative judicial practices and adversarial, retributive, and punitive ones. Nor is there a separation of rule-based and negotiated justice. As wider studies have shown, rules—whether we call them norms or customary laws—are subject to negotiation in themselves; they do not “determine the outcome of disputes in a straightforward fashion.”<sup>9</sup> Rules do not always rule in practice in the courts.<sup>10</sup> The social relations of litigants and their individual goals, together with the priorities of the mediators or judges, shape how and which rules are upheld in negotiating the outcomes of cases.<sup>11</sup>

Many rule-of-law practitioners often perceive customary law as a discrete indigenous set of rules originating in the distant past and preserved within tribal communities. Studies of African customary law, however, have shown that such systems were frequently produced in the colonial period by the interaction between colonial administrators and local chiefs and elders, in a process of inventing tradition that largely strengthened the

**Table 1: Judicial Hierarchy by Law**

Local government unit	Local Government Act: customary courts	Judiciary Act: judiciary courts
<b>County</b>	<p><b>C court: county paramount chief</b>            Head chiefs as members            Appeals <b>from</b> B courts and <b>to</b> county judge            Criminal cases referred by statutory courts; cross-cultural civil suits            Supervised by county commissioner (not judiciary)</p>	<p><b>County judges</b> (first and second grade)</p>
<p><b>Payam</b>            (Note: it is not clear whether the courts at this level provided for by both acts are to be combined as a single court or exist in parallel.)</p>	<p><b>B (regional) court: head chief</b>            Chiefs as members            Appeals <b>from</b> A courts and <b>to</b> C court            Major customary disputes (including land); minor public order cases            Supervised by paramount chief</p>	<p><b>Payam judge</b>            (legally trained)</p>
<b>Boma</b>	<p><b>A (chief) court: executive chief</b>            Subchiefs as members            Appeals <b>to</b> the B court            Family/marriage cases, traditional feuds, local administrative cases            Supervised by head chief</p>	

Note: Arrows denote direction of appeal.

control of patriarchal authorities over women and younger people.<sup>12</sup> The legacies of the colonial period are highly visible in both the chiefs' courts and customary law in Southern Sudan today.

To contribute to current policy debates on the role of customary law, this project felt it necessary to revisit the basics. Many of the discussions in Juba take as their starting point the notion that there is a clear dichotomy between customary law and statutory law, between chiefs' courts and government courts. In reality, these lines are seriously blurred. Southern Sudan's complex and turbulent colonial and postcolonial history, including long periods of civil war, coupled with a very young new government, have resulted in a patchwork of courts run by chiefs, laypersons, and judges with varying degrees of legitimacy, qualifications, and legal status. Field research reveals how customary and statutory law have interacted and become intertwined from the perspective of litigants and justice providers at the local level. This section sets out findings and provides a historical perspective that deepens our understanding of local-level court structures, chiefs as justice providers, and the nature of customary law today.

### Mapping the Court Structure

The Judiciary Act (2008) and Local Government Act (2009) envision basic judicial hierarchies corresponding to the local government units of counties, *payams*, and *bomas*, albeit with some

contradiction as to whether the courts at different levels are considered customary or government courts (see Table 1).

However, the situation is far more complex and confusing than the neat hierarchies shown here on paper, and there is considerable variation in both the terminology and the court structures at the local level.

### *Making Sense of the Terminology*

The basic structures and some of the enduring terminology of the courts originated in the colonial period. The 1931 Chiefs' Courts Ordinance, implemented by the British administrators of the Anglo-Egyptian condominium government, established a simple hierarchy: A courts, which were headed by a single chief, and B courts, which consisted of a panel of these chiefs, headed by a president. Special C courts made up of B court presidents could also be formed to hear specific cases. All of the chiefs' courts were supervised by the British district commissioners—more or less closely, according to the individual official—who combined executive and judicial powers as both administrators and magistrates.

Even during the colonial period, some divergence in terminology opened up across different regions. In some areas, there was an attempt to separate the judicial and executive powers of chiefs, resulting in the two roles of executive chief and court president. Although the removal of judicial powers from executive chiefs did not succeed, these terms proved more enduring, so that in some areas, particularly Bahr el Ghazal, the two levels of court—A and B—are known as executive chiefs' courts and regional courts, respectively. These structures were preserved after Sudan's independence, but the general terminology has undergone further changes and additions under different governments, with chiefs' courts known variously (in translation from the Arabic) as "people's local courts," "native courts," "rural courts," and other terms still in use, for example, in Wau Town, which remained under GoS control during the SPLA war.

Under SPLM/A administration, the court structures and terminology have proliferated. The SPLA created its own judiciary as early as the 1980s, with mobile high and appeals courts operating in areas under its administration.<sup>13</sup> Following its national convention in 1994, the SPLM/A tried further to establish a degree of civil administration, adopting the new local government terminology of counties, *payams*, and *bomas*. Following successful military advances in Equatoria in 1997, including the capture of Yei Town, the region became the focus for efforts to establish the new hierarchy and incorporate the chiefs' courts into it.<sup>14</sup> In theory, former A courts were now to become *boma* courts and B courts to become *payam* courts. More literate individuals were also appointed as county judges, with varying degrees of paralegal training. The efforts to introduce the new terminology in Equatoria were gradually successful, though many local people continue to refer to A and B courts.

More significantly, introducing the new local government units prompted a period of division and subdivision of the old administrative and chiefdom units, and a resulting proliferation of the numbers of counties, *payams*, *bomas*, and chiefdoms. This meant that the former areas of A-court jurisdiction often became *payams* rather than *bomas*. In general, the boundaries of the new units bore little connection to the old ones, resulting in considerable dispute and confusion. In 2007, the GoSS local government board announced a moratorium on the creation of new counties, but local campaigns to establish new counties, *payams*, and *bomas* continue today.

At the same time, an unprecedented number of different authorities set up their own courts, from individual military officers and military police to regular police, government officials, and

committees of traders. By 2004, in the town of Rumbek, for example, it seemed that some kind of court was in process under almost every sizeable tree. Some of these were seen as exploitative and abusive ventures undertaken by members of the military and security forces, while others attracted civilian cases and became new forums for dispute resolution. In the displaced communities in the GoS-controlled garrison town of Juba, for example, particular headmen in the displaced camps gained a reputation for judicial abilities and heard cases from all across the town. Even the chiefs' courts, which correspond to the official system, are rarely established legally by warrant.<sup>15</sup>

Since the CPA of 2005, there have been some attempts to check the proliferation and informality of courts and to extend the terminology of *payam* and *boma* courts across Southern Sudan. In March 2010, the new Lakes State governor declared that all illegal courts operating in and around Rumbek should be closed. This seems to have meant all the chiefs' courts, which operated without warrants of establishment from the judiciary, but the list of other kinds of courts also revealed the continuing variety of justice forums: "Trade Union court, Cattle thief court, Fisheries court, Market and Porters court, Sheikh-el-Hilla [town quarter chief] court, Town regional court, Border court and Gelweng [cattle-camp youth militia] court."<sup>16</sup>

To illustrate the disparity between the neat hierarchies in recent legislation and the confusing reality, the Wau county commissioner described the local courts in his areas as follows:

There is the executive chiefs' court, which has the executive chief as chair, plus four members. Then from there, there is the village court or people's court: rural court. It has seven members. Now this seven-member court is supposed to be the *payam* or *boma* court, and the executive chief's court is now the village court. They can refer cases to the *boma* or *Payam*. That is the Makama Shaabia [popular/people's court]. Then there is the town court, which also has a people's court.

When we [SPLM/A] came from the bush we made a *payam* court, which means the judge should be a law graduate, but can be without the bar. Or it can be someone with experience, like a former policeman or administrative officer, or a retired judge. The *payam* court is still under the judiciary, under the province judge, as it used to be called—now the county judge. The system has not yet been implemented but we are planning two *payams* here in Wau, with one *payam* judge.

The town court is supposed to be under the commissioner—that revenue should be remitted here. But during the war it was put under the judiciary, in order to marginalize southerners. The chiefs working there belong to us; they get their salaries from here, but then they also get incentives from the Judiciary. (County commissioner, Wau, in English)

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*The local courts are generally less bewildering to the local population than they are to outside observers. Intermediate courts blur the boundary between statutory and customary law and between government and chiefs' courts even more.*

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The local courts are generally less bewildering to the local population than they are to outside observers. Local people often have transferred older or vernacular nomenclature to the latest courts, including simply the names of chiefs, which clarifies the hierarchy to them while adding to the confusion for outsiders.

### **Searching for the Line between Customary Courts and Government Courts**

Since the colonial period, the simple three-tier hierarchy of executive/A chief's courts, regional/B chiefs' courts, and county judges has existed, together with an urban court consisting of a bench of leading lay townsmen and town chiefs. The newer *payam* and county chiefs' courts and the expanded role of town bench chiefs' courts have created a more confusing grey area. These intermediate courts blur the boundary between statutory and customary law and between government and chiefs' courts even more.

The Judiciary Act of 2008 establishes the *payam* court as the lowest-level state court, the judges of which should hold a law degree (sections 20, 25). The Local Government Act of 2009 establishes a hierarchy of customary law courts at the *boma*, *payam*, and county levels. These provisions are not necessarily contradictory, but the implication is that there will be both a state court and a customary court at the *payam* and county levels. It is difficult to see in the near future how the shortage of legal professionals could be overcome to establish state courts at the *payam* level. In practice, the two are subsumed into a single hybrid *payam* court: The judges are usually more literate than other chiefs, have usually had more training, may have a copy of the codes of law, and dress more like government officials, but actually settle cases in much the same way as the chiefs' courts; some of them actually are chiefs. At present, neither the judiciary nor the local government officers appear to be exercising much supervision over any of the local courts.

The uncertainty over the *payam* courts is likely to remain unresolved for the time being, but it is not without implications, as a county judge in Wau noted:

We requested the executive [i.e., GoSS] that all the chiefs' courts should be under the judiciary so that we control [them] because their cases appeal for [i.e., are appealed to] the judiciary courts not [to] local government. But the local government wants these courts because of revenues. Revenues only. But for us we needed it because the cases which are finalized by the town courts and chiefs' courts come to [i.e., are appealed to] the county court.... We want these local courts under judiciary. (County judge, Wau, in English)

Although the realities of the current local court systems appear confusing and very different from the neat hierarchies of the legislation, the vestiges of earlier hierarchies remain, creating some broad similarities in structures despite much variation in terminology (see Table 2).

As stated at the outset, we will use the term "chiefs' courts" to refer generally to customary courts and government courts to refer to those established by the judiciary. In addition, the following terms based loosely around the 2009 Local Government Act indicate different levels of courts; however, they might be known locally by a different name, and some levels might not exist in every area. They are listed in descending order of hierarchy.

#### ■ Government Courts

*County Judge's Court.* This is a court in the official judiciary hierarchy, staffed by legally qualified magistrates. Locally it may be referred to as simply the county court, the province judge (an old term), or more often as the government court, big court, *molana*, or *gadi* (judge). There is a resident magistrate at this court, responsible for sending all cases or appeals opened at the county court to the appropriate judge or chief's court. Above this court is the state high court, followed by the regional appeal court and the supreme court of Southern Sudan.

#### ■ Intermediate Courts

*County Chiefs' Court.* So far, this only exists formally in Kajokeji (the C court), but the term will also be used for the panels of elders or chiefs that assist the county judges in Aweil East and in Aweil Town.

*Payam Chiefs' Court.* The *payam* court currently represents the gray area between government and chiefs' courts, and is interpreted differently in different areas. It does not yet exist at all in Wau. In Aweil East it has been created as a new tier in the court hierarchy, between the regional chiefs' court and the county-level courts, and is chaired by a literate layman selected from anywhere in the *payam*, rather than a hereditary chief of a particular section; it nevertheless operates very similarly to the chiefs' courts. In Kajokeji,

**Table 2 : Judicial Hierarchy in Practice**

Judiciary / "customary"	Kajojeji	Aweil East (Dinka names)
<b>Southern Sudan</b>	Supreme court (Juba)	
<b>Regional</b>	Appeal court (in Juba)	Appeal court (in Rumbek)
<b>State</b>	High court (in Juba)	High court (in Aweil Town)
<b>County</b>	County judges (first and second grade)	County judge (first grade)
<b>County</b>	C chiefs' court	Panel of elders
<b>Payam</b>	Paramount chief's court	<i>Payam</i> court (literate lay judge)
<b>Town</b>		Town (chiefs') court
<b>Group of chiefdoms</b>	—	Regional court (Akur Diec: Group 5)
<b>Boma</b>	<i>Boma</i> chief's court	Executive chief's court (Alama Thiith's court)
<b>Village/hamlet</b>	Subchief's court	Subchief's court (Alama Chol's court)
<b>Clan/neighborhood</b>	Headman's court	Headman's court (Nhom Gol/Mareng's court)

Notes: Wau is excluded from the table because it was more difficult to establish real hierarchies there. The town remained in the hands of the former government of Sudan until the CPA, which seems to have left a legacy of a stronger role for government courts, as well as the use of Arabic terminology. Within the town, there are chiefs of each area or quarter (*hai* or *hilla*), with their own courts, known generally in the GoS terminology as native courts. In the GoS-controlled areas of Wau County outside the town, chiefs' courts were known as rural or popular courts. These names were also applied to the central higher chiefs' court inside the town. In 2005, as the former GoS judiciary merged with the new judiciary of Southern Sudan, the old chiefs' courts were officially suspended, pending a new system. In reality they have continued to function, but the only one county judges recognize and refer to is the main town chiefs' court. These judges assert that all cases are supposed to be opened with the county resident judge, who can then decide whether to refer them to the town chiefs' court. The rural chiefs' courts appear not to be well linked to the government judiciary in the town, and there is considerable uncertainty about terminology and the new legislation in general. The predominantly Dinka areas of Jur River County came under SPLM administration earlier than Wau County, and here the court structures and terminology are more similar to those of Aweil East.

the former B or regional courts have become known as *payam* courts, and are headed by a paramount chief. Because none of these courts is yet staffed by legally or paralegally trained personnel, this report refers to them as chiefs' courts, though in Aweil, the *payam* judges are neither chiefs nor legal professionals.

*Town Bench Chiefs' Court.* Each town has one or more town bench courts, the members of which tend to be more literate than rural chiefs and are drawn from the multiethnic urban population, but are nevertheless commonly known as chiefs. These big town courts tend to have a close relationship with the county judges' courts and the police. In Aweil East, the court is said to be on a par with the regional/B chiefs' court; elsewhere, they are seen to be equivalent to a *payam* court. In Wau some of the chiefs are even said to be classified as second-class magistrates.

#### ■ Chiefs' Courts

*Regional/B Chiefs' Courts.* The B or regional chiefs' courts—not to be confused with the



regional courts, which used to be among the highest government courts for the three former southern regions of Bahr el Ghazal, Equatoria, and Upper Nile—have existed since the colonial period as a court for a number of chiefdoms, chaired by a paramount chief or court president, with other executive chiefs as members. In Kajokeji, they have been conflated with *payam* courts. In northern and western Bahr el Ghazal, they are often known as the Group Five courts.

*Town Quarter Chiefs' Courts.* Each town is divided into areas or quarters headed by a town chief, who usually have their own local courts. In Wau, the latter are still referred to in the old terminology as native courts. These courts are comparable to executive/A chiefs' courts.

*Executive/A Chiefs' Courts.* Again, these courts have existed since the colonial period, though the number and size of chiefdoms—and hence, courts—have changed considerably. They sometimes correspond to the new unit of the *boma*, a subdivision of the *payam*, and may be referred to as *boma* courts; they are headed by a single chief, with elders or subchiefs as members.

*Subchief's or Headman's Courts.* The lowest levels of local court tend not to be formally recognized, although in some areas, previous governments have given official court stamps to the subchiefs or headmen of villages, clans, cattle-camps, or town quarters. Regardless of government recognition, subchiefs and headmen play a role in dispute resolution and often inquire into cases initially before forwarding serious ones on to the chiefs or police.

#### ■ Private Dispute Resolution Arenas

Outside any formal courts, there are family and neighborhood mechanisms for settling disputes.

## Chiefs

It will be obvious by now that the system of local courts centers primarily on the figure of the chief. Chiefs are commonly referred to nowadays as traditional leaders or traditional authorities. There were many kinds of local leaders in Southern Sudan before the colonial period, but the specific title of chief was created as part of the British administrative system of indirect rule, a system instituted, with variations, in most rural areas of Sudan.<sup>17</sup> The 1931 Chiefs' Courts Ordinance should not be seen as the colonial government's formal recognition of an indigenous system of justice. Not only were the courts as constituted under the colonial administration a new institution, but the chiefs who presided over the courts, some of whom were formally recognized as third-class magistrates, were often themselves the result of the encounter with colonial government. The societies of Southern Sudan had varied and complex forms of self-government before colonial rule, but these tended to be more collective and diffuse, rarely involving a single ruler with overall authority. Even the kings of the Shilluk, Anuak, and Zande were not necessarily the kind of compliant leader that the colonial government needed.

Indigenous and local forms of authority and justice continued to function without government endorsement during the colonial period, as they do now. The new government chief acted as an intermediary with the colonial officials, taking his place alongside other specialist community leaders, such as those responsible for important spiritual functions, or for war. Sometimes the government chief also played one of these other roles, but in many cases com-

munity elders chose him to be their interlocutor with British officials precisely because he was not powerful or important, and therefore kept the leaders of the community at a distance from what was initially an unpredictable and potentially threatening colonial power. Often such individuals became chiefs simply because they could speak some Arabic, the lingua franca of the early colonial administration.

Despite the arbitrary ways in which the earliest chiefs were identified through interaction between the colonial government and local communities, over time, they became institutionalized as the key traditional authorities. Their resilience is impressive. After Sudanese independence, political leaders in Khartoum sought to diminish the power of those seen to have collaborated with the former colonial regime. This culminated in President Jaafar Nimeiri's abolition of native administration altogether in 1971, and the rather ambiguous People's Local Courts Act of 1977, which repealed the Chiefs' Courts Ordinance while allowing existing courts to function. As the 1977 measure indicated, in reality—particularly in the south—there was little alternative to the chiefs and they continued to act as principal government intermediaries, tax collectors, village administrators, and court presidents.

During the first (1950s/60s–1972) and second (1983–2005) periods of civil war, the chiefs' positions were extremely difficult. They had always walked a tightrope between the demands of government and their communities, and this balancing act was made more difficult with the appearance of rebel groups; the rebels expected assistance from the chiefs, while the government expected the chiefs to inform on the rebels. The second period of civil war also created vacuums of government in areas where the SPLA effectively drove out the GoS but did not immediately erect an alternative administration. Chiefs in such areas became intermediaries with military forces rather than with a government, and often endured physical mistreatment when they were unable to meet the soldiers' demands.

Despite the chiefs' varied origins, their positions have become largely hereditary. Since the 1970s, the idea of elections for chiefs has taken hold, at least in some areas, but the concept is very loosely interpreted. On the whole it seems that, when a new chief is to be appointed, the county government authorities invite some degree of selection or shortlisting by the community, which in practice means certain leading elders or other prominent figures belonging to the chieftdom, such as local politicians, government officials, church leaders, head teachers, and so on. In the vast majority of chieftdoms, the candidates are limited to the men of the hereditary line of chiefs; this can still mean a considerable pool, however, and it is by no means automatic that the former chief's son is chosen. In some areas, or on occasions when there are a number of suitable candidates, an election can be held, in which the candidates stand at the front and supporters line up behind them. At the other end of the scale, there are instances in which county commissioners are said to have simply appointed their preferred candidate. During the war, this was particularly common; some of the resulting SPLA chiefs have gradually been replaced in the last few years. It is clear that government appointees without sufficient local backing tend to encounter passive resistance to their orders or outright opposition. In Dinka areas, there is a proud tradition of vocal complaint against unpopular chiefs, which has frequently led to their removal and replacement. Most local government officers thus have realized the need to consult with communities over the selection of chiefs. But this consultation rarely involves the mass participation of the chieftdom's population, and the great majority of chiefs still come from hereditary chiefly families. In some cases, these families also hold special spiritual powers, but even when they do not, the inheritance of chieftainship is related to spiritual sanctions and the power of the ancestors.

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*Most local government officers thus have realized the need to consult with communities over the selection of chiefs. But this consultation rarely involves the mass participation of the chieftdom's population.*

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The Local Government Act clearly envisages a continuation of the multiple roles of chiefs, as administrative and executive authorities in their villages and also as judges or presidents of local courts. The chiefs have succeeded remarkably in maintaining their unique and interstitial status: They are closely connected to the government, and yet somehow apart from it too. This does not mean that they enjoy a straightforward popular legitimacy; most people criticize their chiefs for corruption or inability, and some of today's chiefs are said to have acted as informants for the repressive military and security forces during the war, reporting any support for the opposing side in the conflict. Nevertheless, as this county judge observed, the chiefs are distinguished from the even less-trusted government and police:

Q: Do people complain to you about their chiefs sometimes?

A: No, and in fact if you as a judge take action against a chief, people become very angry and think you are acting against the whole tribe. The chiefs are very powerful—people don't believe in police or government, but only in the word of the chief. And especially in cases of compensation, even if we settle the case here, the chief is the one to collect the cows. If you send the police it will cause a new problem! (County judge, Wau, in English)

Despite the differentiation of the chiefs from the rest of the administration, they have begun to receive salaries again in the last year or so, although the money is often termed as an incentive to try to avoid incorporating them fully into the civil service. Payment of chiefs varies across Southern Sudan: in Warrap State, most chiefs have not yet received any salaries; in other states there is variation, particularly between areas formerly under the GoS, in which chiefs were already receiving quite generous salaries, and those formerly under the SPLM/A.<sup>18</sup> In Wau, all chiefs seemed to be receiving around 180 Sudanese pounds (SP) per month, whereas in Aweil East, executive chiefs receive 900 SP and their respective court deputy earns 700 SP.

Chiefs use the lack or small size of their salaries to justify keeping all or part of the income from their courts, which is supposed to be remitted to the government. In most areas, the local government's limited capacity to monitor court registers (if these are even used) and compare them with the amounts remitted ensures that chiefs can easily keep at least a portion of the court fees and fines. Some courts explicitly demand a few pounds of the court fee, for the table or chairs, to cover their running costs. In Kajokeji, the county and *payam* administrators are in some conflict with chiefs over their failure to remit court income, and have threatened to reduce the number of chiefs, since they seem from their remittances to be hearing so few cases. Elsewhere, the local governments make sporadic efforts to inspect court records and demand remittance of court income, but chiefs, clerks, and local government administrators are also said to come to their own private arrangements to keep and share some of this income, if necessary, by the selective recording of cases.

The chiefs and their courts remain the responsibility of local government; they are supposed to be paid and supervised by—and remit court income to—the county authorities (in some areas, via the *payam* administration). But the selection and appointment of chiefs to sit on courts is supposed to involve the judiciary.<sup>19</sup> In some areas, the county courts and police have much more direct contact with the chiefs' courts than does the county government, which supervises the administrative rather than judicial role of the chiefs and their appointment. The supreme court of Southern Sudan created a mapping committee that visited all of the states in 2009 to survey the local and *payam* courts in terms of their number, composition, selection procedures, remuneration, and oversight; the resulting report is currently pending.<sup>20</sup>

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### *Customary Courts and Customary Law: Paradigms and Problems of Definition*

We have seen how government chiefs were created as the intermediaries between communities and colonial state structures. The early colonial courts that the government chiefs presided over were largely concerned with enforcing the colonial administration's rules and the chiefs' authority: Many of their cases concerned disobedience or failure to provide the taxes or labor the government demanded.<sup>21</sup> In the early Condominium period, colonial officials reported on the continued existence of other indigenous assemblies, which they referred to as courts. These were convened by elders and spiritual leaders, such as rain priests, and were frequented more than the chiefs' courts, because the latter were seen as government courts. However, it seems that the chiefs' courts nevertheless quite rapidly gained in popularity. There are a number of possible reasons for this. One is that they offered an alternative to local dispute resolution mechanisms controlled by particular male elders. Younger men and women, especially those educated in the new missionary schools, began to challenge existing marriage customs in the chiefs' courts. The few literate government employees even wrote letters appealing to distant British authorities to help in their cases, and when British officials trekked around their districts, they were constantly accosted to settle cases. Clearly some people were looking for outside or alternative authorities to support their case. This opportunistic approach to the government and its courts is still apparent today.

Above all, though, the government chiefs' courts had a connection to the force of the colonial state. It might be assumed that this association would render them less legitimate in local eyes, and it certainly did. But it also enhanced their prestige and power, and people realized that papers and rubber stamps had a symbolic power, linking them to the more instant force of the government police and soldiers. If somebody was determined to get back his cows from someone who had stolen or borrowed them, or owed them as a customary obligation, the chiefs' court might be most able to ensure that the cows were actually returned. There is a culture that the courts should be approached as a last resort, when it is felt necessary to enforce an immediate payment of a debt or compensation.

In the colonial period, British officials closely monitored the chiefs' courts and heavily influenced their procedures, architecture, laws, and sentences. Some of the colonial buildings constructed for the higher chiefs' courts are still used for the same purpose, particularly in the main towns of Southern Sudan: They tend to have a formal internal architecture, with raised platforms for the court members. Accompanying this architecture are the formalized, authoritarian practices also inherited from the colonial era. One British colonial governor observed in 1932 that the early chiefs' courts "were not regarded as native courts at all, but as purely Government institutions"—resulting, he added, in "an aping of what they thought were our ideas and our laws; and a tendency on the part of the chief's police to push people about, make them stand at attention and so forth."<sup>22</sup>

Today the courts also enforce formal procedures, making litigants stand or sit in particular places and positions, and follow rules for speaking, all of which is intended to enhance the court's power. As we shall see, the spatial and ritual barriers of the courts are continuously broken down by vocal and defiant litigants, but the court rituals nevertheless mark out an official, formal arena and differentiate it from informal arenas of dispute resolution. These legacies have made chiefs' courts neither wholly customary nor wholly governmental, but an amalgamation of both.

The historical developments also have had lasting ramifications for what is known as cus-

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*The court rituals nevertheless mark out an official, formal arena and differentiate it from informal arenas of dispute resolution.*

*These legacies have made chiefs' courts neither wholly customary nor wholly governmental, but an amalgamation of both.*

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tomary law. From the colonial period to the present, pressures from both local communities and government have shaped the chiefs' courts, resulting in a very hybrid set of judicial practices and cultures. Rather than the coexistence of two distinct statutory and customary legal systems in Southern Sudan, the reality is more like a loosely governed unitary system that incorporates legal principles and practices from different sources and applies them with varying degrees of consistency, at varying levels of the judicial hierarchy. The chiefs' courts form the lower rungs of an integrated court hierarchy; cases can be appealed from these so-called customary courts to higher judges' courts. This appellate link has ensured that government courts have had to understand and even apply some version of customary law. But the law applied by the chiefs' courts is itself the product of a long history of interaction with the government and judiciary; chiefs frequently possess and refer to penal and civil codes. Customary justice and statutory justice are perceived as substantively different only regarding certain issues; most people, including chiefs, would not distinguish along these lines, but commonly assert that all laws come from the government.

The SPLM/A legal codes produced from the 1980s explicitly sanctioned the use of customary law by its official judiciary courts. As one Southern Sudanese lawyer puts it, "there was an informal fusion of statutory and customary law," which has subsequently become "a hard nut to crack."<sup>23</sup> Meanwhile under the GoS, a provincial parliamentary speaker, John Wuol Makec, led the restatement of the customary law of all of the Dinka of Bahr el Ghazal Province in 1984, which updated the earlier Dinka codes of 1975. These laws are known as the Wanh Alel laws, after the site in Tonj District of the conferences that agreed to them. Wuol Makec also published his own more detailed versions of Dinka customary law, as did the academic Francis Mading Deng.<sup>24</sup>

Wuol Makec is now the chief justice of Southern Sudan. He believes that customary law is not merely relevant in certain family law cases, but is an entire system for dealing with criminal as well as civil cases, which could form the basis for a common law system. Not all SPLM legal and judicial personnel would necessarily accept this view, but as this report will show, it appears to be the de facto reality that government judges as well as chiefs believe that it is necessary to refer to customary law in the majority of their cases. Most basically, this means that compensation has become the most common remedy, usually together with a punitive penalty, and that civil and criminal procedures have frequently been amalgamated.

One international expert described the result as a mishmash of statutory and customary justice.<sup>25</sup> A recent report emphasizes that local justice networks in Southern Sudan cannot be equated with "non-state" justice because of their continual overlap with and assimilation of elements of state justice.<sup>26</sup> To suggest that customary law still exists in an unadulterated form in some rural areas is essentially misleading; even in the rural areas observed by this project, the influence of principles and practices originating in state institutions is apparent in the local courts.<sup>27</sup> Even the most remote regions in the country have been affected by government, war, trade, migration, returns, and wider communication. There is no such thing as "unadulterated" customary law, if this implies an isolated and untouched indigenous body of law. Some aspects of today's local laws were the product of British colonial ideas of what African tradition was; many other aspects have evolved and emerged from changing societies since then, as well as from continuing government interpretation of custom.

Given the extent of hybridity and integration in the Southern Sudanese judicial system, it becomes easier to say what customary law is not—that is, ancient, untouched, non-state, tribal, purely restorative—rather than what it actually is. Any characteriza-

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*Government judges as well as chiefs believe that it is necessary to refer to customary law in the majority of their cases.*

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tion of customary law today must at least account for the following three principal, but overlapping sources.

■ **Social and Moral Norms and Values**

In Southern Sudan, the norms and values of local societies are frequently the subject of official rhetoric, but in reality they are negotiated and enforced primarily through family and neighborhood arenas of mediation, decision-making, social contracts, and moral teaching. These are private arenas, in which outsiders and government rarely intrude—and government officials are supposed to leave their offices behind if they enter. Their ideal goal is to preserve and restore social relations, but in doing so they inevitably preserve structures of authority and inequality within families and communities. Yet they also reflect continuous change and wider interaction, and considerable debate and conflict in local society. Even if the overall goal is to preserve social relations, individuals nevertheless desire victory in their disputes and argue their case in adversarial ways. Chiefs may have particular weight in their own family meetings, but no more than other senior men; it is not chiefs alone who are the custodians of this source of law, though they may help to communicate it to wider society through their courts.

■ **The Chiefs' Courts**

As discussed above, the chiefs' courts have long been an amalgamation of the norms of local communities and the rules of government administration. The result is a changing, variable form of applied law, based more upon the context of each individual case than on a fixed set of rules. The key point is that the content of this law does not necessarily exist in any fixed and predictable form, but is produced in the course of each court case by negotiations and wider context. Like the social norms upon which it partially rests, the law of the chiefs' courts is "fluid, relational and negotiable."<sup>28</sup> The chiefs, especially in the towns, sometimes refer to statutory penal code sections. Neither people nor their chiefs necessarily perceive a distinction between different kinds of law; many say that all laws come from government. But whether the courts refer explicitly to normative rules or statutory laws, these are used as underlying principles rather than as rigid rules to be strictly adhered to. The courts interpret the applicability of rules to each case according to its particular context and their evaluation of a litigant's character and speech. Their reference to law then adds authority to their pronouncements and decisions, rather than predetermining the outcome. The result is a highly flexible and contingent form of law, which adapts and changes, and is, therefore, living.

■ **Official or Government Versions of Customary Law**

Government judges long have had to develop mechanisms for handling civil cases and appeals from chiefs' courts, which requires them to understand local law. Their interpretations of customary law are sometimes very similar to those of the chiefs' courts, based on an understanding of the principles underlying local socioeconomic systems and the need to negotiate each case individually. But sometimes their understanding is more limited or critical, which can lead to tensions within the court system and a greater sense of disjuncture between local and government law. Nonetheless, the body of jurisprudence involving their interpretations is another source of customary law, particularly in light of the common law system, in which precedent and case law are binding. A few judges or scholars have gone further and attempted to produce a written, formalized version of customary law, and even to agree on a homogenized version across entire regions. The most prominent example of this is the so-called Wanh Alel laws of 1975, updated in

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*Government judges' interpretations of customary law are sometimes very similar to those of the chiefs' courts, based on an understanding of the principles underlying local socioeconomic systems and the need to negotiate each case individually. But sometimes their understanding is more limited or critical.*

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1984 as the restatement of the customary law of the Dinka of Bahr El Ghazal, led by the current chief justice of Southern Sudan, John Wuol Makec. These recorded versions of customary law tend to be generalized statements of offenses and fixed sanctions, rather than the more nuanced and fluid norms and principles of the living customary law negotiated in the communities and local courts. The results of the restatements and records of customary law are discussed in detail below in Part III, as are current proposals to conduct similar initiatives on a more comprehensive scale; Part III also explores the implications of a more nuanced understanding of customary law for current policies favoring ascertainment in Part III.

## Step by Step: The Processes and Culture of Dispute Resolution

If you know the system you can go step by step and you will get your right. (Middle-aged Balanda Viri man, returnee, in English.)

The complexity and difficulty of characterizing customary law and the courts described above underscores the importance of focusing on the actual practice of dispute resolution and the experience of litigants. This project thus traces actual pathways of seeking justice and analyzes the processes at each level. One overarching finding is that, despite the rather haphazard development of the courts, there is a general acceptance of their hierarchical nature; they are perceived as a ladder or chain, graduated according to the size of a case or the progression of appeals. There is some concern that the order of the system has broken down partially in recent years, and that there is confusion as to which court should be approached in the first instance, but people remain confident of how the system is supposed to look. In later sections, we explore additional findings about Sudanese perceptions of the justice available at these levels and how these perceptions affect the way Sudanese approach their options in reality. Here we lay out the processes and culture of dispute resolution in the generally accepted step-by-step hierarchy.

### *Private Resolution: the Family and Neighborhood*

Across Southern Sudan, there is an overwhelming consensus that the majority of disputes arise within the close or extended family or in the immediate neighborhood, and that these disputes should be contained and resolved with the assistance of relatives and neighbors before “going ahead” (as it is commonly put) to any court arena. The family and neighborhood are the real locations of informal mediation and restorative justice, within which untold numbers of quarrels and offenses are handled without ever becoming visible to wider society or government.

But however private the dispute settlement is, it is not without its own formalities and links to the court system. When cases reach the chiefs’ courts, the chiefs are likely to ask about previous attempts to resolve the problem and consider the opinions of elders and others who have already listened to it. Many chiefs’ courts also refer cases back to families and elders for settlement, and in some areas, this has become formalized in court language as “referral to home affairs.” Even in vernacular discussion, people may use the English words “committee” and “chairman” to describe the groups of elders and senior relatives who meet on an ad hoc basis to discuss disputes and problems, or to negotiate marriages. Funerals are also known to be occasions for such meetings, particularly in those Sudanese societies where death is routinely held to be caused by acts of witchcraft or a breach in social relations within the family or with a deceased ancestor, necessitating thorough discussion to uncover the fault. In some areas, the

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*One overarching finding is that, despite the rather haphazard development of the courts, there is a general acceptance of their hierarchical nature; they are perceived as a ladder or chain, graduated according to the size of a case or the progression of appeals.*

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final day of the funeral—which can be a number of months after the burial—is a particularly appropriate time to uncover and discuss not only the death itself, but also any other important matters in the extended family.

The elders look after the clan. They handle cases of fighting during beer [i.e., social gatherings and dances when alcohol is consumed and fights are common]. And they make sure that people marry when they are young, to avoid these venereal diseases. They come together at funerals, and especially after the forty days [i.e., the mourning period]. The elders all come and discuss general problems. If someone has been offended, they can be told to go and pay five pounds and open a case in court. (Balanda Viri elder, Wau, in English)

The use of writing is also creeping into informal family meetings as a means of formalizing the agreements reached. Some people explicitly explain this in relation to the courts: If later disputes arise and reach the courts, disputants can produce incontrovertible written evidence of the previous agreements reached. This is particularly true of agreements regarding marriage, because they involve two different families. On the one hand, then, people frequently state their preference for settling their problems privately within or between families, rather than airing them publicly in the courts. But at the same time, there is always an awareness that a family meeting may prove to be merely the first stage of a longer settlement process involving the courts.

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*There is always great sensitivity to the danger of outright conflict and violence, which is the primary reason for the decision to send disputes to a court rather than solving them at home.*

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There is always great sensitivity to the danger of outright conflict and violence, which is the primary reason for the decision to send disputes to a court rather than solving them at home. Decades of armed conflict in Southern Sudan have underlined the limited power of the elders before the physical force of younger people, and there is a strong perception that the courts are the principal means of avoiding violent outcomes of disputes. Against this is the perception that it is shameful to air marital and family problems publicly in court. Women feel this shame more acutely, reflecting the social pressure on them to avoid taking their grievances to court and thereby endanger their marriages and relations with their in-laws, though there also is a more general belief underlying the association of shame with the courts, namely, that court settlements can harm or destroy relations between people, whereas the family settlement is designed to repair and restore relations.

The goal of restoration can entail reinforcing power relations within families, which inevitably favor the senior men, who are likely to lead the meetings. But restoring relations also requires compromise and agreement from all sides, even when they are cajoled. If women or younger people can mobilize some relatives as allies, they can have a strong voice in negotiations. Women elders also play a part in advising. Because the emphasis is on compromise and resolution, each problem is also handled individually, through discussion and agreement. This means that applying rules or laws in a uniform manner would not necessarily be helpful, particularly if this entailed finding one person guilty of an offense. Instead the members of the committee are usually concerned with attributing blame and giving advisory lectures to all sides, as in the following example:

We were settling cases here in my house yesterday after the funeral. There was a case from within us, between my cousins and my uncle (my father's brother), and the granddaughter of my uncle. My uncle has a plot of land, but it is said to belong originally to my cousin's grandfather. Those cousins have been in Juba for a long time; they were even born there. My uncle gave the plot to his daughter to stay in, but when she died he started to claim it. It was like he was taking the estate from her. So her daughter contacted the cousin to say "my grandfather is taking the plot away from me." So the cousin declared that he would claim that whole area back from my uncle, in front of the government. It became a very strong case; people were pointing in each others' faces! But we managed to control it. We were chiefs and *bazingers* [guards] at the same time!



We spoke to the daughter of the [woman] and said, "It is bad to talk to your mother's father like that; you should hold your tongue sometimes." My uncle's sister said that both her brother and his granddaughter were bad, because they talk as if they were not related in blood. She does not respect him, and he does not lie low [sic] to the granddaughter. People said the granddaughter should not try to hit the heads of the cousin and her grandfather, bringing conflict between them. Then we turned to the old man and said, "Your daughter died recently; you are still sitting with tears, and yet you are trying to evacuate the lady from the house within the year. That is wrong." And we told the cousin (my uncle's brother's son) that he should respect his uncle. I said, "You, uncle, should respect the small ones and not belittle yourself when you are drunk. Try to be heavy rather than light. You have caught and twisted the hand of your granddaughter, and she is not your wife for you to do that. You need to talk well; bad words will make them also shoot bad words at you. I was away in Khartoum but now the family must come together and resolve this." I told the granddaughter not to make her uncle angry or it can make God also to be angry and then punishment will come somehow.

So the granddaughter will stay for now in her mother's place. Before her mother died, she left money for her to get her own plot, from the mother's wages because she worked for the government as a messenger or something. So now the uncle should also help with that, to finish the new house before she has to move. (Balanda Viri elder, Wau, in English)

Such meetings are vitally important to produce and reproduce the normative principles that can translate into more formal penalties in the courts. In this particular case, the elders clearly upheld the basic principles of patrilineal land rights, but at the same time their pronouncements reflected more fluid principles of obligation and social behavior, and the outcome was a negotiated compromise. The chiefs' courts often conduct their cases in much the same way. The key differences between home settlement and the courts, however, lie in the public nature of the latter, their generally more adversarial style and punitive sanctions, and their capacity to enforce their decisions. Often, in family settlements, the elders or facilitators repeatedly warn and threaten those in dispute that failure to resolve the problem among themselves will lead to a more punitive and costly settlement in a court.

We as elders come to settle disputes in families, or marriages, or crises like if somebody has died or been killed. It is ideal to solve problems outside, because once you go to court, you have gone outside the circles of normal understanding, and referred to a law which is alien. It is better to negotiate, giving in, give and take, because then you can live longer and become more friendly, rather than becoming enemies. Like when somebody causes an accident, like crashing a bicycle with a car, they can just agree to pay the cost of the bicycle. It is easier and saves time, and it becomes an understanding. If you go to court it becomes "what, what": very harsh words. (Luo elder, Wau, in English)

### *The Chiefs' Courts*

If family resolution fails or is unavailable, or if people want to avoid it, the next step for disputants is likely to be a court headed by an officially recognized member of the traditional leadership or formerly native administration. As we have seen, the precise names of the courts vary, but there are usually at least three levels of them, starting with a headman or leader of a clan, section, or neighborhood, who may or may not hold a regular court, and who acts either as the highest level of family settlement or the lowest rung of the court system.<sup>29</sup> The degree of government recognition of such leaders varies. In Aweil East and other Dinka areas, the government has long recognized the *nhom gol* for his role in tax collection and relief distribution, as well as in the settlement of minor cases. In Wau, Balanda clan leaders are not officially recognized in this way, and their role in dispute resolution is more like that of a family elder. In some areas, headmen have an official rubber stamp to forward cases in writing to the next level of court.

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*The key differences between home settlement and the courts, however, lie in the public nature of the latter, their generally more adversarial style and punitive sanctions, and their capacity to enforce their decisions.*

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Above the headman level are usually the subchiefs' courts, and above them, the executive/A or town quarter chiefs' courts, followed by the regional/B chiefs' courts. The changes in terminology in recent years have generated considerable confusion, though most people retain a general sense of the order of the local courts, from small to big. The distinctions among the different levels of court have historically been maintained by limiting their powers of punishment, and most courts still state very clearly what the maximum penalties are that they can impose, even if in practice they sometimes exceed them.

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*Cases come to the chiefs' courts either from the police or because the plaintiff opens a case.*

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Cases come to the chiefs' courts either from the police or because the plaintiff opens a case; in either situation, the plaintiff, not the state, brings the case. This involves a visit to the court or to the office or home of the chief or the court clerk, and sometimes payment of a fee to issue a court summons to the defendant. In some areas, only the complainant pays a court fee. Elsewhere, the defendant may also have to pay it. Fees range from around 5 to 40 SP, depending on the region and level of the court. Cases are usually heard within a few days of registering a case, or even on the same day.

The courts have retainers or guards, and town chiefs' courts or higher also have policemen seconded to them. The court retainers are what used to be called chiefs' police; in Kajokeji, they are called home guards. The vernacular terms for them are interesting: In some areas, such as Western Bahr el Ghazal, they are known as *bazingers*, which is derived from the Turkish name for the locally recruited soldiers of the slave and ivory traders of the nineteenth century. In one chiefs' court near Wau, they even carry the old rifles of the colonial era. In Dinka areas, the guards or bailiffs are often called *beny riel*, which literally translates as chiefs of power or force. In different ways, these vernacular expressions reveal the aspect of military or government force behind the chiefs' courts, which is embodied in the retainers' capacity to arrest and extract compensation. In reality, however, especially in the lower-level courts, these retainers are a fairly motley collection of often elderly and physically weak men; any power they wield is derived symbolically from the court, rather than from their own physical or martial strength. They are sometimes paid from court income and sometimes by a direct allowance from the local government. In the chiefs' courts in the towns, policemen are also seconded from the main police service to perform court duty, usually on a long-term basis. These make the courts' connection to the state more visible.

The majority of the courts do not have court buildings, and are instead held under large trees. Some in the towns have inherited old colonial court buildings, or have appropriated other run-down buildings; one chief in Wau constructed a wattle and grass building on the edge of his own yard with an entrance onto the street. But even when held under the trees, the courts have their own architecture of sorts, which largely originated in the colonial period. There are usually at least a few chairs, on which the chiefs and court members sit, perhaps with some rough wooden benches or logs for other members and observers. When their case is called, litigants are made to stand or sit quite formally in front of the court panel; in Kajokeji, boxes are drawn on the ground to indicate where people should stand, having removed their shoes. Women and girls are usually told to sit on the ground with their legs straight out in front of them.

In many courts, there is a repeater or translator who sits or stands between the parties to the case. In some courts, especially in the towns, these are actually translators, sometimes speaking a number of different local languages, as well as colloquial Arabic. In Dinka courts, however, there is an *agamlong*, which literally means "repeater of speech," who repeats more loudly the speech of court members, litigants, and witnesses. Sometimes it is only the last few words of each statement that they repeat, resulting in a kind of echo effect; at other times, they elaborate

or clarify the statements as they repeat them. Their function is partly to make the case more public by enabling an audience to hear more easily. They also function as a means of regulating the court proceedings, which is particularly important during heated discussions; if someone wants to speak, they must get the *agamlong*'s attention for the court to listen to them. An *agamlong* can also be used in marriage negotiations and private dispute resolution, where his role is compared to that of written documents, as a witness and record of proceedings. Some of the non-Dinka courts around Wau seem also to have a similar figure, who sometimes translates among the numerous languages of Western Bahr el Ghazal, but often simply repeats like the *agamlong*:

He is the interpreter, the one who makes quiet voices louder, the repeater: *mutarjim* [translator] in Arabic. We call it *nve wandi so*: one who makes the word wider. Or *nve vagbi so*: one who makes clear, who reveals secrets; who doesn't hide things; who goes straight, not around the bush. (Balanda Viri elder, Wau, in English)

The chiefs and other court members play an investigative role in the court proceedings.<sup>30</sup> The court president usually gives court members the opportunity to question and comment before the president issues the final verdict. In Kajokeji, one member formally takes the role of *kapi-pianit* or *kajumanit*, the one who leads the questioning and discussion of a case; even in family-level dispute resolution, someone is given this role. Figures such as the *agamlong* and *kapi-pianit* may have their historical roots in indigenous practices that were then transferred into the courts; they may also have originated in the courts, encouraged by government practices of translation and questioning, and then were copied into private forums. In either case, they are just one example of the many ways in which local cultures of mediation and justice have both permeated and absorbed aspects of state judicial practice.

In the great majority of courts, both parties to a case are given ample time to speak, and they often give very long narratives. There is a sense that the hearing is partly a performance, in which litigants seek to demonstrate or gain status through their speech and behavior, as well as through the witnesses and supporters they can muster.<sup>31</sup> The court meanwhile is said to uncover the truth through questioning. As the description of the *nve vagbi so* above shows, a key aspect of the role of the courts is their revelatory and publicizing function.

In what remains a predominantly oral culture, evidence in court cases largely takes the form of the word of witnesses. There is a strong culture of admitting guilt in certain cases, notably sexual offenses and murder; in some areas, if a woman fails to admit adulterous relationships, it is believed that she will have difficulties in childbirth. But when litigants directly contradict each other, they usually have the option of taking an oath that they are telling the truth. Sometimes people are also ordered to swear not to do something again, like drinking alcohol or having a particular illicit relationship. The method of swearing varies from court to court, but is usually done either on the Bible or Qur'an, or by holding or licking an iron hoe or spear—the hoe is said to bring life and so also has power to bring death; the spear is usually said to have the blood of a person or animal upon it, also capable of causing death. The oath can also be made by sacrificing an animal or drinking water in which special objects or plants have been soaked. Whatever the method, the basic principle is that, if the person swearing is lying, or breaks the oath, some harm will befall them or their relatives, potentially leading to death. In some courts, a special person with spiritual power can be called upon to conduct swearing ceremonies, and might receive a fee from the disputants; in other courts, the court itself administers the oath.

Sometimes litigants are willing to risk swearing even if they are lying; then their relatives often stop the oath, for fear that others in the family might be harmed by it. In general, even if someone is not lying, there is a fear that swearing can bring ill fortune on the parties involved,

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as the oath invokes powers that destroy social relations and potentially life.

People can swear in cases. But not if you are trying to get people to reconcile: only when they are really in dispute. (County judge, Wau, in English)

The oath was not taken. The court clerk and the other people said [to their relative the defendant, a chief], “Do not take the oath. Pay the cow to N. It is not good when big people like you take an oath for one cow. If a big person is always taking oaths like this it is bad. It might affect the children. There might be death in the family.” (County judge’s court case, explained by local research assistant, Aweil East)

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*Recording of cases varies considerably among courts, depending on the court clerk’s presence and energy and the chief’s literacy level.*

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Recording of cases varies considerably among courts, depending on the court clerk’s presence and energy and the chief’s literacy level. Some town courts have termite-ridden piles of loose case papers; other chiefs keep neat, bound notebooks of cases in their own houses; others seem to keep little record at all. A number of chiefs and elders complained of the lack of writing materials and official forms for issuing summonses, arrest warrants, and imprisonment orders. Such papers are actually very important beyond their apparent practical use, as they reinforce the official appearance of the courts and their links to the government, police, and judiciary.

In the past there used to be one big chief, but now there are so many chiefs. And the judiciary used to set the laws, so chiefs could sentence for up to three years, or up to 3,000 [old pounds], and they could issue arrest warrants. Now there are no warrants, no receipts for the fees, no court books. It brings corruption, because the money just goes into the pocket! The judiciary promised to send all these things and send the laws but they have not. (Elder, Wau, translated from Dinka)

Most chiefs do not have any written laws or guides to use. One literate chief of an area of Wau Town prepares annually a list of what he terms “sections” (written in English), essentially a list of penalty amounts, some associated with specific offenses, but most simply a graduated scale to be applied according to how big the case is. This enables the court to refer to section numbers, in imitation of the penal code. One or two chiefs in Kajokeji have copies of the old 1994 Penal Code, on which they had received training in the 1990s, although it is unclear how much they actually apply it. Often reference to a particular number seems to add to the official appearance of a court, and can be used to threaten a heavy sentence, but does not necessarily determine how the case is actually settled.

The majority of cases in all chiefs’ courts are concerned with marital problems or sexual transgressions. The number of such cases may be increasing due to the erosion of strict enforcement of formal marriage procedures, as more and more young people in the towns or refugees camps cohabit and have children without the traditional marriage agreement and payment of bride wealth. According to the same town quarter chief in Wau noted above, cases involving these local marriages, as they are known, cannot be forwarded to a government judge, who wants to hear evidence of a formal marriage before taking the case seriously. Ironically, the supposedly more traditional courts are proving more flexible in negotiating personal relationships in a rapidly changing urban population.

### *The Intermediate Courts*

Above the regional/B chiefs’ court are various forums still considered to be customary courts, but which potentially overlap even more with state forms of justice.<sup>32</sup> As noted above, there has been considerable confusion over the past decade or so as to whether the *payam* courts are to be government or customary courts. In practice, either the old regional/B chiefs’ courts have evolved into *payam* courts, or a new *payam* court has been created, headed by a literate layman, perhaps with some paralegal training. Case registers and (sometimes) law books tend to be more prominent in these courts, but in other respects they differ little from the lower chiefs’ courts.

In the towns, there is usually an older precedent for a court that sits between the government courts and the rural chiefs' courts. Town courts were originally established in the later colonial period to hear cases of traders, government employees, and the ethnically mixed small urban populations. As the towns have rapidly expanded more recently, so too has the role of such courts, which are often headed by chiefs of the town. Sometimes these have become known as town *payam* courts, or sometimes as town benches, which is how the Local Government Act describes them.

The judiciary seems to find these town chiefs' courts particularly useful and concentrates on them when referring cases to customary courts. In Wau, the town court is the only chiefs' court to which the resident judge officially refers cases, and in which the state police play a prominent role; the chiefs also receive a financial incentive (again, to distinguish it from a salary) from the judiciary. In Kajokeji, the county judges are most likely to refer cases to the C county chiefs' court. In Aweil East, the county judge's court has its own panels of elders to assist in settling the customary aspects of cases, and the town bench chiefs' court is situated next to the county judge's court to benefit from its security. The county judge described the town bench chiefs' court as a customary court equivalent to the rural regional/B chiefs' courts, adding: "We cooperate: When I am absent, he [the town court chairman] is the one in charge in the town." In the NGB state capital of Aweil, the compound of the county judges and high court also contains two chiefs' courts, again with a close working relationship to the government courts.

As a result, litigants who live in or near towns are most likely to have their cases settled by courts that are even more hybrid than the rural chiefs' courts. The town chiefs' courts tend to be familiar with a few of the numbers of the penal code because of their close interaction with the police and the judiciary:

We know the sections for the different cases. Number 293 is for the thief; that means six months' prison, and it cannot be changed to money. Adultery is 427, 428. If you cannot pay the compensation or fine then you are sent to prison for a year and you get thirty lashes. But there is a new law of the South now, from 2008. So *zina* [fornication/adultery] is now number 266. The thief was 321 but now it is 293. We learn the numbers from the police forms. (Town bench chiefs' court clerk, Wau, in English)

Such courts also demonstrate that it is possible, with sufficient experience, to settle the cases of a range of ethnic groups and interethnic cases. The Wau town bench chiefs' court is an example of this, housed still in its original colonial building and containing three different courts representing the main ethnic groups of Wau. In reality, the cooperation and contact among these courts have helped to generate a shared understanding of the differences in custom, so that any of the courts could settle any case. One of the chiefs is from the Fellata ethnic group (descendants of West African Muslim pilgrims en route to Mecca, who settled in Sudan); he is representative of the second- or third-generation mixed ethnic populations of towns, which have long included northern Sudanese traders and officials.

Anyone observing these courts would immediately understand the difficulty of identifying and recording discrete bodies of customary law for each ethnic group; the entire basis for the operation of the town courts is flexibility, negotiation, and accommodation. The chiefs on them have intimate knowledge of the differences among local ethnic groups in marriage practices, compensation types and amounts, and other issues, and this enables them to approach each case on an individual basis and draw upon broader principles and government law. Such flexibility allows customary courts to adapt to the multiethnic urban environments in which increasing numbers of Southerners are living, discussed further below.

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## The Government Courts

In two of the three counties studied for this report, there were both first- and second-class magistrates at the level of the county; in Aweil East, there was only a first-class magistrate. According to one county judge, the first-class (or Grade 1) magistrates can handle criminal cases with a maximum sentence of seven years and civil cases valued at 1,500 SP or more; Grade 2 judges, who often have paralegal training rather than any legal qualifications, can handle criminal cases involving sentences up to three years and civil cases below 1,500 SP. Criminal cases requiring sentences above seven years must go to a state-level high court.

The procedures and practices of the county judge's courts clearly differ from those of the various chiefs' courts, most notably in the greater prominence of papers and in their more exclusionary architecture. A number of people emphasized that judges only look at their books of laws or case papers, not at the litigants in front of them. It is also apparent that the often small offices and courtrooms that the judges use do not permit more than a few witnesses and supporters to attend cases. The greater (though not complete) privacy that this affords is attractive to litigants, particularly those with prominent positions or jobs. One town quarter chief in Wau said that he could hear the cases of "government people" or "big men" privately in his own compound rather than in his court. On the other hand, the greater privacy also reduces the accountability and receptivity of the court to the opinion of an audience.

Although the county judge's courts represent a rather different and formal judicial culture, they are shaped by the needs and demands of local society and often apply many of the same principles as the chiefs' courts. They regularly refer explicitly to customary law in their own judgments, and if necessary, they call chiefs or elders to their courts to assist in particular cases. Even judges with origins outside the ethnic groups of their court area seem to be confident that they can handle customary cases, and can get assistance, if necessary.

In Wau, one county judge estimated that around 70 percent of the cases involved customary law; in Aweil East, it was estimated to be even higher, at 90 percent.

The customary law is applied for all laws: traffic law and criminal law and also in civil cases like marriage... We use it even in murder cases. Hence we at times use criminal and customary law at the same time. When we start the criminal cases like the traffic case here we use the codes from 2008. After we have the founding of the case we ask the parties sitting in the court. These parties, all of them are from Dinka. The complainant asks the compensation because he is wounded by that time. Then if they ask the compensation, this is the area where we are implementing customary law. We can issue the conviction as well as the compensation for the damage of the complainant... Therefore the conviction will be reduced. (County judge, in English)

As this reveals, customary law is primarily defined by government judges in terms of the award of compensation, which is what the great majority of litigants seek when they go to court, regardless of whether the case is officially criminal or civil.

You punish because of the offense and you compensate. There is no civil law concerning compensation. You refer always to customary law. Even in the death cases. We don't have civil transaction law. It is not here in Southern Sudan. So we rely on customary law. (County judge, in English)

## The Role of the Police

A basic, universal, and commonly upheld principle is that cases involving blood—a rough approximation of grievous hurt—should be taken immediately to the police. It is also clear that disputes at risk of becoming violent are also more likely to be referred by chiefs or others to the police, in case they are subsequently blamed for not preempting the violence. In or near

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the towns, many people also take other cases directly to the police, including petty fights and quarrels as well as sexual or marital transgressions, but further from the towns this is less likely. Much of the police's time in the towns seems to be taken up with traffic accidents, theft, market disputes, and fights. But officers also play a very visible role in the towns in investigating cases, carrying case papers to and from the police prosecutor and the resident county judge, and bringing papers to court, where they may present statements and evidence. In some cases, they act as court clerks, recording the hearing and sentence. In the Wau Town bench chiefs' court, they also administer lashes. The police are thus closely connected with the chiefs, although the relationship varies: Some chiefs reported good cooperation with their local police post, while others complained of a lack of support or poaching of cases. In the rural areas, some *payam* headquarters have a small police post with perhaps two policemen, but any significant or permanent police presence is still mostly confined to the towns.

### *The Spectrum of Judicial Culture and Sanctions*

Local and national laws and procedures percolate both up and down the judicial hierarchy outlined above. Some chiefs sentence according to penal codes; some judges or policemen apply principles and procedures derived from local cultures; some family meetings ascribe guilt and exact fines. The methods, styles, and outcomes of different courts depend as much on their individual judges and members as on their place in the judicial hierarchy.

There is nevertheless an overall continuum from arenas that place greatest emphasis on reconciliation and restoration to those that meet a desire for punishment or material gain. The most obvious dividing line is between noncourt and court arenas: In family or neighborhood forms of dispute resolution, the general goal is to preserve or restore relations of marriage and kinship. However, this does not necessarily preclude the attribution of blame or demands for compensation and payment of debts. Most arenas, in reality, combine elements of both restorative and adversarial justice.

In the chiefs' courts, nearly all cases are settled with a mixture of compensation and fines, which can be confusing to an external observer, particularly as court members frequently use terms such as fees and fines interchangeably to refer to any payment demanded, whether compensation or penalty. The Wau Town quarter chief's handwritten sections stipulate fines for the government and for the accuser, and this is more commonly how the payments are distinguished: Penalty fines are understood as the government's share or money for the court. As we have seen, the government courts also frequently award compensation, even in criminal cases. Section 6 of the Code of Criminal Procedure Act of 2008 makes compensation an option for the victims of crimes, including murder.

Prison sentences are usually directly commensurable with payments of money, and only rarely is imprisonment enforced if the convict can pay instead, unless the court determines that the behavior or attitude (more than the actual crime) of the sentenced requires a more obviously punitive or humiliating response. Inevitably this means that prisons largely contain people who are too poor or lack the family support to pay a fine. The chiefs' courts are limited in the maximum prison sentences they can give, but this seems to vary in different areas to between six months and two years.

There is an execution process, so if someone fails to bring that amount, they can be arrested as a judgment debtor until they can complete the payment. Most people in the prison are there for that reason: for not responding to summons or judgments. Usually people do not pay unless they are arrested by the police. (County judge, in English)

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We are allowed to sentence guilty people to prison terms not exceeding one year. In the case of divorce cases, we sentence to between six and twelve months; animal theft, three to five months; and debts, three to five months. The persons sentenced actually pay money, and do not go to jail. For each month, ten Sudanese pounds are paid. We confiscate the property of those who fail to pay after a given period of time. Also, the complainant and defender are required to produce ten pounds or standing fee. (*Payam* court paramount chief, translated from Kuku)

Obviously the courts themselves—and the county governments to whom they are supposed to remit their fees and fines—profit more from receiving money than from imprisoning people. But in general prison is not particularly accepted or liked in local culture; it is seen to achieve nothing, whereas victims at least benefit from payments of compensation. Imprisonment is also seen to exacerbate a breach in social relations.

Prison is not good. It is better to pay money to help the victim or their family. Prison is only good if someone is very rough, to make them become good, or else they might continue doing these things. And it can be an example to others, to warn them what prison is like so that they fear. But lashing is better—people come to watch and laugh, and it makes others fear to do the same crime. (Elder man, translated from Balanda Viri)

Flogging is a popular spectacle in some Southern Sudanese courts and seems to be most widely used in urban courts in the former GoS (Khartoum government) garrison towns, such as Wau and Juba, where whips are a prominent object on court tables. Policemen or court retainers carry out sentences of flogging immediately in the court itself. Flogging is administered over thin clothing, on the back and buttocks. It is clearly very painful, but above all inflicts humiliation, and is largely reserved for thieves, teenagers, or particularly drunk or abusive defendants. As another report notes, it is important that it is carried out by a police official rather than by the court directly, as a form of neutral and state-derived punishment,<sup>33</sup> reflecting its associations with government rather than with indigenous culture, where beating is usually a more private domestic action.

Yes, we lash here in the court, fifteen or twenty, so that everyone sees and fears! We give lashes especially for thieves, because they cannot be asked to pay money—a thief cannot be fined. Or if people have been fighting we lash, because we say, “You broke the law, why didn’t you come to court if you were angry with someone, instead of fighting?” So we might give them fifteen lashes. (Town bench chiefs’ court clerk, in English)

Above all other crimes or offenses, petty, repeated theft—with the exception of certain kinds of cattle stealing—is widely seen to be a deeply antisocial and unrespectable activity, punishable by flogging and imprisonment. This is the nearest thing to a purely criminal case in terms of how the courts handle it, seemingly because thieves so lower their own status that they are removed from normal social relations, thus precluding a payment of compensation, which implies a certain equality and reciprocity of relations. Witchcraft and poisoning are also not resolvable with compensation, as we shall see below.

The sentences of imprisonment or flogging are one extreme of the spectrum of judicial culture encompassed by the chiefs’ courts, and reveal them at their most punitive and humiliating. In the majority of cases and in most of the courts, however, the goal is to reconcile as well as to punish. One town quarter chief’s court observed in Wau spent hours listening to the narratives and arguments of litigants before delivering extensive lectures to them, appearing to function more like an advisory or counseling service than as a court. Litigants themselves want different outcomes to different kinds of cases, according to their prior relations with the other party. However, their decisions as to which court to approach with their cases do not always correspond to their expressed opinions of these courts. It is to their perceptions and opinions of the courts that we turn next.

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*Prison is seen to achieve nothing, whereas victims at least benefit from payments of compensation.*

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## Local Perceptions of the Justice System

The qualitative research methods of this project combined detailed interviews and conversations with a wide range of people, with observation of court cases and interviews with litigants. This has enabled a comparison of people's perceptions and opinions of the various justice options in the Sudanese justice system with litigants' actual choices and actions. The most prevalent opinions take the form of complaints that the courts at all levels—but particularly the government courts—are vulnerable to bribery, and that the system therefore disadvantages the poor. However, though people perceive abuses in the system, there is a perhaps surprising belief that, in their normal operation, the courts and laws are fair and nondiscriminatory. The greatest obstacles to justice and personal security are still seen to be the extensive militarization of young men, police incompetence or abuses, the power and corruption of the government, and the perceived relative erosion of the power of elders, chiefs, and even judges. People frequently express preference for the negotiated, flexible settlements of the chiefs' courts over any rigid application of written laws.

### *Bribery, Delays, and Favoritism*

The most common complaint about government courts is the protracted nature of their procedures, and the associated belief that this “delayment,” as many people put it, is the result of either a defendant's bribe or a deliberate tactic by judges to provoke the plaintiff to bribe them just to get the case heard. Judges explain that the very nature of a first-class magistrate court requires it to hear the case over a number of sessions to bring witnesses or other evidence. But for most ordinary people, the inevitable delays and repeated sessions required for some cases in the judge's courts are straightforward proof of the judiciary's corruption. Most seriously, delays in the judicial system or police investigations are blamed for revenge killings and some of the serious local conflicts that have occurred in recent years (though not in the three research areas).

The judiciary delays cases. There was a case before a certain judge, and he kept delaying. He was always drunk and not in his office. Then one day the accuser and the defendant met in a drinking place and the accuser hit the defendant with a stick and killed him, because he believed that the judge was deliberately delaying the case because he was related to the defendant. That judge was transferred away, but there are still delays there. (Town court chief, translated from Arabic)

You have to follow up all the time. Some delays come from the police. The crimes officer is slow... The process is long. For example, we visited the magistrate's court seven times before the case was resolved. I would have lost my job if I was employed then! (Middle-aged man, translated from Kuku)

There is a lot of postponement there in the judiciary. If I am angry with that person, it can create another situation. Especially women with women, and particularly co-wives, it can be very dangerous. There is a lot of corruption. The Arabs taught us bad manners and now we are worse than them! Now we are making bribery openly, without even trying to hide. Now they cannot sign a paper without payment for it, even though they are paid by the government. (Balanda Viri elder, Wau, in English)

We believed the magistrate was like God... But now we have corruption, forgery, people paying to avoid the court. And the court is too full of cases; there is too much postponing, saying “you give money”; too much delayment. If you see the court there now, it is very populated: too many cases because of these delays.

If you have a man with money, it is not easy to deal with him in court. For a poor man there is no justice nowadays. (Balanda Viri elder, Wau, in English)

The time scale for hearing cases and the resulting popular suspicion are the most significant differences highlighted between the government courts and the chiefs' courts. Extended pro-

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*Though people perceive abuses in the system, there is a perhaps surprising belief that, in their normal operation, the courts and laws are fair and nondiscriminatory.*

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cess in chiefs' courts is generally more accepted as being useful. Lengthy discussions may be required for the court to broker compromise and maintain relations. Courts also deliberately delay cases of requests for divorce: A period of time to cool down and reconsider is ordered; often a case will have to come to court three times—and sometimes involve prison sentences in between for a wife seeking divorce—before a divorce certificate is granted.

However, the chiefs' courts are not immune to accusations of corruption in the forms of favoritism and bribery; a common complaint is that people can go secretly, perhaps at night, to offer the chief something in return for a favorable court decision. If individual chiefs become seen as particularly corrupt or unfair, the number of cases brought to their court may fall, reflecting the built-in accountability of the current system with its room to exercise choice.

I did not want to take him [the defendant] to the *boma* court because the executive chief is a useless man. He is corrupt and incompetent. He only wants money... He is terrible. He claims to be the first and last in the *boma*. He is useless. (Middle-aged man, translated from Kuku)

At least some of the accusations of corruption are obviously subjective, voiced primarily by disgruntled losers of cases. But the overall result is a perception that wealthier people or those with relatives in high positions are more likely to win cases in both government and chiefs' courts. The following marital case, involving Molly and John (pseudonyms), a couple living in Kajokeji County, illustrates litigants' experience of delay and suspicion of favoritism through both chiefs' and government courts, and the ultimate barrier that the distance and costs of the state capital pose to further appeals.

Molly married her husband John in 2002, and they entered into business together, running a bar. However, in 2006 John accused Molly of having an affair with her old friend, Paul (also a pseudonym). He became violent toward Molly and Paul and had them arrested. They were released and referred to the *boma* chief's court, but John and his relatives did not appear until the fourth attempt to hear the case:

The fourth time he came with his father and other relatives. He came together with the executive chief, who was very drunk. Then the hearing began. The executive chief was behaving strangely. He was jumping from topic to topic and forced me not to talk. My aunt got annoyed and quarreled with him. Then he walked away, saying he would not hear the case and would not refer it to the paramount chief. Obviously my husband bribed him. They came together and left together. (Molly, translated from Kuku)

Meanwhile Paul also complained to the police about John's assault. The assistant police commissioner called Molly and John and advised them to settle their problem outside court. But John declared he wanted to divorce and so the case went to the second-class county judge:

He [the judge] said we were behaving like children. There was no arrangement to solve the problems, and we were just thrown out. (Molly, translated from Kuku)

John went to live with his other wife, leaving Molly to live with her aunt. After two years Molly returned to the same judge, who is also one of John's uncles. When the judge "dodged" her, she enlisted the help of the gender office in the County Social Affairs Department to write to the judge. The judge heard the case again, but this time John denied that he wanted a divorce, and the judge "chased" them away to settle the problem with relatives. A few months later, Molly heard that John had moved to Juba. With the help of the same county government official, Molly wrote a letter to request a divorce, listing all the property she and John had shared, including considerable cash savings. The letter also listed various articles in the interim state constitution relating to the rights of women and children. This time the case was sent to the first-class judge, and after further delays he offered in May 2008 to refer Molly's case to Juba.

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*The overall result is a perception that wealthier people or those with relatives in high positions are more likely to win cases in both government and chiefs' courts.*

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The problem was that I had no money for travel and staying in Juba. I gave up. He [John] took all the property we acquired together, and abandoned me and my child. His father is herding the cattle we acquired.

I learned about a new human rights organization from the person for gender in the county. I do not know if they can help me. (Molly, translated from Kuku)

It is apparent from cases such as Molly's that men frequently have the upper hand, in court cases, through their potentially closer relationships with chiefs and judges; in marriage systems, which vest rights over women in their parents or husband's family; and in inheritance systems, which largely exclude women unless they are widows. The courts are also overwhelmingly male arenas. Yet women nevertheless seem confident that they will be heard and judged fairly in the courts, and female litigants often speak with considerable force.

Women speak more than men in the court! Especially when they feel aggrieved, they speak strongly. (Woman county judge, Wau, in English)

While there are widespread criticisms of personal favoritism in the courts, there is surprisingly little complaint that the courts are inherently biased along gender or generational lines. Even Molly attributed her unfair treatment to the personal relationships between her husband and the chief and judge, rather than to the fact that she was a woman, although of course she also saw the gender and human rights offices as a resource. In a number of courts, especially in Wau and Kajokeji, women were explicitly exhorted to bring their marital complaints to court sooner, and marital disputes were often decided in favor of the women.

In one case that particularly amused the audience in a chief's court, a man had brought a complaint against his wife for refusing to sleep with him. She retorted that he was impotent and that a series of new wives had also left him because of his inadequacies. The court lectured her for not bringing a complaint against him herself, but she explained the shamefulness of airing these humiliating details in public. The husband, naturally, was even more humiliated, especially as the court decided to give him several months to seek treatment for the problem, as well as ordering him to pay an amount to his wife for failing to meet his marital duties.

In the towns, and where women are returning from displacement in different legal and social environments, wives seem to be increasingly and successfully arguing for divorce or the enforcement of marital obligations upon their husbands. The powerful cultural imperative to try to maintain and restore relations actually gives women considerable room to express their grievances in both private and public arenas. This extent of negotiation is vitally important to the flexibility and dynamism of local justice.

Law is law, whether you are a man or a woman. (Parish priest, Wau, in English)

The court judges fairly, whether you are young or old—there is *akuma bess* [judgment only]. (Young man who had just lost a case in a *payam* chief's court, translated from Balanda Viri, with italicized phrase in colloquial Arabic)

The following group discussion with teenage pupils at a secondary school in Kajokeji revealed a perception among the girls that the courts had no gender bias, and among the boys that the courts actually favored women. There was a general agreement, however, that young people had less of a voice in the courts:

Q: What is your opinion of the court system?

Boy 1: Judgments are often unfair. A person who is wrong escapes justice. Bribe is the problem.

Boy 2: I agree. Bribe is a problem. Favoritism is another problem. If you know people in the court system, you can escape justice.

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*The courts are also overwhelmingly male arenas. Yet women nevertheless seem confident that they will be heard and judged fairly in the courts, and female litigants often speak with considerable force.*

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Boy 3: Another problem is the charges imposed by courts. Overcharging is a big problem and discourages some people from going to courts.

Q: How are women treated by the courts?

Girl 1: They get the same treatment as men. There is not discrimination.

Boy 1: I disagree. Women are favored in the courts. Men are always viewed as the wrong ones, particularly in domestic disputes cases.

Girl 2: You are wrong. There is no discrimination.

Boy 2: I also think women are favored. Our neighbor was recently given a harsh judgment even though his wife is the cause of problems in the house.

Girl 3: The guilty person is always the one who receives the harsh judgment.

Q: What about young girls?

Boy 1: Young people are not allowed to speak freely. Talking freely might lead to accusation of being bad mannered.

Boy 4: Young people do not have freedom of expression. In fact, elderly people fear that young people will say things that they do not want revealed or not to be said in a certain way. (Focus group discussion, translated from Kuku)

Returnees from displacement or exile also did not perceive any bias against them in the courts, even though they complained bitterly of discrimination in employment and politics:

There are differences among us here between the people who returned from Khartoum, those who returned from other places, and those who remained here during the war. The ones who stayed here, if they quarrel, they immediately look for a gun or a weapon, but the returnees don't do that. And if you as a returnee want to marry, they think you have a lot of money from living with the Arabs, so they charge you more highly than the ones who stayed here.

Q: Do the courts also treat you differently if you are a returnee?

A: No, the courts here just look at the crime you have done, not at whether you are a returnee or where you come from. (Middle-aged man, returnee, translated from Balanda Viri)

The courts give you your right even if you are a returnee. But in general people do not treat us the same; they do not greet us because they think we want to put ourselves above them. The laws are there, they did not change, but people changed. (Young man, returnee, translated from colloquial Arabic)

### *Weakness, Lack of Enforcement, and Interference*

When you try to open a case here in the town chiefs' court they make some problems, delaying. They said to me "are you ready?" and that means you have to pay something. It is the same with the police—if you are injured and go there to get the form for the police, they will send you to copy the forms yourself, and they make you copy a few so that they can keep them and still charge the next person for them. And then they say they need money for transport to the place to investigate.

Q: Is it the same with the chiefs in the village?

A: It is better in the village—you don't have to pay like that there, and the chiefs understand our situation, so for example if it is marriage they can let you pay in installments.

Q: So why go to the town court?

A: We go to the town court and not the village because the chief has no gun, whereas the town court can force people to attend. But here, if you have a good job and money then it is easy to get your case heard. When you come to open a case they ask who you are and what you do, and if you have no job or look like a poor person, then you will find

long delays, unless you can pay this bribe. In the courts you can spend the whole day going from office to office. It is just like in the market where village people will be charged more because they don't know the price. (Middle-aged man, returnee, in English)

As this statement reveals, despite all of the problems of corruption and cost, which are particularly associated with town and government courts, litigants are not deterred from opening cases in them if an even greater concern is the enforcement of a decision. The war and extensive militarization of society, especially among young men, have inevitably eroded the chiefs' power to enforce the orders of their courts. They also have eroded the power of the police, who often appear as a second-rate security force compared to the SPLA or other armed groups. Even before the war, one incentive to litigants to open cases in higher courts was the belief that a favorable decision would actually be enforced, through the power of the state that lay more visibly behind such courts.

The power of enforcement might be directly proportional to the perceived alien or corrupt nature of a court, but a court's disciplinary capacity can sometimes be the most decisive factor in a litigant's choice of court. A common complaint about some courts is that they are unable or unwilling to follow up the awards of compensation and execution of judgments. A particularly strong complaint—made by some chiefs and other people—is the failure of the police and prison forces to effectively support the power of chiefs by detaining suspects and prisoners. In reality, the reasons for this may have much to do with newly enforced police procedures limiting detention or requiring evidence, but ordinary people and chiefs tend to attribute releases to bribery, conspiracy, or police weakness.

We can only keep people here for twenty-four hours. We try to send people to prison there in the town but the people there do not respect us and can just release them, and then that can make conflicts worse. It is a really big problem—we are trying to complain to the government about it. If you have a relative there in the police, you can just be released. There was somebody here who hit someone on the head with a stick, but when he was sent to the prison they released him, so now people still want to go after him for that. Then there was another person who killed someone during the war and paid thirty-one cows, but now he was about to cause a problem again and kill somebody else, so we sent him to the prison but he was also released. We really don't know what to do—people are just released like that. We went to the commissioner to complain about it and he said we would soon be given some written laws, but nothing yet. (*Payam* chief, translated from Dinka)

Some chiefs complain further that their personal retainers or guards are not receiving salaries from government, and therefore refuse to perform their work for the court.

Some names of home guards have been excluded from the payroll. The result is that arresting bad people has become hard. (*Payam* chief, translated from Kuku)

Not only the chiefs face difficulties of security and enforcement; even the highest government courts deal with serious problems of intimidation, and complain that the police's court security is ineffective. The judiciary compound in Wau, for example, has suffered from attacks by individuals armed with sticks, spears, or guns; its vulnerability has been exacerbated by police officers' strikes over their lack of pay.

Soldiers do not understand the long procedures of cases: They think they should just be given their right. Yesterday one came here and tried to shoot the accused. (County judge, in English)

Some judges and government officials also mentioned that county commissioners, governors, and other powerful men see themselves as immune to prosecution and sometimes interfere in judicial processes. Even officers of state ministries in local government complain that county commissioners block implementation of reforms because they are still mainly military officers,

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appointed for political reasons rather than local government experience. Most people would say that the situation has improved rapidly in recent years, however, given the extent of interference from military personnel before the CPA.

If a government person commits a crime, for example, deliberately not providing electricity to someone, I can write to the head of their department to open a case. If it is officials with immunity, I have to get permission from the governor, or if it is the governor, then from the president; or if it is a judge, from the supreme court.

If I write to the governor, he can be biased towards the SPLA. The governor can tell the ministry concerned not to open a complaint. And if there is no complaint, we cannot do anything. (Public prosecution attorney, in English)

It is difficult to get the executive to understand the independence of the judiciary. Some commissioners do not respect that, and also they don't want the judiciary revenue to be sent to Juba rather than to the county. (County judge, in English)

Although most ordinary people did not dare to complain explicitly about county commissioners or governors, there were common references to “lack of good governance,” along with the sense that the roots of problems in the judicial or policing systems lie in the nature of the government itself, and the recent history of the war. There is also a continuing sense that soldiers and other big men remain outside the reach of justice.

During the war here soldiers could take girls by force. Now after the peace people can open cases against them, but they still fear sometimes because he still has a gun. (Elder, Wau, translated from Balanda Viri)

Sometimes the chiefs are seen to defend people against the military and security forces; during the war, they often negotiated the release of their people from custody. They continue to play this role, if one case observed is anything to go by; the case also reveals the problem of prolonged detention without trial.

The person with the executive chief is the small boy. The small boy has been arrested for eight months. He has been arrested because he fought with a soldier. He fought until the soldier got an injury. The soldier and the police put him into prison for almost eight months and the soldier did not come [to open the case]. The boy made a complaint. The executive chief said, “I want to take the boy home, but when the soldier comes tell him that I, the executive chief, have taken the boy home.” If he wants the boy in the court they will bring him. He [the chief] will sign the paper. This young boy is over eighteen. (Description of proceedings in a county judge's court by a local research assistant, in English)

It is also clear that local government officials at times get involved in judicial processes, either because of personal connections or because they perceive a wider security problem. The cases of poison accusations in Kajokeji are an example of the latter and will be discussed in more detail below. But chiefs rarely seem to see such interventions as helpful:

The chiefs work according to orders and pamphlets; for example, I raised the fines for adultery, to try to reduce crimes. If they are illiterate we sit with them and tell them, and the court clerks also tell the chiefs. (County commissioner, in English)

The county commissioner is only politics. The court works with the rule of law but the commissioner works only with politics. (Town quarter chief in the same county, in English)

### *Local Knowledge and the Social Relevance of Justice*

County judges clearly vary in how familiar they are with, and sensitive to, local customary law, and how far they follow similar processes of negotiated arbitration with the chiefs. This is also influenced by whether they grew up in the area or community in which they work. But the

effects are obvious: In counties where judges rely on statutory law and ignore or contest local law, litigants tend to approach the courts rather less often.

A common point made in all three research areas is that the county or high court judges are concerned only with looking at their books of laws and sentencing accordingly, whereas chiefs look into the individual case in more detail, listening to the litigants at length and attempting to achieve resolution rather than merely a sentence.

The *gadi* [judge, in colloquial Arabic] cannot listen for a long time to the complaints, but the local court allows people to explain and explain—they can talk for long. If you don't give a chance to somebody to talk everything, then he will reject and go ahead [appeal]. (Town quarter chief, in English)

The *gadi* only works according to the Acts, but the chiefs reconcile and give advice; their aim is not just to punish. The *gadi* goes according to the paper; he just reads the crime in the book and that tells him the sentence too. (Middle-aged man, returnee, translated from Balanda Viri)

As well as reading more than listening, the judges are said to enforce rigid sentences, whereas the chiefs consider the characters and histories of individuals and their financial and family situations. In particular, the chiefs' courts allow people to pay their fines or compensation in installments over a period of time, whereas the government courts are likely to imprison the sentenced until they or their relatives make the payment.

I know the people and their characters. If it is not intentional then I can treat it lightly, but if they repeat the offense then that shows they are stubborn and I will punish them with prison. (Rural executive chief, translated from Ndogo)

The difference is that the judge charges high fines. We chiefs know the financial situation of the people, so we cannot fine so much. We know the people have no animals, they are only cultivators. Sometimes there is drought. So we fine according to the conditions. Chiefs do not solve according to the laws but according to the person. We are not judges, we are native chiefs. We sit with our members. (*Payam* chief, in English)

With the chief, you can negotiate, but with him [the judge] you can be arrested for the cows. Here [in the county magistrate's court] you cannot negotiate. (Comment by local research assistant in English, Aweil East)

If they [the chiefs] find that a person is guilty, they advise him or her. But in the county there they solve and they do not advise. (Young woman, translated from Dinka)

Sometimes the distinction is said to lie more between the town and rural courts rather than between government and chiefs' courts:

Now many things have changed. They [the chiefs] don't know whether they are part of rural or urban areas. There are differences. When they are there [in the rural areas] they try to solve the cases legally. The people choose the chief who is a good person ... to solve the many problems. The good chiefs need the peace in the community and not just this man is guilty and this man not. Even to the guilty person, he [the chief] will explain "please do not repeat that," because he is our brother. You are my community. When he tries that case good and legally, there will be peace and not conflict and not many legal cases. (Public prosecution attorney, in English)

Villagers say that these people [the judiciary] did not give me a chance to express myself. They think the law there is only agreeable to the town people, literate people. The illiterate will always think they are being cheated. Although it is true that bribery is there; you cannot have a clean case. (Luo elder, Wau, in English)

One very aged elder and former chiefs' court president summed up the perceived problems with the government courts and their different culture regarding oral enquiry:

These graduates only look at the paper, but we look at the person to find out if they are telling the truth—we can look at the tongue! But these judges don't study the person, only the book [mimics somebody looking down at a paper all the time and not looking

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*In counties where judges rely on statutory law and ignore or contest local law, litigants tend to approach the courts rather less often.*

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up]. Now graduates are given high positions but they are not finding the real facts—they just think they are very high up.

I remember a case in Aweil in the court, when somebody was accused of stealing a cow, and when he started speaking the chief told him to shut up. But I said no, you should let him speak so that you find out if he is guilty. So then it emerged that in fact the one whose cow was stolen had previously stolen a cow from the accused. The accused had gone to his executive chief to get it back, but the chief had failed to get it for him, so in the end he had gone directly to take it. So proper investigation is important, otherwise you might judge wrongly.

The *mabakim* [courts] of the chiefs are better than the *mabakim* of the *gadi*, because they hear people well. The judge says always “Come back tomorrow, come back tomorrow,” so even something small can take six or seven months. And somebody who is guilty can keep asking for a new witness to be brought, to delay the case. The prison is full of people just waiting for trial, and being taken from the prison to the court and back again, many times. (Elder, Wau, translated from Dinka)

While a preference for an understanding of and sensitivity to local culture and context was evident, it sometimes was balanced against a desire for neutrality, derived from judges’ perceived outsider status. In Kajokeji, there was a sense that the first-class judge failed to understand local society because he came from a different area and dismissed local customs and beliefs as uncivilized. On the other hand, a high-court judge in Wau was seen to be fairer because he came from a different region, and thus would not be biased toward any particular Wau tribe.

A judge supposedly remains completely outside local social and political relations, ensuring that he can be a neutral arbitrator, something for which there is considerable public demand. Yet this outsider status, which is so important for mediation and justice, also renders him potentially alien (not quite a human being, as explained in the following quotation): part of the *hakuma*, the government, rather than the local community. The chief, on the other hand, is closely connected to the *hakuma*, but remains entwined in local relations. A county judge emphasized in some detail the advantages of remaining outside local social and political relations to maintain the neutral position of the judiciary:

We cannot talk politics; do not take sides. Don’t interact. We are not allowed to be very social to prevent being biased. When you make friends and they come to the court, one would be biased. You would favor your friends.

Q: You cannot have deep friends?

A: No, it is not allowed by the judiciary ethics.... It is not allowed for the judge to stay more than six years: Then you will be well-known and people will try to attract you to be their friends. They give you some gifts they want to bring you. At last you are a human being. An elder man can offer you a lady. I got married here. It is not forbidden. But to extend the relations....

I am not allowed to borrow money from traders; making business is not allowed, because you are going to be involved and you could be brought to the court. That is very shameful for a judge. If you become friendly to everybody you cannot go ahead with the job. As a human being you can be influenced by your friendship. When your friend is involved, you might not fine him, or [sentence only] a short period of time. We are not allowed to play on the road and drink, because people are believing in you: you are the one to solve the case. You have to be a good example. (County judge, in English)

In reality, both chiefs and judges are suspected of the kind of bribery and favoritism highlighted by this county judge, as we shall see below. But from his perspective, such biases result from the pressures emanating from local society, as it seeks to draw the judge into its webs of relations and obligations. Perhaps in search of the idealized neutrality that he describes, litigants have long sought out government judges, despite the dubious morality of the government as an entity.

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## *Problems with Police and Prisons*

The lack of a widely understood civil-criminal distinction makes the role of the police more nebulous. A recent report on the Southern Sudan Police Service (SSPS) concludes that the service has been comparatively neglected since its creation in 2005; it has been staffed largely from undertrained former SPLA soldiers, resulting in a 90 percent illiteracy rate. As a result, “many people see the security forces themselves—including the police, the SPLA, and other armed groups—as major sources of threats to their security and as perpetrators of crime and human rights abuses.”<sup>34</sup>

This research project comes to the same conclusions. The police are clearly key interstitial and sometimes decisive players in an increasing range and number of cases. Yet people are also more widely critical of the police than of any other institution in the judicial system. They are, unsurprisingly, seen as former SPLA soldiers without sufficient training for civilian policing. There are particularly widespread criticisms of the practice of proxy detention of the relatives of suspects, which is associated with SPLA administration during the war. In a Kajokeji prison, one of the researchers for this project found a woman and children detained to pressure her other son into turning himself in to the police (unsuccessfully, as he had fled to Uganda). There are also bitter and widespread accusations that the police release suspects in return for bribes, or settle cases themselves.

Police are supposed to keep persons for twenty-four hours but that is not what happens. People stay in jail even for two weeks without meeting a magistrate. I do not know on what basis people stay that long. Some people are set free when they are supposed to remain behind bars. It appears police find some ways of settling cases. You pay some money and the case is closed. The worst policeman ... settles cases without consulting the executive chief. The decisions are arbitrary and motivated by greed for money. We took many cases to him and got referred back. For example, we took a man to him ... and he was allowed to walk home. We are supposed to hear the case, which involved blood. The hospital records disappeared in the police [station]. The man seemed to have paid 80 pounds to him and he set him free. That was a case of grievous assault and we cannot settle it... The other problem is that it is expensive to call police to come and deal with a situation. You have to hire motorbikes to bring them in and take them back. That is expensive. (Elder, translated from Kuku)

The problem that the police have to be paid for their transport for them to reach a crime scene or to arrest somebody was a common complaint, and clearly adds to the impression of bribery.

Q: I heard lots of complaints about the police.

A: All the police are answerable to me. I know they cause problems, for example, solving problems through bribes. They are supposed to receive cases, investigate, and decide where to send them: to the chiefs or magistrates. But sometimes they decide cases themselves. (County commissioner, in English)

In Wau, a number of people referred to a recent incident in which eleven prisoners awaiting execution were released from the prison by an armed force; it seemed to encapsulate the corruption, weakness, and incompetence of the police and prison services.

There is no police in Wau now. No police at all. I went to the director-general of police to complain, because the police can just be given money and then they release a person. This executive chief recently brought two people to the police and they gave money to the police and were released.

The police now are drunk. You go there and find a policeman blind with alcohol, looking too sleepy to do anything. And the recruitment now is also bad. The British used to choose someone big and strong, but now even a very small boy can be recruited and then he is not capable of arresting anyone! (Elder, translated from Dinka)

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*People are also more widely critical of the police than of any other institution in the judicial system.*

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It really depends on the individual policeman. For example, there was a case here recently. A person got married and then later his wife wanted a divorce, because she had a boyfriend who was a policeman. The man and that policeman were actually friends, but when he went to visit the policeman he saw his wife there. So he went back quietly but when the lady came home he questioned her about it and she said they were only talking. So he said I forgive you this time, but do not repeat it. But two weeks later she repeated. So he went to the police station and opened a case, and asked the police to talk to her, because the chiefs, the subchiefs and the elders had all talked to her and she will not listen. The wife ran back to her mother's house, and that man came after her with a spear. But her mother was coming out from the house as he threw the spear, and it hit the mother and killed her. And then when the police investigation was made, it was that same policeman who had gone with his wife who was put in charge of the investigation. So that was really wrong.

A: What happened to the man in the end?

Q: He was killed, hanged. So if someone close to a policeman has a case, they will not give you your right. (Young man, in English)

The most basic problems in policing come, however, from the lack of resources. Most prisons and police stations are still sorely lacking basic infrastructure and resources, so that prisoners and detainees are even denied basic water and food, as well as sanitation and suitable accommodation. Prisoners only receive food from their own relatives, so those without such support can literally starve. In rural areas, there are only the most rudimentary structures for detaining prisoners; although in theory people should not be detained in such places for more than twenty-four hours, in reality the lack of transport and alternatives means that they are frequently held longer. In some places, prisoners are chained to trees or to the ground; in some *payam* prisons, inmates' legs were shackled with bicycle chains so that they had to "hop like frogs" (Moro). It is telling that UN officers in one area noted that, although they witnessed frequent beatings and physical mistreatment in the police stations and prisons, the detainees were much more likely to complain to them about the lack of food, water, and sanitation. The most obvious abuses of human rights occur through a lack of basic resources rather than intentional mistreatment, though the latter does clearly also occur.

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## Choices of Forum

Common sense can tell that if people choose to open a case in a court, they must think that the court is the right place to go, that it is worth going there. (Middle-aged man, returnee, in English)

The sections above described the notional hierarchy or chain of arenas for dispute resolution and the perceptions and criticisms of litigants concerning their justice options. A further set of findings reveals, rather strikingly, that in practice there is often a large discrepancy between the expected pathway of dispute resolution, people's expressed preferences, and the actual choices they make. First, to some extent, this is due to confusion and uncertainty about the court system, exacerbated by the changes in official terminology in recent years and the proliferation of new chieftaincies and administrative units and their associated courts. In some areas, the number of different courts causes confusion, particularly in the appeal process. Most people know their headman, subchief, and *boma* chief, but beyond that, the courts are in some areas less well known or understood. Often two or more different courts are also held in the same place, further blurring the distinctions.<sup>35</sup> In addition, a number of informal justice forums have emerged in the last decade or more, as a variety of military and security personnel set themselves up as judges, and as committees of traders and other professional groups also settle a range of cases.

But second, and more intriguing, is that what people say in interviews when asked directly

about the fairness or efficiency of courts does not necessarily determine where they decide to take their cases. An individual might state that it is better to settle disputes outside the courts altogether, because all courts are punitive and adversarial, whereas family-level mediation is restorative. She might also express a preference for chiefs' rather than government courts, in that the latter rely on written law and punishment rather than on the individual, local context, and reconciliation. Having said this, the same individual might then reveal that she actually took a case to a government judge, perhaps because in reality she wanted victory over an adversary and enforcement of punishment or compensation. And in a final complication, the judge might well have referred to some interpretation of customary law in settling the case, and followed similar procedures for hearing it as would a chiefs' court.

There is thus a paradoxical interplay between chiefs' and government courts, in that different people view each as more corrupt than the other, and although the government judges are more widely criticized than the chiefs, they also seem to be hearing an increasing proportion of cases. Chiefs particularly complain that they are being bypassed as litigants go directly to higher courts to open cases. Judges expose the inconsistency in the system, some saying that people are supposed to open all cases directly with them, while others note that they are only supposed to hear customary cases on appeal from the chiefs' courts.

Obviously, people approach the judicial system in a very pragmatic way. While appearing contradictory and confusing to external observers, litigants themselves are generally very good judges of their own justice needs and are adept at using the system, flawed as it may be, to their advantage. Sudanese litigants demonstrate an impressive resourcefulness and tenacity that underlies the disjuncture between the common belief that there is no justice for the poor and the apparent reality that this does not deter people from opening cases. It seems to be worth a try, even if there is limited faith in the judicial system. Molly's case above reveals such an attitude in her recourse to the county government and the resulting letter appealing to constitutional law. Her appeals may have ultimately failed, but such demand and debate from within society is gradually changing the courts.

### **Reputation of the Court**

Often litigants are advised by a senior relative or friend with greater knowledge or experience of the courts; they also consider the court's general reputation. Some deliberately go to a court in which a relative or friend is chief or a member; others conversely avoid the potential accusation of bias and further appeals by their opponents and instead choose a more neutral court. When the parties come from different chiefs, there is sometimes a principle that the accuser should open a case in the court of the defendant's chief; on the other hand, in marriage cases, the case should be heard in a court of the girl or woman's chief. Individual chiefs or judges sometimes acquire a particular reputation for good judgment; in some cases, this seems to be based at least partly on their capacity for scathing and amusing questioning and speeches, or on their frequent sentences of lashing, particularly of young people. The courts are in part a spectacle, in which the performance and oratory of both judges and litigants are publicly assessed, with implications for their status more widely. The audience contributes to the court opinion in individual cases, and in the process, also spreads opinion about the court itself. In this sense, the courts are accountable to public opinion, though this is restricted in some county courts held in small offices, with no room for audiences. Courts of an unpopular chief tend to have few cases, as people deliberately avoid them:

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*While appearing contradictory and confusing to external observers, litigants themselves are generally very good judges of their own justice needs and are adept at using the system, flawed as it may be, to their advantage.*

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The chief stays here in town and only goes to his village as a guest, like it is something of a duty. He sleeps only one day in his village, if that.... The chief is not leaving himself to be fit in his chair. People do not bring cases; they hate him in fact. The [village] citizens went against him and appointed a young man. But the government stood on [the chief]'s side.

Q: So if people are unhappy with his court, where do they take their cases?

A: They can go to the subchiefs in the villages. Or else they over-jump and go to the court in the town, or to [a popular town quarter chief from the same area]. (Elder, in English)

The position of the court in the overall hierarchy is also an important consideration; people have a general sense that the bigger a case, the bigger a court it should be resolved in. The bigger or higher the court, the more status it has and can convey on victorious litigants.

Q: Is there a difference between chiefs' and government courts?

A: No, they are all one. They are one *bakuma* [government], only that they separate themselves. There are small cases which should be solved by the chief and there are big cases which should go to the big court. (Young woman, translated from Dinka)

### *Litigants' Goals: Adversarial or Restorative*

Important local cultures play a part in decisions about courts. Indigenous norms tend to promote resolutions to conflicts that both parties genuinely accept. Obviously this ideal is not easily attainable, but it contributes to the desire to take cases to a neutral arbitrator. Before the introduction of a government and chiefs' court system, this need was probably met by inviting other, neutral clans or influential (perhaps spiritually important) outsiders to help resolve serious disputes and fights. Another important aspect of local culture is the status to be gained from a successful court case, which is obviously greater if the decision is perceived to be fair and not the result of favoritism. This neutrality is theoretically the province of government judges, who are supposed to be outside or above local political and social relations. But people also emphasize that the flexible processes of negotiation in the chiefs' courts are more likely to lead to an outcome that both sides accept, rather than a rigidly imposed penalty that may exacerbate or prolong hostility and grievance.

At the same time, the significance of the cultural objective varies according to individual goals, and litigants who seek to punish or gain from their opponent without care for any resulting breach of relations may discard it. Such litigants are often criticized by others, who see them as greedy, selfish, and harmful. The decision to take a case directly to the police may also reflect a particular desire for retributive justice as well as protection. Such decisions are determined by the nature of social relations between the parties to a case; most people are generally reluctant to take relatives or other close relations to the police or even to court, as a retributive outcome could harm or destroy social relations. In towns where people are living next to strangers or less dependent on social or familial relations, there may be less to constrain them from going straight to the police. But even among close relations, occasionally anger drives people to risk a permanent breach of relations; it is said that those with "hot" or "bitter" (i.e., angry) hearts go directly to the police and courts.

In short, although there is a strong culture in favor of restorative and consensual dispute resolution, individual litigants make reasoned judgments as to their desired outcome and the most suitable justice forum for achieving it, according to the circumstances of the case and their relations with the other party.

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*The flexible processes of negotiation in the chiefs' courts are more likely to lead to an outcome that both sides accept, rather than a rigidly imposed penalty that may exacerbate or prolong hostility and grievance.*

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### *Trend toward Government Police and Courts*

Despite the very poor opinion most people have of the police, they appear to voluntarily seek their assistance with increasing frequency. This epitomizes the disjuncture or contradiction between perceptions of the judicial system and litigants' actual choices and practices. Access or referral to the higher chiefs' courts, together with the county courts, is increasingly controlled in some areas by the police and judiciary, which concomitantly reduces the autonomy of litigants. In Wau, people can take small disputes and cases to their town quarter chiefs, but anything bigger must be taken to the police or to the judiciary headquarters, where the resident county judge sends it to either a county judge or the town bench chiefs' court. This degree of control is inherited from the former GoS administration, which also placed greater power over criminal cases in the hands of the police prosecutors or attorney-general. This has generated a greater sense of mystery: Litigants have to approach an office or police station, which is more intimidating for some people than a village court under a tree. This confusion disadvantages and potentially excludes particular sectors of society, most obviously returnees who are unfamiliar with the local systems, in general. But anyone with little prior interaction with the chieftaincy, court, or government structures could feel uncertain and be intimidated by the unfamiliar terminology and procedures.

However, the enlarged functions of the government, town courts, and police are not entirely imposed upon people. Even in areas that were administered by the SPLM rather than the GoS, where control over the courts was relaxed rather than tightened, there has still been an increase in the volume and proportion of cases coming to the higher or town courts. To a certain extent, those who seek out the police rather than other options may do so because they feel socially disadvantaged in the chiefs' courts. But there is also a powerful sense that the government police should handle cases involving serious violence or death, even if people currently doubt their capacity to handle such cases. In fact, this equates to a strong popular demand for protection. The wars in Southern Sudan have exacerbated the limitations on chiefs and judges to offer protection from armed men. Weak, incompetent, and corrupt as the police may be, they perhaps represent the only hope of such protection. Even a leading elder, who was very critical of the police, nevertheless assumed that he would go to them if necessary:

Q: So would you go to the police, if you have a problem here?

A: If there is a problem I go to the chief to make a report. But if there is any blood, I have to go to the police. But they are not trained police. They are police in their dressing, but underneath they are thieves. (Elder, Wau, in English)

Another factor leading people to seek out government justice is the broader trend of socioeconomic change and urbanization: Increasingly, more people have been to school or work in the towns and see themselves thus as too modern or advanced to go to a mere chief's court. (This is not entirely true in reality; self-styled intellectuals frequently deny to researchers ever having been in court, and yet their names appear in chiefs' court records and they are sometimes seen appearing before the chiefs.) Similarly, returnees from Khartoum or East Africa are more familiar with the bureaucratic structures of refugee or internally displaced person (IDP) camps and deem it more appropriate to go to the police or government courts than to the chiefs. But there is also a more general perception that the higher or bigger the court, the greater the potential reward—or revenge—in the scale of compensation and penalties, the capacity to enforce payment, and the simple status of winning a case in such a court.

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*But there is also a powerful sense that the government police should handle cases involving serious violence or death, even if people currently doubt their capacity to handle such cases.*

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## *The Effects of Forum-Shopping*

On the one hand, forum shopping or the lack of a clear hierarchy presents the danger that individuals manipulate the system, choosing a court in which they believe they will have an advantage over their opponent or which will bring them the greatest reward. The result could be an inevitable bias toward plaintiffs and against defendants. On the other hand, there is a perception that such tactics only prolong disputes because the opponents appeal a decision that appears too biased. Litigants' room for maneuvering is an important tool for maintaining the accountability of courts to public opinion, as litigants literally vote with their feet in choosing a court, though this is hindered by the degree of control that the government judiciary exercises in places like Wau, and may explain the greater extent of criticism of the government courts there. The tight connection between the town bench chiefs' court and the Wau county or state judges can also make the court less accountable to ordinary litigants, who have less control over where to take their cases. There are advantages to a less restrictive system, in which litigants can choose which court to approach, rather than being sent by the resident county judge.

The town court is trying to help, but the rights of the people can be suppressed on the basis of the way you talk. We can't say anything because they are under the government, the judiciary. Practices in law can guarantee your right, but there in the town court, rights can be overlooked if you are not up to date in the way you present your case. They also build on previous cases; it is like common law based on what happened before. This might be correct up to a point, but not completely. (Luo elder, Wau, in English)

In Aweil East, the more numerous different courts are in open competition to attract revenue from cases, creating a real market for dispute resolution that appears to increase the accountability of the court system. The chiefs there commonly recommend that their courts be allowed to enforce a popular practice of the higher courts, which is to order the loser in a case to pay the court fee of the victor in addition to any compensation. The chiefs complain that they are losing cases to the higher courts because of this difference.

The greatest downside of the current confused or loose court hierarchies is the lack of a clear appeal process in some places, or at some stages. Having said that, people are always aware that they can appeal somewhere, though they may feel that doing so is too costly, distant, or difficult. Those who are determined enough or have sufficient resources nevertheless approach appeal courts in the state capitals, or even the highest appeal court in Rumbek. During the war, a few litigants showed similar readiness to approach even the feared military courts of the SPLA. Some people have an almost entrepreneurial attitude toward litigation, which ensures that they will pursue a case to the highest levels.

What appears to an outsider or legal professional to be confusion and procedural failings can appear to a litigant to offer opportunity and accountability. What confuses and deters ordinary litigants the most are the bureaucratic and legalistic procedures of government courts and police offices. But even this is modified by the way that people nevertheless invade court and office space, often forcing authorities to respond to their particular case and needs.

They always just rush. They often come directly to the county court. We accept them; we do not chase them away because it is their choice. They look for a place where they can get justice. So we accept them. Sometimes we advise them to start from the lower level but they refuse because they don't trust that hierarchy which is down there. They accuse it of influence, expecting bribes, favoring, being politically and socially influenced. That is why they come directly to the county court. (County judge, in English)

In general, the downsides of forum shopping in Southern Sudan seem to be outweighed by the advantages of freedom of choice and resulting accountability, in what is in effect a competitive market for justice provision. Forum shopping can lead to plaintiff-biased justice, since the de-

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*The greatest downside of the current confused or loose court hierarchies is the lack of a clear appeal process in some places, or at some stages.*

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feudant does not choose the forum, but this seems preferable to the judiciary exercising tighter control over litigants' options, as they do in Wau Town.

## Alternative Sources of Resolution and Mediation

For many Southern Sudanese, important actors outside either the family or the hierarchy of chiefs' and judges' courts play crucial parts in dispute resolution. While disputants increasingly rely on government authorities, in a substantial number of cases, they try to avoid the court system altogether and seek out alternative sources of arbitration or retribution that are religious or spiritual in character. For those seeking to avoid the shame of airing disputes in the public space of the court, church authorities are an outlet for peaceful resolution of cases, from marital disputes to serious crime. A different set of reasons accounts for the role of divination and spiritual and occult authorities in resolving disputes. For many Sudanese, there is a powerful spiritual, ancestral, or ultrahuman dimension to local justice and social relations that needs to be addressed. The incompatibility of these beliefs with the principles that underlie the government court system results in significant tensions over certain cases.

### *The Churches*

Churches are an increasingly important arena for settling marital and family disputes. Women in particular often feel that it is more respectable to take their problems to church than to court; they cite the preaching of the churches about forgiveness and peace as a reason to ignore offenses or insults rather than seek redress. In this sense, the churches appear to have reinforced wider social pressures on women to avoid making their disputes and grievances public. But when women have more intractable problems, church elders and parish priests can be approached to help to mediate and resolve them. In general, it seems that the churches present a similar form of mediation to that of the family or neighborhood settlements, in that the goal is to reconcile and preserve relationships, including marriages. But they are perhaps an alternative for women in particular because they offer a different authority structure than the family, one in which women can also become church elders, and can draw upon aspects of Christian teaching to argue their cases, such as against the drinking habits of their husbands.

The churches are generally extremely powerful institutions and their leaders are prominent in the governance and politics of counties or states. In Wau, the Catholic Church is said to be more influential than the state government, which calls upon the bishop at times to legitimize and disseminate policy, as it did in November 2009 to encourage voter registration. The Catholic Church has formal institutions for mediation, including peace and justice committees—primarily to try to reconcile local conflicts, including between ethnic groups—as well as a family cases office. Priests here claim that, if marriage or divorce cases reach the court and the judge or chief sees that the couple were married in church, they automatically refer them to the church authorities.

Parish priests can also become involved in serious criminal cases. In late 2009, a policeman was sentenced to death for his involvement in killing a man during his arrest. The convicted man appealed to his priest to try to persuade the family of the victim to show mercy and prevent the execution. At the time of research, the police and court had allowed the case to be suspended while these negotiations took place, but the female relatives of the victim were then still insisting on execution.

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*Women in particular often feel that it is more respectable to take their problems to church than to court.*

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The court can bring a lot of insult, but here we start by reading the Bible and then we explain everything, so that when they leave they are really reconciled. They even greet each other at the end in front of us. (Parish priest, in English)

We have a church council so I do not solve problems alone; it needs people with experience of marriage themselves.... If we fail to resolve it then we go to the elders and call one of them to intervene. If it still fails sometimes it has to go to court, but that is the worst. If you do not reconcile at home and you take it to court, you will pay a lot and there will be no good relationship. You are supposed to solve at home. The court judges who is wrong; it does not reconcile. (Parish priest, in English)

### *Divination and Spiritual and Occult Authorities*

In Sudan, an entire realm of thought and practice remains largely outside the local judicial system, yet is hugely powerful and influential in local society. English language and Western thought make it difficult to translate the complexity of this realm without resorting to negative or vague terminology, such as magic, witchcraft, or worse, superstition. Even the local Arabic word *kujur* is originally a fairly derogatory term for pagan magic or magicians. In the vernaculars of Southern Sudan, however, there are many more words for the variety of practices that outsiders lump together as magic or witchcraft. Some of these are seen to be more destructive or antisocial than others.

In Sudanese society, the activities of some important religious and spiritual leaders are vital to the entire well-being of society and the environment. In Dinka communities such as those in Aweil East and Wau, the most important of these are the *beny bith*, usually translated as “spearmasters,” who perform cattle sacrifices to communicate with God, spirits, divinities, and ancestors. In other areas, similarly crucial figures perform rituals to control rainfall and fertility or eradicate pests and diseases. The heads of clans also have important functions and powers, particularly in relation to the land. Such leaders are sometimes said to have lost influence and authority with the rise of churches and the wider social and cultural changes of recent decades. But they remain important, especially in rural areas and among those who depend on the fertility of the land and their crops or animals. They also offer a sense of protection that is needed more than ever after the traumas and devastation of the war. In judicial terms, their power to curse has been a crucial sanction against harmful and antisocial behavior.<sup>36</sup>

Two elements in the indigenous systems of thought and belief are particularly relevant. First is the fear that an enemy may resort to supernatural means to harm or kill, through purchasing the medicines or rituals of a particular practitioner, or through their own innate (often inherited) abilities. By definition, an enemy must be known to the victim, and hence, this fear is a powerful incentive to avoid making enemies among one’s relatives and neighbors, whether by inciting jealousy or by causing offense. Second is a more generalized concern that ancestral or divine spiritual forces can harm the living if they are provoked by particular offenses, such as incest, or by a breach in current or historical relations within a family or clan. Even the curse of living relatives is greatly feared, especially that of one’s father or maternal uncle. On occasions such as funerals, family elders can seek to uncover these sources of harm through investigation and discussion. But both individuals and families also resort to specialist practitioners to divine the cause of misfortune or obtain protection, especially if there has been a series of deaths, illnesses, or accidents within one family. Such practitioners can gain significant influence and wealth from their profession; they are also usually feared and mistrusted.

Another problem is posed by the work of witchdoctors. They are causing lots of problems to the police. You know people seem to prefer witchdoctors, whose actions have been responsible for some mob killings and communal tensions. For example, a sick person

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*In Sudanese society, the activities of some important religious and spiritual leaders are vital to the entire well-being of society and the environment.*

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goes to a witchdoctor who claims that a neighbor is the one making him or her ill. To be cured, the person must produce lots of money, say two million pounds. The sick person is compelled to pay, and later hate his neighbor for no good reason. Even highly educated people are deceived. They often claim that they have been going to the hospital when in fact they have been visiting a witchdoctor. (Assistant commissioner of police, in English)

In the case of accusations of poisoning in Kajokeji, these aspects of local society have long been a challenge for the government legal and judicial systems, revealing particular incompatibility with notions of evidence and proof in the European-derived court procedure.

Only the traditional chiefs can deal with witchcraft because there is no material evidence. (Elder, in English)

The judge will not admit that he cannot solve a case of magic, but he will just keep postponing and delaying it, or transferring it to other judges, until in the end you give up! (Elder, translated from Balanda Viri)

For many people, the results of rituals and oracles, or the pronouncements of diviners, are a form of credible evidence. Since the colonial period, governments have been suspicious in general of the authority of religious leaders and supernatural practitioners. Yet they have also sporadically recognized the power of the judicial sanction they can provide, particularly in peacemaking. And in line with their wider bricolage, the chiefs' courts have incorporated some of this sanction, particularly to uncover the truth through ordeals, oracles, or the swearing of oaths. Some chiefs' courts refer people to diviners or other practitioners outside the court or call witnesses to recount such consultations. This is one of the issues that most clearly reveals how closely accountable or responsive to the local community a particular court is: The higher the court, the less likely it is to hear cases related to witchcraft accusations or to admit evidence derived from supernatural means.

The practice of swearing oaths, of course, is a shared method of obtaining truth, and the Western-style use of the Bible (or Qur'an) for this purpose in formal courts has begun to carry weight equal to more traditional methods. Meanwhile, older sanctions, such as the curses of elders or spiritual leaders, have been partially undermined by social change, mobility, urbanization, the influence of churches, and the more immediate power of guns. But the power of the spiritual and supernatural in local society continues and is sometimes pervasive; it has huge effects on the decisions people make in seeking to resolve disputes. The courts in general are associated with the danger of creating a permanent rift in social relations, which in turn risks the wrath of the ancestors, spirits, and divinity, or the potential use of harmful magic by an enemy. In some societies, this danger is as or more significant a deterrent to court litigation as the practicalities of cost or time.

A young man used to go into the forest to collect honey, and while he was away his younger brother was going with his wife. One time the man came back from the forest during the night to check on his wife, because our people always suspect that. He came and heard her talking with his brother, so he took spears and broke down the door, and found his wife. She said what is wrong, but he put the torch and there was his brother hiding, so he went to kill him with the spear, but his wife caught him and prevented, and shouted, so people came and took him out. That was a terrible case because he really wanted to kill that man. We said what can we do? But we settled that peacefully. The man wanted to divorce the wife, but they had six children, so the elders convinced him not to, and they brought the magic man and swore them. And his brother had to leave the village and went to Warrap—he has not returned. But the husband said, "Do not imprison him: let him swear not to go with my wife again."

Q: Why didn't he want him to go to prison?

A: Because of this thing called *kure*, that is blood brotherhood. So it would be shameful for my brother to go to prison, and people would sing songs against us. Generally people

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*For many people, the results of rituals and oracles, or the pronouncements of diviners, are a form of credible evidence.*

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prefer to keep things like that private and not make public in the court. Like if I catch my wife with someone, that is very shameful for me as a chief to bring it publicly. So I will make my wife swear with a terrible local one, but in secret, because it is shameful if people know. (*Payam* chief, Wau, in English)

## Areas of Concern or Conflict

To a large extent, the local justice system operates as a single, gradated spectrum, applying varying combinations of legal principles and procedures. In general, the lower levels engage in more flexible negotiations that account for the complexities of local context, while the higher levels in some cases attempt to enforce procedures and impose laws and penalties more rigidly. As disputants navigate among these forums to pursue opportunities for justice, the system is generally able to accommodate their varied and nuanced demands.

However, certain issues nevertheless reveal a tension between the local living customary law and the statutory and constitutional laws. Such cases represent the deeper paradigmatic differences between local socioeconomic realities and state-imposed laws, as well as between chiefs and government judges. This section explores four areas where punitive justice or the Western-influenced, rights-driven aspects of statutory law are potentially at odds with indigenous social and cultural norms: accusations of witchcraft; the introduction of human rights principles, particularly in the context of juvenile criminal or antisocial behavior; cases of sexual offenses; and the balance between compensation and punitive sanction in cases of killing.

These issues all demonstrate the critical need for sensitivity to local context and flexibility to accommodate the living customary law. A tendency to impose statutory or constitutional laws in such cases generally leads to misunderstanding and resistance, including evasion of the courts and the potential erosion of the credibility of the entire justice system. There is need instead for dialogue and negotiation, particularly the development of alternative means of providing a sense of protection from what are perceived to be dangerous antisocial forces. A fifth area where current strategies for justice reform perceive a problem is in handling interethnic disputes in the context of rapid urbanization. But in reality, the existing local judicial forums are negotiating such cases and again demonstrating the value and efficacy of local solutions.

### *Poison*

One of the greatest tests of the professed government support for indigenous custom, both in the colonial period and in the last few years, has been the issue of witchcraft. As we have seen above, accusations of supernatural harm tend to be handled outside the court system because it is generally known that the government disapproves of such cases. The attitudes of government in Southern Sudan have fluctuated however, as both the first Anyanya rebels and the SPLA saw it as their role to cleanse their communities of witches.

In Kajokeji and nearby areas of Central Equatoria State, there have long been specific accusations of poisoning, which have been particularly confusing for governments: In theory, they could concern the criminal use of poisonous materials, but in reality the accusations tend to have more in common with witchcraft beliefs. Poisoning is thought to be an inherited propensity, particularly though not exclusively associated with women. Although the poison is believed to be administered in food and drink, it can also be conveyed by a mere touch or handshake, and in some cases can effect an apparently remote action, such as an attack by a wild animal or a lightning strike. In recent years, a new poison is also said to have appeared in the area, brought from Uganda (as with other kinds of poison). Known as *abiba*, it is a form

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*Certain issues reveal a tension between the local living customary law and the statutory and constitutional laws.*

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of zombie belief, in which the perpetrator kills relatives and neighbors to become wealthy by supernaturally employing the labor of the dead. It has added to a sense of crisis as people return from the refugee camps of Uganda with the perception of new dangers hidden within the community.

For a number of years, the SPLM/A administration of Yei and Kajokeji counties tried to overcome the problem of evidential proof in poison cases by demanding that accusers identify and produce the poisonous substance that they claimed defendants had used. If litigants could do so, the defendants were then ordered to consume the poison to see how deadly it really was. Many people accused of poisoning thus died after being forced to consume tins of insecticide or other chemical or poisonous substances allegedly found in their homes, in what were effectively ordeal trials. Yet this policy, with its emphasis on material proof, was seen to be an improvement over the previous period, in which SPLA soldiers simply executed those accused of poison.

In more recent years, government courts have rejected poison cases altogether and judiciary and local government directives have been pressuring chiefs considerably to do the same, on the grounds of a lack of evidence. This issue exposes and strains the in-between position of chiefs, who clearly often believe in the existence and threat of poisoners, and even if they do not, are under great community pressure to provide protection against this danger. The issue also reveals the limits of the extent to which the norms of local communities can coexist with government and international law in an encompassing judicial system. Frustrated by what they see as court and police failure to protect them from a serious threat, people have turned in recent years to mob justice, involving torture, killing, or expulsion of suspects. Yet they have also made some ingenious attempts to find a modern solution to the problem of proof, as a recent case of suspected poison in Kajokeji reveals.

The case involved two young boys killed by a lightning strike; rumors immediately spread that this tragedy was the result of poison. The boys' parents discovered raw groundnuts in one boy's pocket, arousing suspicion because the boys had taken roasted, not raw, nuts to school in the morning. A week later, a meeting was held at the boys' school and a decision made to organize an election among the school pupils and the wider community to see who the most popular suspects were. The elections (by written ballot) were organized a few days later by the school parent-teacher association, the headman and *boma* and *payam* chiefs, the *boma* and *payam* administrators, and some policemen. The outcome appeared conclusive: The community elected the mother of the same schoolchildren who had been elected by their fellow pupils. The consensus was that this woman had given poisoned groundnuts to her children to take to school, who then secretly swapped them for the boys' own nuts, causing them to be struck by lightning.

Before the election results were announced, the *boma* chief transported the suspected family away and handed them to the police, who put them in the county prison to protect them from the danger of another mob killing. The county judge then discovered the mother and children in the jail and called a meeting with the community leaders. The judge is not from the same area and did not believe that poison could cause lightning strikes. He threatened to jail the community leaders for organizing the illegal elections and refused to honor their request to exile or "excommunicate" the family from the county. Everyone tried to deflect blame for the election onto each other, but in the end, the *boma* chief declared that the real problem was that the government courts did not understand the problem of poison, and that he could not protect the suspects from mob killing if they returned to the village. The judge nevertheless

ordered their return, and the county commissioner tried to take them back to their village. In the meantime, church leaders had further incited the community against the “devil” woman, and an angry crowd threatened to attack the commissioner and his party as well as the suspects. The commissioner was forced to return the woman and her children to the jail for protection; they were still there at the time of this project’s research.

The practice of holding elections for witchcraft is said to have started in the refugee camps in Uganda, and cleverly employs the modern notion of democracy to legitimize what is in effect mob justice. The community, including the schoolchildren, clearly already believed that this particular lady was a poisoner, but the election was seen to constitute evidential proof. The county government is at a standstill over how to handle such cases, caught between the popular demand to kill or exile the suspects and the government judiciary’s refusal to accept elections as evidence of the suspects’ guilt. For government authorities, particularly those who are not Kuku, like the first-class judge, the problem lies in the backwardness of the people. Meanwhile, the people believe that the government is not only failing to protect them from a serious threat, but is even protecting these dangerous killers instead.

The problem is clearly linked in part to the trauma of war, both in the pressures of life in the refugee camps and the undermining of indigenous sources of protection from harm. Without a sense of community protection, suppression of all official discussion of the problem is only driving it into informal arenas, and may ultimately lead to further torture and killings.

The *abiba* [witchcraft] defeated us. Some suspects were killed, or chased away, but the problem is still with us. The problem is that the government is doing nothing to discourage the practice and appears to be supporting the wrong people or suspects at some times.... We are confused and do not know how to handle this matter. A few weeks ago, chiefs were called by the president of the C court to find solutions to this menace.... He advised us to conduct some rituals to cleanse the land. Much *rima* [blood] was shed during the war, and the land has been polluted. This requires cleansing. The process will commence with the construction of two huts, *kadi na piyong* [hut of water/rain], and *kadi na dianga* [hut for mother of the former chief]. After these have been built, the *mataki ti porogo* [landlords] would prepare their own compounds in which they could *lombu* [curse] evildoers, including those using *abiba* and other forms of poison to kill people. I gave a cow to get this process moving. I think the huts will be completed in December. Then the *mataki ti porogo* will deal with the *abiba* and other poison cases. They will curse, and the guilty will die. The government will not interfere in this traditional way of dealing with poison. (*Payam* chief, translated from Kuku)

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### *Youth, Human Rights, and Urban Delinquency*

In Southern Sudan, urban juvenile criminality or immorality causes people to feel that the government and its constitutional or human rights laws are actually undermining protection of the community. In general, the efforts by government and international organizations to disseminate and enforce human rights principles and constitutional bills of rights have been unpopular and poorly understood. The English term “human right” (often used in the singular) is seen as a deeply foreign imposition, which primarily seeks to remove the alternative right of parents and elders to discipline family members or offenders through corporal punishment.

Human rights are not good for us here—maybe for the *kbarwajas* [white people] but not for us. How can you beat a woman or child without reason? It is not there. And you do not beat someone the first time they make a mistake, but when they continue to repeat the mistake. Even another man, you do not fight the first time but only if he continues to make a problem. If you don’t beat a child for doing wrong, he can become a criminal. (Elder, translated from Dinka)

In the chiefs’ courts, the fairly confused interpretation of human rights legislation seems to be that anyone under the age of eighteen cannot be sentenced to prison, which is not actually the

case.<sup>37</sup> And this means that sometimes the courts deliberately record teenagers to be eighteen or over, when they are in fact younger, to sentence them as adults; this practice was witnessed in more than one research site. It is common to find children and juveniles in prisons together with adult prisoners.

In one town chiefs' court, it is believed that anyone under eighteen can be flogged, but not imprisoned. One case observed involved two teenage boys who admitted stealing goats from another young man of Northern Sudanese origins; they were sentenced to twenty and thirty lashes, which were administered immediately. (The local research assistant believed, incidentally, that the lashes were lighter than usual because the court disliked the northern accuser.) The court members explained to the researcher that the lashing was done because of "human right," even though the GoSS Child Act (2008) clearly prohibits such use of corporal punishment.

In Wau, there is a particular concern with a phenomenon known among Southern Sudanese as "nigger behavior." The term originally referred to styles of dress, music, and speech that were seen to be copied from African-American culture and principally associated with young returnees from Egypt, East Africa, and North America, including low-slung jeans and reggae music. However, these styles have also come to be linked with immoral and antisocial behavior among youth, and the "nigger" has become an increasingly sinister and criminal figure. There are also political dimensions to the term because many of these returnees are believed to be the sons of government and SPLA elite, sometimes known as "lost boys" after the former child soldiers who attracted considerable attention as refugees in North America. In Juba in 2008, the county government issued a special order criminalizing "nigger behavior," and it seems to be a greater concern in big towns such as Wau and Juba.

These niggers are from us; they are our children. When a lady delivers without the father there and the children end up on the street, they watch films and the Internet and then they start copying that behavior. But the government are the ones supporting the niggers, because those clothes cost 150 SP, so the big people must be the ones behind this problem. If they are taken to court they say, "Which law are you going to judge us with; we are free; we are lost boys." There are young boys who have no parents and take petrol or glue, but these niggers have good clothes, even cars; they are not poor. (Young man, returnee, translated from colloquial Arabic)

There is particular controversy around the issue in Wau, because the courts are seen to be too lenient on criminal "niggers," due to the direct intervention of international human rights officers:

This nigger problem started from Europe or America, not Sudan. The people there in Europe are educated, but here they are illiterate, so they do not understand what they see on TV and films. We need a fixed law to stop this, or this generation will be spoiled. It is more dangerous even than HIV. They dress wrongly in these loose trousers hanging down, and they form a group and then get a woman or girl at night and rape her or even murder her. They have long knives and they steal or even kill. They go outside the town at night and dance naked, girls and boys together. It is very dangerous.

Recently, a month ago, a group of niggers were caught by the police and taken to court. The ones who were over eighteen were sentenced to three or four months in prison, but the human rights organizations came to release the ones who were under eighteen. The community is not happy about this, because the ones who were released will think they are powerful. They say, "The human rights are there behind us," so they will do more bad things. They should go to a reformatory prison. One hundred and fifty families wrote to the government to ask for such a place for niggers, and said that human rights should be for Europe but it should not enter here like this. These people are illiterate, they do not know about human rights, or how could they rape and attack people? Human rights should be applied only to someone who knows about it.

The youth who are doing this are the children of the big people in the government, so the government is protecting them. Those big clothes of the niggers are very expensive:

150 pounds in the market. They must get the money from their fathers; poor people could not afford it.

The chiefs would handle such cases better: they would beat them and put them in prison. When that case was taken to the big court, those who were released by the human rights came out shouting, "Niggers, niggers, can come there," and they were laughing and proud. (Middle-aged man, returnee, translated from Balanda Viri)

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The issue of "niggers" appears to have become enlarged and distorted, but this is because it touches on deeper concerns about the effects of urbanization and the shift in power relations between elders and youth; the latter have become more militarized and have gained greater access to income independent of their elders. As with the issue of poison, it would seem that dialogue about these wider concerns would be more beneficial than targeted human rights interventions, which have been deeply misunderstood by local society and added to the sense of helplessness and lack of control over rebellious youth.

### *Defilement, Rape, and Adultery*

Cases of sexual transgression, including rape, adultery, defilement, or impregnation, are clear examples of how attempts to impose statutory law can lead to the avoidance of government judges' courts because of dissatisfaction with strict application of the penal code. Above all, they demonstrate the vital importance of context to local justice; the chiefs' courts have generally proven more popular forums for these cases because they are seen to be able to negotiate more acceptable outcomes for the parties, considering the cases' specific contexts and the potential for restoring good relations through marriage.

The first difficulty is that overlapping normative orders make sorting out the definitions and natures of sexual transgressions a challenge. Adultery is sometimes used to refer generally to fornication because the Arabic term *zina* similarly refers to the crime of any illicit intercourse, which does not actually correspond to Southern Sudanese law or most custom. In most local custom, fornication with a married woman is an offense against her husband, while fornication with an unmarried girl is not in itself an offense, unless it leads to pregnancy or elopement without bride wealth. This contrasts with the position of *shari'a* law, though this too has trickled into GoS-controlled areas. In the Wanh Alel Dinka laws, the impregnation (or "elopement") of an unmarried girl requires payment of a pregnant cow to her parents; adultery with a married woman requires seven cows to be paid to the husband. Clearly these offenses [defilement and adultery] are considered to damage the woman's husband or girl's family in both humiliation and the value of lost bride wealth. Hence the sanction focuses on compensation. To a certain extent, the statutory form of adultery follows a similar logic. Under the 2008 Code of Criminal Procedure, adultery is understood as an offense against a husband, committed by his wife and another man or men, and treated as both a criminal and civil offense, punishable by two years in prison. This can be complicated by the levirate and widow inheritance in some areas: Even if a husband has died or abandoned his wife, she remains legally married to him unless formally divorced.

Rape cases present a greater paradigm challenge and source of confusion. Under the 2008 Code of Criminal Procedure, rape is defined by consent, for which the legal age is eighteen, and punishable with a maximum fourteen-year prison sentence. As one county judge therefore stated, "For underage girls it is even rape when it happens with the consent of the girl, according to the new penal code." The same judge asked for birth certificates to prove the age of girls; few people, if any, would be able to produce such a thing. Judges appear largely to have abandoned attempts to treat all sex with underage girls as statutory rape, because all parties in

such cases prefer a customary compensation payment, if not marriage. Chiefs and even judges advise those who try to open cases of rape to settle the issue outside of court instead, because otherwise the case has to go to the high court and the boy or man will be sentenced to many years in prison.

The criminal definition of rape and the accompanying prison sentence would deter many people from taking such cases to a government court. There is confusion over the conflation of the legal definitions of rape and defilement, that is, sex with an unmarried girl; in indigenous culture, rape or pregnancy can often, and ideally, lead to marriage. As a recent report focusing on gender-based violence points out, marriage is often seen as the best outcome of rape of unmarried girls because it restores respectability to the girl and her family.<sup>38</sup> A court procedure, on the other hand, is seen to lead to a needless prison term for the rapist, while extending the shame and humiliation of the victim. This is compounded by the evidence needed to prove rape, which may include whether the girl cried out or screamed so that people could hear her. In some areas, a medical examination is a possibility, but this can add to the girl's humiliation and shame, and girls are often under considerable pressure from relatives to remove this shame by transforming the rape or defilement into a legal marriage. In some cases, it also appears that the girl herself is keen to marry, but may be reluctant to admit that she consented to sex. Sometimes the girl's parents threaten to open a rape case simply to exert pressure on the boy or man and his family to marry her instead: "They want to pressure the family of the boy to pay cows to make it a marriage.... If he refuses, they will open a rape case" (County judge in English, laughing).

A case in a county C chiefs' court illustrates how the threat of imprisonment for rape in the government courts can be used to persuade litigants to settle cases in the chiefs' courts or outside court altogether. It also reveals the extent of shame that young girls or women experience in such cases, and the possibility of a resulting desire to marry. A nineteen-year-old boy and fourteen-year-old schoolgirl had been having a relationship and wanted to marry. The girl's parents refused because of her age and also because the couple were distantly related, thus breaking incest taboos. "I want to marry him," the girl stated. "If I don't, people will point at me and humiliate me." The court warned them both that, if the case went to the government judge, the boy could face seven years in prison: "If you accept your mistake, the case will be solved in the traditional manner. If you refuse and continue to insist on marrying your relative, we will return you to the government court, where a foreigner will judge you. He will read from law books and send you to a long jail term." At this threat, the boy agreed not to try to see the girl again, and she started crying. The boy and his father were ordered to pay two sheep for a ceremony to cleanse the incest, and the boy was also punished with a one-year prison term (converted into money at 15SP per month). Then the court suddenly wondered if the girl could be pregnant, which only increased her humiliation. Without any woman on the court, another female litigant was asked to talk privately with her. It emerged that she had not had her period since sleeping with the boy, and so the court sent her to a hospital to be tested for pregnancy. At this point she declared, "I want to go home. I do not want to be paraded on the roads!" Her father agreed to take her to the hospital, and the court ordered that, if she were pregnant, the child would belong to the girl's family.

In Kajokeji, an NGO working with local schools has encouraged *payam* education offices to hold special courts to settle cases of defilement—that is, pregnancy—of schoolgirls. These courts behave similarly to chiefs' courts and are even advised by local chiefs, but the members are not necessarily experienced in settling cases. Presumably the idea is that the courts will be a

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more supportive environment in which to discuss the case than a formal court would be. However, for the girls concerned, the public nature of such discussions is embarrassing, regardless of the type of court, and the education office courts have attracted an even larger audience than the normal courts. The result is considerable confusion and a vacuum over how to protect girls or the rights of their parents over their reproductive potential:

We have school regulations that ban immorality... But defilement is a confusing matter. First, people talk about defilement without specifying the meaning. There is no age limit. As long as the girl involved in sexual relations is in school, people consider it a defilement case. There is also discrimination against males. For example, when a fifteen-year-old boy engages in sex with an old woman, say teacher, the boy is blamed. People would say he penetrated her and he must be the guilty one. Secondly, there are no clear laws promulgated by the education ministry to deal with this issue. There are no circulars tackling defilement. People say it is punishable with three years' jail term. But no one has gone in for three years because of defilement. Mothers also are a problem as they encourage marriage even for very young girls. They would say do not spoil the future of our daughter. (Headmaster, in English)

The second-class magistrate ordered the imprisonment of persons who defile schoolgirls for seven years. That is the government law. Parents do not like the law. They say it is a big loss to put a boy away for seven years, and also it ignites a long feud with the family of the boy. (*Payam* chief, translated from Kuku)

Some people are taken to police, after a while they are freed. Also, some teachers are involved in "spoiling" girls. Since 2005, fifteen teachers have lost their job because of this problem. Serious cases are forwarded to the police, who forward to the second magistrate court. The magistrate court is a problem. The person is put in jail for three days and then released. As a result, defilement is rampant here. Parents are very concerned about their daughters. (Female NGO employee, in English)

It is not only in Kajokeji that all parties often prefer to avoid the statutory definitions of rape, as the following case from an executive/A chiefs' court in Aweil East reveals. As explained by a local research assistant,

This man sitting there told his wife to look for his sister-in-law (the sister of the wife) and to bring her to his house. The wife went and brought the girl... His sister-in-law came to his house. When she came to his house he used her; he forced her for sex... He raped her. Then... the parents of the girl opened the case.

The husband says "I eloped the girl. Now people are opening a case to me and say it is rape. I have not raped her. I did a mistake: I eloped her at the wrong hours... at 7 p.m."

Q: Rape or elopement. Why do they not ask the girl?

A: They said it has been solved yesterday: They called the girl yesterday here in this court. The girl said, "When I entered the house the man forced me to have sex." She said it was rape.

Q: The girl wants to be married?

A: Yes. She accepts him.

Q: But you said she was raped?

A: With the process they have sex, she did not agree. But now she agrees: "So long as the one who raped me pays my father. The way they come to me is not good."

Q: He has to pay eleven cows and also punishment?

A: No, no punishment. They go home: Then they will make a celebration.

Q: The fact that he raped the girl will not be considered?

A: The girl has not a problem because the girl has accepted to enter the house where the man was. And when the man forced her she did not cry. That means she agrees also. So if she would have cried so that people would hear her voice...



While a case such as this raises obvious concerns that victims of rape cannot achieve justice, it should not necessarily be assumed that they have no choice in the outcomes of cases. Overall, it is far from clear which rights need to be protected in cases of rape, intercourse, or pregnancy. In local society, the most important right is that of the parents, and this will not change in the near future. Even if the rights of the girl are being considered, it is unclear whether this means her right to remain in school, her right to be protected from sexual assault, or her right to choose a sexual partner or to get married. Parents' views of the best outcome would vary. Some would be keen for their daughter to marry as soon as possible, to protect her from sexual danger—especially with the growing awareness of HIV—or to guarantee their bride wealth. Others would want her to finish school, again both for her own benefit and status and because school fees have been added to the bride wealth for educated girls. There are no easy ways to address such concerns, especially in the rapidly changing society of Southern Sudan. But an understanding of the complicated social and legal factors involved, rather than the application of strict rules, might best determine a satisfactory outcome in such cases.

### *Dia or Death: Group Conflict and Killing*

One of the greatest challenges for the local justice system in Southern Sudan generally is the handling of killings that occur as part of local fighting, raiding, and warfare. Such local conflicts and the associated cycles of revenge have posed difficulties for governments since the colonial period, but the transition to the use of modern weaponry has further exacerbated the judicial challenge, as it is extremely difficult to identify individual killers in a group conflict. As we have seen with sexual offenses, local context and cultural conceptions of justice must be considered in determining sanctions for homicide cases. At stake in cases of killing, however, is not only people's satisfaction with the justice system or competing rights and interests, but the potential for an escalation of violence and revenge killings if cases are not resolved appropriately. It is thus critical to understand the concept of *dia*, or compensation, and its connection to certain socioeconomic communities.

The inclusion since the 1990s in Southern Sudanese criminal law of an option to compensate the living for homicide rather than imposing the death penalty has been interpreted as evidence of integrating customary law into statutory law. In reality, the situation is a little more complicated. The payment of blood money, or *dia* in Arabic, is widespread in the Muslim areas of northern Sudan, and over the last two centuries, its use appears to have trickled into Southern Sudan. It parallels the transfer of cattle from the killer's family to the victim's family in the cattle-keeping areas of Southern Sudan. It is not known whether this latter practice emerged through interaction with notions of *dia*, but the payment of cattle rather than money is important because the cattle can be used to obtain a wife to bear children in the name of the deceased. The indigenous desire in such cases has been to replace and reproduce life, not to gain materially from the compensation payment. In the past, in other Southern Sudanese societies, such as in Eastern Equatoria, a young girl would have been directly handed over to the victim's family to similarly restore the reproductive resources lost through the killing. The restorative value of such exchanges also restored peaceful relations and removed the need for revenge killing or cattle raiding.

Over time and with the influence of Northern Sudanese judges and government officials, indigenous practices have become conflated with *dia*, so that Dinka may use the word interchangeably with their own term, *apuk*, which specifically refers to cattle. As the practice of paying *dia* has become more prevalent, it has also become more frequently converted to a

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money payment. But taking it out of the context of its cultural purpose—that of restoring lost reproductive resources—renders it less effective.

One Dinka elder raised the issue of conflicts in neighboring areas, and the recent instigation of peace conferences, which have encouraged both sides to forgive and forget, without punishment or compensation:

Now there are a lot of delays in the courts—it can take two or three years before a case is finished. Before, if there was a big fight like between Apuk [here, the name of a tribal section] and Aguok last year, the people could be called and the case would be settled in seven days. But not now. That is why fighting is increasing—there is no law. After that fight and so many lives, cattle and property lost, the government decided that everything should just be cancelled, no punishment. People agreed, but they got nothing good from the agreement, so they are bound to try to revenge at some point. In the past the court would find out who was guilty and then *dia* would be paid, and they would be reconciled. For the Monjang [Dinka] thirty cows would be paid for the dead man, and that would be used to marry another girl to deliver a person instead of that dead person, to show that the man is still alive, because the children take his name. (Elder, translated from Dinka)

As well as repeating the danger of the delays in the court system, this man also highlights the key role of cattle compensation in Dinka homicide cases as the only means by which to break the cycle of revenge. The pronouncements of appeal court judges in 2001–02 enforcing application of the death penalty over customary compensation show that their interpretation of customary law was based on their assessment of its wider legal and political implications, rather than on the individual circumstances of the parties or the desirability of achieving lasting resolution between feuding families.<sup>39</sup>

We in the court of appeal have had occasion to make clear an issue of public policy to the effect that cases of sectional fights should be visited with stiffer sentences in the interest of deterrence and to assert the strong arm of the law. It has been pointed out in earlier cases that the level of violence, occasioning needless loss of lives in some of our counties, has reached unacceptable proportions and frequency, hence the dire need to attempt at curbing this unwarranted tendency through tougher sentencing policy. (Chief Justice Ambrose Riny Thiik, court of appeal)

However, while many people, especially in cattle-keeping areas, express a preference for compensation over execution, other people remain deeply opposed to receiving any form of compensation for the death of a relative. In some areas of Southern Sudan, the payment of blood money is not only unwelcome, but deeply feared, as it conveys the risk that the blood of the deceased may accompany the payment and bring disease and death to the recipients. Despite frequent enforcement of the death penalty in recent years, people perceive the growing prevalence of *dia* in areas where it was not formerly paid, and see this as part of the increasing dominance of cattle-keeping groups that have conflated *dia* with their own forms of compensation. One man from Yei in Central Equatoria State declared in 2007 that

We will never accept compensation, because we say that we don't want to eat the blood of our brother. But the New Sudan Penal Code [1994] tried to impose the culture of the Dinka everywhere.<sup>40</sup>

However, some of the communities that formerly opposed *dia* are now coming to favor it over the death penalty:

Q: In murder cases, is it better to pay *dia* or to execute the killer?

A: In the past it used to be the death penalty, but then you lose two people. Now *dia* is being paid and that is better because it can help the children of the dead man, with a house, schooling, and so on. In the past our people used to insist on killing but now the government says "Pay *dia*." During the war too many people died anyway. (Elder, translated from Balanda Viri)

There are therefore continuing tensions as to whether *dia* should be paid in murder cases or whether the death penalty should instead be imposed. Many people from a range of different areas or groups express a dislike of execution, because it benefits no one, and—some would say—there has been enough death due to the war. Certainly for communities that need to produce children in the names of the deceased, execution is pointless and would fail to break the cycle of revenge and raiding. It is clear that there is often considerable local cultural preference for peaceful settlements of homicide cases, leading to payments that can be used either to marry and procreate in the names of the deceased or to support their children or relatives. The idea is not that relatives benefit from the death, but rather that the loss of life is mitigated by the productive use of compensation. The death penalty is made particularly undesirable by the frequent lack of legal due process reported in recent cases of execution, including limited or no access to defense lawyers, and the inherent room for bias when the deceased's relatives are given the power of life or death over the killer. As one county judge admitted, even members of the official judiciary might not be qualified to handle such cases: "In some areas, there is lack of training for the judges, police, officials. A high court judge may be seeing murder cases and yet have had no training."

Yet ironically the judiciary of Southern Sudan has seen the death penalty as a more effective way to deter sectional conflicts—a belief not borne out by the evidence of escalating local conflicts in recent years, despite the imposition of the death penalty in many cases. Instead, people see the delays and corruption in the judicial system as contributing to the continuation of these conflicts.

To try to accommodate different cultural preferences, the current Code of Criminal Procedure allows the family of the dead person to decide whether to accept compensation (reducing the sentence to ten years, maximum) or to enforce the death penalty. A complex set of factors can determine the decision of the family, however, even in areas where cattle compensation has long been paid in cases of killing:

If somebody is convicted under this Article 206 of the Penal Law 2008, the court has to give two choices for the family of the victim: ask them whether they like compensation or they want death penalty. It is the choice of the family of the deceased. It is for them to decide whether they need customary blood compensation of thirty-one cows or they want the death penalty for the convicted. Some are very radical and don't want compensation. We have about five cases with death penalty who are sent to Wau to be hanged. It is the hatred to the person and the clan of the murderer. They cannot accept. Sometimes there are social differences. Maybe the accused is coming from a very poor clan. And the victim belongs to a wealthy and social wealthy family. So they sometimes don't accept cows from somebody who is poor in his clan and his family. So they prefer him to be hanged. It is the social differences among the clans. (County judge, in English)

As with the case of thieves, the judge's statement suggests that receiving compensation implies a certain equality of relations; the same reasoning excludes common thieves from being ordered to pay compensation or restitution to their victims. The obvious implication here, however, is that a poor person is more likely to be executed than a wealthy or high-status person.

The current choice courts give to the families of homicide victims as to whether to demand compensation or the death penalty thus might appear to open up undesirable inconsistencies and room for abuse. But it is perhaps preferable to the blanket imposition of either the death penalty or compensation. The widespread opinion against the death penalty is a positive circumstance and should be supported wherever possible. But given that some people still deeply dislike *dia*, its use should not be imposed. In the absence of execution or compensation, the government penal system has little capacity for alternative sentencing, given the poor standard

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of prisons. Where people do not feel the need for retribution, they often can negotiate either *dia* or a cleansing and restorative procedure outside the courts, which of course contravenes the criminal procedures requiring a punitive sentence. The informal support of county judges and police for negotiations outside the formal courts appears to be a welcome step in recognizing local capacity for peaceful resolution, even in homicide cases.

Thus, government policies requiring that murder cases be handled solely by higher levels of government courts might unintentionally result in fewer cases being reported, while people continue to rely on the ability of chiefs to negotiate timely and peaceful resolutions. The delays and mistrust of the government courts' handling of murder or fighting clearly mean that some cases are solved by chiefs outside the towns, with or without the knowledge of the judiciary.

The parties can agree outside that our son did a mistake and we are ready to solve that traditionally. They agree outside and pay thirty-one cows outside and they come with the agreement to the judge: "You try our case; before you finish, we will come to our agreement." If the two sides agree, the judge cannot do anything. (Public prosecution attorney, in English)

In two *payams*, where chiefs complained that the police were releasing suspects from detention, the chiefs were also settling murder or accidental homicide cases without reference to the judiciary.

Chiefs are not supposed to handle murder cases or other serious cases, but especially in the remote areas, they are jack of all trades. (UN officer, in English)

Local settlements of homicide cases are not confined to cattle-keeping areas, but were also reported in Kajokeji, in a case described as suicide, but which was actually an abortion attempt that led to death, punishable with up to ten years or even life imprisonment under section 218 of the Code of Criminal Procedure:

A boy and a girl, both in senior two [at secondary school], had a sexual relationship which resulted in pregnancy. The girl told the boy, who decided to give money to her for medicines that could trigger abortion. She bought twelve chloroquin tablets and took them. She revealed this information to her father, but it was too late, and she passed away. We arrested the boy, and referred him to court. At the court, the parents said they had no case against the father of the boy. I was embarrassed. In fact, the two families and the paramount chief of the area had concluded a deal. The parents of the girl had received 2 million pounds. The paramount chief got involved in a case that did not fall within his remit. Suicide cases do not belong to local courts. From the police, they go direct to the resident magistrate. It is a criminal case. (Assistant commissioner of police, in English)

Chiefs do not necessarily want to be given the power to settle homicide cases by themselves; they often explain that this could put their own security at risk, because the cases are so "hot." But it is also clear that they are more likely to be able to negotiate a lasting resolution, particularly when the death occurs as part of a communal conflict. It is therefore important that judges include chiefs and other influential figures, such as church leaders, in negotiating sentences for homicide. In communal conflicts, an agreed payment of compensation and restoration between the warring parties—even if individual killers cannot be identified—is more likely to bring about lasting peace than executions or the complete renunciation of claims.

### *Interethnic Cases and Urbanization*

The local justice system's capacity to settle interethnic cases is vital in light of the extent of migration and urbanization in recent decades. These processes have greatly accelerated since 2005, as returning refugees prefer to settle in towns than in the rural areas. In this context, it is easy to instigate fears that as demographic changes produce more ethnically mixed areas, it is bound to result in increased conflict and a failure of local mechanisms. In reality, the local

courts appear to be settling large numbers of cases between people of various ethnic groups without too much difficulty.

As discussed above, the courts in the towns have developed sensible procedures and institutions to assist in interethnic cases and multiethnic jurisdiction, including panels of court members or elders drawn from different ethnic groups, or mechanisms for judges to call upon chiefs and elders to advise on suitable forms of compensation. As other reports have noted, these are impressive mechanisms, and should be supported.<sup>41</sup> One report on courts in Juba noted that many cases “seemed not to be based on customary law, per se, but on reasoning and an innate sense of justice.”<sup>42</sup> A 2004 World Vision report pointed out that the conciliatory potential of customary law is an important resource for community harmony, not least in the towns; the report also argued that any ethnic differences in customary law were ones of “style rather than substance.”<sup>43</sup>

One question is whether it would be helpful for the courts to standardize exchange rates among different forms of compensation, particularly between cattle and money. This already occurs on an ad hoc or local basis, and it may be best left flexible to accommodate changing local market rates. Further discussion and local research on this point would probably be helpful, but it should be done less in ethnic terms—which could merely exacerbate tensions and fears—and more in straightforward economic terms.

As the question of blood compensation shows, certain aspects of justice differ among various groups or regions in Southern Sudan. However, each tribe does not have its own discrete and fixed body of laws. It is true that systems of local customary laws long ago operated within fairly confined spaces, and helped to define political and moral communities. But these communities observing a particular judicial authority were small, and would rarely, if ever, have corresponded to a larger ethnolinguistic group. Also, prominent individuals might have mediated between such communities, but their role as neutral arbitrators meant that they were likely to come from outside the community altogether. In Kajokeji, poison cases in the early colonial period led local chiefs to call in experts in divination from neighboring ethnic groups. Elsewhere, Nuer prophets helped resolve conflicts among Dinka as well as Nuer communities.<sup>44</sup>

Judicial cultures have therefore stretched across ethnic boundaries, while actual institutions for dispute resolution and justice have been confined to communities smaller than ethnic groups. To an outsider, the similarities in living customary law across Southern Sudan are far more conspicuous than any differences in the underlying principles and definitions of offenses. The differences lie not so much along ethnic lines as along the divisions among different economies and livelihoods. Local justice is inevitably bound up with the local economies that it helps to regulate. The most obvious source of difference is the centrality of cattle in these local economies. In predominantly cattle-keeping areas, local economic and social systems are highly dependent on cattle, which continue to be the main form of compensation in the courts, as well as of marriage bride wealth payments and other socially constitutive exchanges. Although cattle can be purchased with—and sold for—money, they are more likely to circulate within and among families, and to be purchased only when necessary. This means that, when somebody needs to pay cattle for marriage or compensation, he needs his relatives to contribute, and when he receives cattle in the same way, he in turn distributes them to relatives. The result is that tracing individual cattle can be an extremely complicated matter, if, for example, a stolen cow has entered these family networks, or if a woman tries to get divorced, necessitating the repayment of the original bride wealth cattle and their offspring.

Inevitably, the complexities of the cattle economies have preoccupied the courts that regu-

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*In reality, the local courts appear to be settling large numbers of cases between people of various ethnic groups without too much difficulty.*

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*The key question concerns what happens when a dispute or offense arises between a party from a cattle-keeping economy and one from a noncattle economy, which is occurring more and more frequently as a result of migration and urbanization in recent decades.*

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late them, and led to the development of particular rules and principles. But the same complexity also ensures that each case has to be negotiated on an individual basis, as the sticking points are usually to do with individual relations and rights rather than blanket principles. The courts act as arbiters in these complex socioeconomic disputes, rather than with judges imposing particular laws.

However, the key question concerns what happens when a dispute or offense arises between a party from a cattle-keeping economy and one from a noncattle economy, which is occurring more and more frequently as a result of migration and urbanization in recent decades. The problem is that the cattle economies exist in a rather unequal relation with the noncattle economies, as it is considerably more difficult and expensive to acquire cattle from within the latter. Put simply, if, for example, a Dinka cattle keeper is ordered to pay thirty-one cows as blood compensation or eleven cows for marriage, he has some chance of finding at least some of these from the family herds. A noncattle owner has to purchase all in the market, at prices that tend to range upward from a few hundred dollars each. Historically, it has therefore been much easier for cattle keepers to marry women from noncattle areas than vice versa, contributing to a sense of the expansionist and assimilative dominance of the cattle keepers, which appears greater than ever in the political and military context of recent decades, and in light of the recording of Dinka laws by Dinka lawyers and judges.

Thus it is easy to instigate fears that Dinka law is going to be privileged in the courts. But to local courts, the question of choice of law is clear:

People know that if they go to another tribe [to marry], they have to accept their laws. (County judge, in English)

We mostly apply the customary law of the woman. I think this is a general rule across Africa. There are problems with intertribal marriage when the girl's family demands the customary dowry of the man's tribe. People can be very materialistic. (County judge, in English)

The recent UNDP-GoSS strategy for customary law recorded a positive sign for the handling of interethnic disputes. The author met chiefs in Wau who said, "We have no problems to meet with all the tribes present in Wau" to discuss and agree upon customary law. The author was concerned that this might create discrepancies in officially ascertained versions of customary law—between, for example, Dinka law and the town law.<sup>45</sup> But that would only be a problem if the strategy of ascertaining laws by ethnic category were pursued, as discussed in the next section. More striking about the Wau chiefs' statement is their sense of legal commonalities across the town and their capacity to handle their multiethnic jurisdiction. This is all the more impressive in light of the history of the town, which became divided along ethnic lines during the war. While Dinka men were recruited into the SPLA, the GoS armed a Fertit militia group. Attacks and atrocities were committed against civilians by both sides, exacerbating fears and ethnic division; the town itself was divided into separate Dinka and Fertit areas. A peace and reconciliation conference was only held in 2005. Yet in the main town bench chiefs' court, chiefs from Dinka, Fertit, and northern tribes settle multiethnic disputes under one roof. This capacity of the local justice system to overcome and bridge ethnic division should be recognized and supported.

[ **III** ]  
**IMPLICATIONS AND RECOMMENDATIONS**



Kuen Wol, chairperson of regional court Mangartong payam



## The Current Status of Local Justice

This project is based on research in only three sites, and there are obvious limitations in both its scope and scale that prevent any automatic extrapolation of the findings to the whole of Southern Sudan. But the focus on local justice in actual practice and in the views of local litigants, justice providers, and the wider public has generated findings of wider relevance, related to the principal directions of current government and international policy regarding the Southern Sudanese justice sector. First, however, we summarize the analysis of the current status of local justice.

### *Positive Aspects or Initiatives in the Current Local Justice Systems*

- Local chiefs' courts are accessible, well known, efficient, and relatively cheap, ensuring that basic access to justice is surprisingly good in the general context.
- The public (often outdoor) nature of these courts ensures considerable transparency and accountability.<sup>46</sup>
- The capacity to exercise the choice of justice forum also increases courts' accountability, as they compete to attract cases.
- The amalgamation of civil and criminal as well as state and nonstate laws and procedures in the courts ensures that they are flexible enough to meet three principal needs: for conciliation and restoration of social relations, for punitive retribution and reparations to prevent retaliatory violence and conflict, and for potential force to effectively execute decisions and offer protection to victims.
- There is considerable and probably increasing popular demand for state justice and policing, alongside the chiefs' courts.

- The chiefs' and judges' courts are linked by systems of appeal and referral, helping to share and disseminate laws, principles, and procedures in both directions.
- In general, there is considerable communication and cooperation among government judicial and legal personnel, police, and chiefs, ensuring a more integrated local justice system than in many other countries.
- The judicial chain offers a potential link all the way from private family mediation to the highest government courts, functioning as one of the few consistent avenues of communication and dissemination between government and local society.
- The robust, forthright styles of oral litigation ensure that the courts at all levels are important arenas of debate between different generations, genders, and social groups, which in turn generates gradual change in both norms and laws.
- The development or expansion of urban courts and mechanisms for hearing interethnic cases demonstrates the dynamism and adaptability of local living customary law.
- Aspects of customary law are vital to effectively resolving serious conflict as well as individual cases.

### *Problematic Aspects of the Current Local Justice Systems*

- The appellate link between chiefs' and judges' courts and the constitutional provision for legal pluralism mean that government judges may be required to hear or review complicated local or family cases, involving legal principles and customs with which they may be unfamiliar.
- Public confidence in the local justice system is undermined by perceived corruption, including bribery, favoritism, and deliberate delay or hindrance, particularly in town branch and government courts.
- The judicial system's effectiveness is undermined by the weaknesses of the Southern Sudan police service and extremely poor detention and prison facilities.
- The courts have difficulty in enforcing their summons and decisions, particularly in relation to military or ex-military personnel.
- All courts are predominantly male in their membership and staff, and they largely reinforce existing inequalities in power, wealth, and status within families and communities.
- The prevalence of verdicts involving payments of compensation or reparations potentially favors the wealthy (though perhaps no more so than most judicial systems around the world).
- The limited regulation of local courts and limited police capacity mean that defendants can evade justice somewhat easily.

With these conclusions in mind, we evaluate the main current and recent approaches to reform of the local justice sector.

## The Question of Recording Customary Law

The findings of the project raise some questions in relation to the current focus of policy on ascertaining customary law, particularly in terms of whether such an exercise would actually improve access to justice.<sup>47</sup> In the course of the research, positive expressions in favor of recording customary law were of two kinds: the desire of government judges to have a written customary law to use, and a popular belief in some areas that each ethnic group should record its own set of laws to counterbalance the customary law of bigger or dominant groups. However, the research also revealed views and practices suggesting that ascertainment may have retrograde effects: It could limit courts' flexibility in deciding cases, and litigants generally dislike rigid application of fixed laws and penalties. The limited availability or use in practice of written forms of law has helped to maintain courts' flexibility and has also led to the positive development of institutions and methods for handling interethnic cases, especially in the towns. The current court system has many flaws, but there may be more to be gained from retaining its built-in capacity to negotiate changing contexts than from attempting to preserve its laws in a static or rigid form. The current GoSS-UNDP strategy similarly seeks to ensure that processes of ascertainment allow for continuing change and flexibility in customary law; the question is only if and how this can be ensured by the recording of laws. Discussion of this question involves a more detailed examination of the characteristics of customary law and the practical effects of recording and enshrining it in written form. The first two subsections below discuss the general premises of ascertainment in Southern Sudan, before briefly turning more specifically to the current GoSS-UNDP strategy.

### What Is Customary Law?

The Dinkas having had no means of recording their laws and customs, no one in the tribe could clearly detail a system of the rules which guide them in the settlement of tribal cases and disputes.... Though apparent differences have arisen in the various districts, the main principles are the same, and what at first appear to be differences are really due to regard for the local circumstances of the case, such as: (a) The existing supply and demand in cattle and marriageable women. (b) The local estimate as to the gravity of any particular offence, dependant on the conditions in the district.

For these reasons any fixed scale of crimes and punishments would only be misleading, and result in errors and real injustice, as being in absolute opposition with their customs. (Senior inspector, Upper Nile Province, 1907)<sup>48</sup>

The general notion of ascertainment is based on the idea that customary law already exists as a body of rules and sanctions within one or more communities, and can therefore simply be recorded and then applied as the chiefs are believed to currently apply it in their courts. In reality, the situation is more complicated. There certainly are rules or laws in local society. Some of these are effectively universal and taken for granted, such as those based on marriage and sexual rights. Across Southern Sudan, it is an offense for a man to have intercourse with a married woman, or to impregnate an unmarried woman without having paid bride wealth for her. Paternity rights over children generally depend on payment of bride wealth or, as it may sometimes be more accurately termed, child wealth. Other local laws may be more specific to particular socioeconomic systems, such as complex exchanges or loans of livestock, widow inheritance, or familial obligations, including specific contributions to bride wealth.

While rules or normative principles in these areas are inscribed into social practice, most of the same rules are also being regularly transgressed in everyday life, as (particularly young) people defy them or as changing contexts require modifications. These rules are not simply applied

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in the courts as rigid laws. As one expert on local law in South Africa puts it, “Rules might be the language in which disputes are argued, but they do not determine their outcome.”<sup>49</sup> Local justice providers account for a complex range of factors in deciding the outcomes to cases, which might include the characters and oratorical performance of the litigants and their witnesses, their family’s status and reputation, and the wider, changing socioeconomic context, including the effects of war. The rules of marriage and widow inheritance have been questioned in the context of the prolonged absence or death of soldier husbands. Each case is negotiated, argued, and bargained out to come to a conclusion that is by no means predictable on the basis of the bare bones of the case.

Customary law means procedures as well as laws, like the way that the audience participate in the judgment. It is all about logic, and what is reasonable. (Justice George Ladu, high court, Juba)<sup>50</sup>

The contested nature of customary law is even apparent from a case in the SPLM judiciary appeal court in 2004:<sup>51</sup>

**Summary of a Court of Appeal Case at Rumbek, May 11, 2004:**

The appellant in this case had cohabited with a lady for seventeen years, and had five children with her. The lady, however, was already married with one child. Her husband had been killed fighting for the SPLA, but in the Dinka custom of widow inheritance, she was still considered to be married to his family, and so her relationship with the appellant constituted adultery. Her first husband’s brother had therefore successfully sued for the return of the widow and all her children, in a series of local courts, and eventually the high court in Rumbek.

The appeal court judges decided to reverse these judgments in favor of the appellant by formally divorcing the widow from her first husband and granting paternity rights to her second husband for all but the eldest of their children (their first child was still considered to be born out of adultery and hence to belong to the first husband’s family). Their recorded justifications were somewhat varied, however. One judge declared that in Dinka custom, if a wife had been left without care for two years or more, her legal husband’s family could no longer claim rights over a child she produced with someone else; also, the length of an adulterous relationship validated it in terms of paternity rights. The other judge argued that in Dinka law the first marriage would never be invalidated unless formally divorced (by returning bride wealth), but that in this case the customary law should be set aside in order to consider the best interests of the woman and children. As recorded in the court verdicts, “In any case, Dinka customary law could not have taken into account the impact of the national duty on the family of a soldier who goes to the war-front to fight the enemy.”

Although the Dinka judges reached the same conclusions, their deliberations—and overturning of a previous decision by another Dinka judge—reveal the differing interpretations of customary law even among judges within what is considered to be a single ethnic group.<sup>52</sup> The second judge also assumed that customary law was a fixed body of law that could not accommodate the effects of modern wars. Yet the court system has been a key arena for debating and negotiating the socioeconomic effects of war in recent decades, and customary law has been changing as a result. Cases such as this reach the highest courts specifically because the customary laws are ambiguous and contingent, requiring the individual circumstances and timing of events to be considered. Judges need to understand the particular economies and social structures and practices within which disputes arise, particularly in marriage and property systems. But this understanding has been and can be gained through other means than a written form of customary law, notably the human resources discussed further below.

That plaintiffs rather than government or police prosecutors nearly always open cases also means that the litigants contribute to defining which rules are to be considered relevant to the

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case.<sup>53</sup> For example, if a man opens a case against another man for impregnating his daughter, the rules regarding parental rights over daughters are automatically invoked—though there is still considerable room for negotiation as to whether marriage or compensation should be the outcome. But if a young unmarried woman working in a town independently opens a case against a man for failing to provide for her after impregnating her, she will argue a different set of obligations and responsibilities, though she may also point out the man's failure to marry her legally. As one town quarter chief explained, the town courts have had to negotiate increasing numbers of cases between cohabiting couples or “boyfriends and girlfriends”; customary notions of rights and obligations thus get reworked in very modern settings.

Once a judge has ruled on the fault or guilt of a party in a case and determined the desired solution, the court is more likely to refer explicitly to laws to assign a penalty and restitution. The scales of fines or punishments are commonly understood to be set by the government. The Arabic word widely used for any court penalty is *hukm*, which is closely related to the word for government, *bakuma*.<sup>54</sup> When people are asked what the laws are, they usually refer to the amounts of these penalties, rather than to the underlying principles and definitions of wrongs.

It is *bakuma* who sits down and decides what the law is. Then after that when they have finished they call them [the chiefs] to come there in the office, and talk to them and discuss all the issues of the laws. (Subchief and member of executive chief's court, translated from Dinka).

The scales of penalties and compensation commonly referred to as laws must be distinguished from the more complex rules and principles that actually define offenses and rights in local society. When local people advocate recording customary law, they tend to mean the former rather than the latter. To varying degrees, governments have set court penalties and compensation amounts, albeit in consultation with chiefs. For offenses that appear in the penal code, the statutory penalties form a guide, though they are not always adhered to in practice. Fixed compensation scales tend to have been worked out more on a local or individual basis.

The major exception to this is the set of pan-Dinka laws for the whole Bahr el Ghazal region agreed to by chiefs' conferences at Wanh Alel and codified in 1975 and 1984. Most Dinka would say that the government “made” the Wanh Alel laws, though their enduring use reflects an apparent consensus over the amounts of the penalties and compensation for the most universal offenses: murder (compensation of thirty cows, plus one as a court fine), adultery (seven cows) and impregnation or elopement of an unmarried girl or woman (one pregnant heifer), plus a minimum bride wealth of thirty-six cows. But these fixed penalties are a minimum bottom line, above which there is often still considerable room for negotiated settlements, particularly of elopement and marriage. A court decision to impose Wanh Alel penalties is often only the beginning of the complex part of the case, in which the court has to allocate the individual contributions of cattle from specific members of the family, frequently sparking off further internal disputes over debts and obligations. And in practice, Wanh Alel is irrelevant for the great number of complex disputes over cattle and family obligation that come to the courts in its area of application. Only the penalties for the most unambiguous offenses of murder, adultery, and premarital impregnation and elopement have remained in common use, and in the case of the latter, plaintiffs usually prefer the court to pressure for marriage rather than enforce the rather small Wanh Alel compensation. Most cases are much more complex disputes, within as well as between families, over debts, obligations, and offenses that might go back generations. The endurance of *ganun* Wanh Alel suggests that there is value in having established bottom-line scales of compensation, but this does not remove the need to negotiate

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the decisions and wider implications in the courts. In the current economic context, even the basic compensation amounts of Wanh Alel are being criticized as outdated.<sup>55</sup>

When the Wanh Alel laws were recodified in 1984 as the Restatement of Bahr el Ghazal Region Customary Law Amendment Act, they included the customary law of the Luo and Fertit ethnic groups. The research team found no evidence of the latter's use in Wau; it appears that only the Dinka codes have remained in use, and largely only in the simplified form noted above. We can only speculate as to the reason, but perhaps the Dinka cattle economy and the associated prevalence of disputes produced greater capacity or need for uniform compensation than other or mixed economies. A code of customary law for Central Equatoria was also written by Justice Deng Biong in the 1990s, but the team similarly found no evidence of its use in Kajokeji County. Observation of court decisions in 2009 shows that the amounts, currency, and forms of its penalties and compensation have rapidly become outdated in a region of intensive trading activity, migration, and monetary employment;<sup>56</sup> in general, any detailed codes seem to be unhelpful, judging by their limited and declining use.

Without constant, rigorous updating, any detailed ascertainment efforts are likely to be rapidly overtaken by changing economies, becoming irrelevant to everyday judicial practice. Even if it is conducted using a language of rules, and even if its outcomes are based to a certain extent on a limited range of penalties seen to be set by government, the defining feature of customary justice is its negotiated and flexible nature.

### *Why Ascertain Customary Law?*

The paradox that the nature of customary law creates for the general idea of ascertainment should be apparent. If customary justice is based on the flexible negotiation of laws and principles in the individual context of each case, how can its essential nature be captured in written form? The justification for ascertainment is premised on the need for certainty, consistency and predictability.<sup>57</sup> Yet this is actually the reverse of what defines customary law as currently practiced in local courts. The drive to ascertain also comes from the new government's desire to exercise greater control over the provision of local justice. It is drawn from a Western state-building model that assumes that the state should be the main provider of justice.<sup>58</sup> A further stated goal of some in GoSS and the judiciary of Southern Sudan is to "harmonize" various customary law systems and statutory law, thus promoting "national unity."<sup>59</sup> The evidence of this research project indicates that the desire for certainty, consistency, and harmonization is coming more from government and legal professionals than from litigants or the wider public. Litigants want a fair, accessible, and affordable judgment, but they also want a solution tailored to their needs and context.

There are no written laws for the chiefs, only for the judge. It means for example that if there is a case of spoiling a girl, the chief will question the one who did it and ask if he wants to marry the girl. If he wants to marry, the fine will be smaller, to allow him to manage to pay for the marriage. But if he refuses to marry, the fine will be higher. So it is flexible; it is better than if the fine was just written. (Young man, in English, returnee.)

The reasons given for recording and standardizing customary law may also be construed as a warning against recording it. When one county judge suggests that figures for compensation should be standardized, it is clear that this would result in removing the negotiation and flexibility that allows the system to work:

It is good to record customary law. For example with the Fertit, in the case of compensation, say for spoiling a girl, you ask them what the amount should be. Amounts like 3,000 SP have been agreed in the community, but then others say, "no, it depends on the

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*Litigants want a fair, accessible, and affordable judgment, but they also want a solution tailored to their needs and context.*

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family sitting.” So the figures vary. But the Dinkas are uniform: seven cows for a married woman; or one pregnant cow for a girl. So it is very easy to settle. We need the Fertit to agree the same; then even a judge sitting alone will be able to apply it. Now we have to call the family members to say what the amount should be. In fact they usually make an agreement among themselves, so the law of contract comes in then. (County judge, in English)

Local law is hard to define. When the question is asked as to what the law is on a particular matter, the answer is usually that “it depends.” This epitomizes the importance of context and negotiation to the particular content of living customary law. Despite the judge’s assumption that the Wanh Alel Dinka laws made her work easier, in the same area, Dinka interviewees also complained that some judges only look at their books, rather than listening at length to the litigants. In a different area, a county judge instead emphasized the need for a flexible approach to cases, illustrating the point with a case of elopement that had led to a big fight. Rather than charging the parties to the fight with criminal offenses or hearing the case as a customary offense of elopement, the judge simply ordered the girl to be returned to her parents, enabling a marriage to be negotiated with the man who had eloped with her. “The court will not complicate,” he said. “We sometimes use some tactics to bring people together.” There are strong customary rules against elopement, but it is a frequent (albeit risky) tactic pursued by young men or their families to instigate a marriage negotiation; in many cases, neither party would actually wish the rules against the practice to be applied rigidly.

It could therefore be more useful to consider and strengthen processes and procedures that would assist the application or understanding of customary law by government courts, rather than attempting to create written forms of customary law. The county and high court judges have, on the whole, already established such mechanisms, notably by having panels of elders attached to their courts to advise on and mediate customary settlements; bringing elders and chiefs as expert witnesses to testify as to the appropriate customs to be applied; and encouraging litigants to settle some aspects of cases—particularly marriage—outside the court. In general, the longer a judge stays in an area, the greater the understanding he develops of the local socioeconomic context. This general knowledge is most useful in informing court decisions, as one former SPLM lawyer, Dr. Peter Nyot Kok, explained in an interview with Francis Mading Deng about the pre-2005 SPLM judiciary:

I have a feeling that what will have seemed to have been a shortcoming in research was not necessarily a shortcoming in the practice of the legal profession. I mean, documentation in terms of books, your [Mading Deng’s] book and John Wuol Makec’s book, were immensely helpful, but there was a lot of room for going out and finding what people were feeling and were living.<sup>60</sup>

Another principal reason given for ascertaining customary law is the need to protect custom and tradition from modernizing trends. The proposed GoSS-UNDP strategy emphasizes how the disruptive forces of militarized youth and urbanization threaten the authority of chiefs and customary law, so that “the verdict of the chiefs is not necessarily the last word anymore.”<sup>61</sup> But this assumes that at some point in the past their authority was total and that there was a definitive, hegemonic community law. Historical evidence suggests otherwise: The chiefs’ courts have always been arenas of debate and contestation, and this project shows that this is actually one of the strengths of the current local justice system, as it allows customary law to evolve with changing contexts, something which is also advocated by Hinz in the GoSS-UNDP strategy. If the chiefs instead enforce a more reactionary version of local custom, their decisions will lose their social relevance. The processes of debate and negotiation currently occurring in the courts can be seen as a kind of filtering process, retaining aspects of customary law that have remained

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relevant and valued and discarding those that are no longer appropriate in the rapidly changing socioeconomic context of twenty-first-century Southern Sudan. This filtering cannot be imposed from outside (as Hinz also notes);<sup>62</sup> as a positive organic process in the courts, it should be encouraged rather than combatted. Court records and observation suggest that the existing local justice system in action is a more effective avenue of change than legislation would be, regardless of whether the legislators are chiefs or government personnel.

A final rationale for ascertaining customary law is that, in the process of ascertainment, the law could be reviewed and harmonized in line with constitutional human rights law. Proponents generally present this as a straightforward process of filtering out the bad aspects of local law. But often the aspects of local law that are at odds with human rights legislation also reflect fundamental features of local socioeconomic systems, particularly marriage and property rights. Creating a harmonized law would entail outright suppression of some key principles. Currently the tension between customary and statutory law is largely worked out in the government courts, but it happens on a fairly ad hoc basis as individual judges decide how best to settle each case according to what is acceptable to the litigants and to their interpretation of statutory law. These judges are constantly weighing and compromising, for example, in trying to square the indigenous principles of paternity rights with the statutory rights of children. A more rigid single law would inevitably contravene either local economic, social, and marital systems or international legal principles, thus either entrenching abuses or creating a gulf between society and the judiciary. At its best now, the system enables some accommodation of both sets of principles.

There is a need to find a middle ground between attempting to suppress aspects of customary law altogether and trying to protect or preserve it in a rigid or outdated form. This project suggests that the best way is to allow Southern Sudanese people to continue to negotiate their law in the courts as they currently do. Over time, this is more likely than a formal ascertainment of laws to lead to useful reform—that is, reform guided by changing needs as understood at the local level.

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### ***How Customary Law Would Be Ascertained: The Current Strategy***

A new strategy to both protect customary law and allow it to evolve has been formulated by Hinz for GoSS and UNDP.<sup>63</sup> The strategy develops and modifies the demand to codify customary law among some in the GoSS into a more subtle process of “self-statement.” Hinz describes three main types of ascertainment: legally binding codification of customary law by statute, restatement (systematic written recording) of customary law,<sup>64</sup> and “self-statement” of customary law by “traditional communities.” He proposes the last strategy for Southern Sudan. The key element in his account, applicable to all types of ascertainment, is the conversion of oral customary law into written form, a process that “contribute[s] to certainty in the application of customary law.” “Self-statements come close to codification,” he asserts, “codification not by the organs of state, but by organs of the traditional communities themselves . . . [who] are also the ones to change their law when necessity arises.” It is this capacity to change and amend the law from below that is given as the key reason to favor self-statement over statutory codification in the recently adopted GOSS-UNDP customary law strategy.<sup>65</sup>

The strategy’s emphasis on community-based definitions and the potential updating of laws rather than state definitions or rigid codification recognizes the fundamental importance of the ownership of customary law by those who have developed and practice it, and its changing nature. The actual process proposed for self-statement also considers the aim of preserving



nuance, flexibility, and negotiability. However, the subtle but vital distinctions from other kinds of ascertainment lead us to raise some questions about its implementation, in light of the findings of this report. These questions concern, first, the practicalities of the process and capacity to implement it; second, the definition of the communities which would state their laws; and third, the potential understanding and use of the resulting documents.

First, the strategy proposes a possible ten-step model, including defining and researching the “target communities,” designing the ascertainment process with the agreement of these communities, training ascertainment assistants, conducting complementary research alongside the ascertainment exercise, and preparing the resulting publications in the vernacular and English. This model would be adapted to the Southern Sudanese context, but nevertheless would clearly be a huge logistical exercise, raising questions of capacity and time, and may be considered superfluous given that the system is working remarkably well as it is. Even proponents of ascertainment have not questioned the enduring effectiveness of the system, confirmed by our study. A particular concern would be whether the large number of ascertainment assistants would be capable of the level of sensitivity and understanding required to assist the recording of laws without influencing the process.

Second, the proposal leaves open the definition of the communities within which ascertainment would be conducted. If the exercise were to be truly comprehensive, it would need to be done at the level of jurisdiction of the local courts—that is, at the county level or below. This would be a huge and complex task, given that there are currently around eighty counties in Southern Sudan and hundreds of *payams*. Judicial communities are really defined at this level. But the general discussion of ascertainment over the last few years has tended instead to associate customary law with the unit of the tribe, a problematic category. There have been previous proposals to group tribes together for the purposes of ascertainment along the lines of outdated ethnolinguistic categories, such as that of Nilo-Hamites, a category that neither anthropologists nor linguists—much less the peoples themselves—employ any longer.<sup>66</sup>

Perhaps the most dangerous potential result of ascertainment would therefore be its exacerbation of perceptions of ethnic difference. The GoSS-UNDP strategy does not stipulate that the ascertainment communities should be defined in ethnic terms, but the language and process of defining customary law have already contributed to ethnically divisive concepts, and the proposed organization of customary law ascertainment seems likely to encourage the idea further that each ethnic group or category should have its own legal system and defend it against others. This notion is already trickling down to the local level: some people among the Fertit believe—and are being told by judges and politicians—that they need to protect their own customs in the face of laws said to be derived from Dinka traditions. The ethnicized discussion of law is only exacerbating the sense of division and political manipulation of tribalism in Southern Sudan. It is unlikely to contribute to national unity, as proponents of various forms of ascertainment argue it will. Of course, there are important positive aspects to the constitutional recognition of the rights of communities defined by ethnicity and common culture, particularly in light of the history of a centralizing and homogenizing state in Sudan.<sup>67</sup> But as political tribalism gains ever greater hold in Southern Sudan, the judicial system as a whole should be seen as a means to achieve greater interethnic understanding, not as an arena for the development of newly discrete tribal legal systems. Far from promoting national unity, ascertainment could further politicize ethnic differences, even though there are more commonalities than differences in customary law across Southern Sudan. The findings of this project (and others) suggest that one of the strengths of the current local justice system is its

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capacity to handle urban and interethnic cases, and thus to mediate among different groups and economic systems.<sup>68</sup> Such capacity should be supported and strengthened, and this is best done by continuing and extending the present policy of making court panels representative of their multiethnic jurisdictions and encouraging courts to consult chiefs and other expert witnesses in handling cases from ethnic groups with which the court members are less familiar.

Differences among local legal systems in Southern Sudan come down less to the offenses and laws themselves than to the specific amount and form of the compensation required. The 2004 World Vision report listed the basic customary laws and remedies for eight different ethnic groups from across Southern Sudan: The only significant differences were laws on incest, wife inheritance, and “forced” marriage.<sup>69</sup> If harmonization is desired, rather than encouraging ascertainment according to ethnic groupings, it would be more helpful to consider mechanisms for agreeing on the scale and exchange rates of penalties and compensation for commonly understood offenses. This might be best done within the territorial administrative units (counties and states) and across their borders, since no territory is actually ethnically homogenous, and many court cases involve people from different ethnic groups living within the territorial jurisdiction of local courts.

Even if a particular community has somehow been defined, it is difficult to see how an ascertainment process could be inclusive and representative. The GoSS-UNDP strategy emphasizes that the ascertainment process should be representative and include “normal” people, women, and youth in consultations and community meetings. As Hinz mentions, his own experience in such meetings is that women barely contribute.<sup>70</sup> Processes of recording customary law in other times and places invariably have privileged certain informants and elites within local society, whose version of law is then enshrined and perpetuated.<sup>71</sup>

In Southern Sudan, if young people or women are asked about customary law, they commonly declare that they do not know the laws and refer the enquirer to the chiefs and elders, who are seen to know the authoritative versions of customary law. Yet the same youth or women might appear in the court and argue vociferously for their versions of the laws governing property, marriage, or relations with co-wives, relatives, and neighbors. Their version of law might include rules presented as customary and at the same time principles derived from wider concepts of rights. As the following statement by a chief from the Balanda Viri tribe of the Fertit group shows, it is extremely unlikely that an uncontested single version of law can be identified:

We want to sit and make our laws, what is the fine and so on, so that we are one, together. The Dinka have laws but the Fertit do not. But people have been afraid to write them in case people say they made a mistake or something. (Town quarter chief, Wau, in English)

It is impossible to capture living customary law in writing, because it is negotiated, relational, situational, and context-specific. All that can be recorded is (certain) people’s ideas as to what their laws are, were, or should be. The resulting documents may have particular meanings and value, but they will be fundamentally different from the living customary law that local courts produce on a case-by-case basis.

A third area of concern regarding the ascertainment strategy is the potential use and effects of the resulting written documents. The application of the latter will depend greatly on the extent of dissemination and supervision, again raising questions of capacity and resources. But we can make some general speculations on the basis of the research findings. First, there is ambivalence in Southern Sudan toward written law. On the one hand, the majority of people and chiefs interviewed for this project expressed a dislike of the government judges’ use of written

laws at the perceived expense of lengthy testimony, negotiation, and flexible outcomes. On the other hand, observation of the courts suggests that chiefs and court members use any available written documents and legal codes selectively to add authority to their sentences. If written versions of customary law were available, it is highly probable that chiefs and perhaps judges would treat them as codes of law, even if that were not the intention. Written documents have an authority in themselves in Southern Sudan, making the distinction between code and statement largely irrelevant in practice. The desire of some leading figures in the GoSS and the judiciary to codify customary law might also contribute to this tendency.<sup>72</sup>

Having said that, most chiefs and many judges currently refer to the penal code only selectively, and usually only to confirm a specific penalty awarded after a more complex discussion and resolution. Whatever rules or laws the chiefs refer to—whether written or simply known—they do so in flexible, contingent, and inconsistent ways. A recorded or codified customary law system would be unlikely to be applied rigidly, particularly in the unsupervised rural courts. It would be absorbed back into local practice, leaving a question as to whether it had advanced the desired government goals of certainty and consistency.

Somewhat conversely, however, the principal danger is that the written laws could become a resource for both litigants and court members who wish to assert authoritative definitions of customary law. At present, the largely oral nature of local law ensures that it remains contestable. If elders and chiefs dominate the process of recording it—which seems highly probable—the resulting recorded law is likely to represent a conservative version of contested, changing norms, and its application could have an unwelcome or retrogressive effect. To record the elders' version of law strengthens their hand against internal challenges from younger people, returnees, or urban or educated people. It actually sets back the cause of legal reform.<sup>73</sup>

There is a tendency to romanticize and reify the notion of community, even more than customs, when in fact communities lack defined boundaries and are full of tensions, conflicts, and inequalities. As Moore has long argued, law is always political.<sup>74</sup> In theory, according to the GoSS-UNDP strategy, intracommunity debates over customary law would be channeled into the process of ascertainment and into regular updating of the recorded laws. These processes certainly could create important space for debate. But evidence from comparable community meetings in Southern Sudan, as well as from similar attempts to record and update customary law in other countries, suggests that these processes remain likely to be dominated by elders and chiefs; regular updating requires considerable long-term commitment and resources from government or other sources.<sup>75</sup>

Government judges in particular have called for the recording of customary law to obviate the current need to consult family and community leaders in settling cases. One further outcome of ascertainment thus could be that the government judges, and perhaps some chiefs, start to enforce the written versions of customary law in their courts, while many of the local courts continue their practices of negotiation and individual assessment of cases. This could lead to a greater divergence between the different courts than currently exists, as currently the government judges often involve litigants and their witnesses or chiefs in a discussion of what their customs are. In general, we observed in the course of research that the application of fixed laws appears to be unwelcome, as the popular rejection of the Kajojeji judge's enforcement of rape law reveals. A former chief in Central Equatoria in 2005 also claimed that the customary laws recorded in the 1990s by Justice Deng Biang Mijak had proved unpopular when he tried to apply them:

I worked as subchief and acting chief and was not bad. But some regulations were formulated for customary law, exactly defining the penalties. When I carried these out,

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*To record the elders' version of law strengthens their hand against internal challenges from younger people, returnees, or urban or educated people. It actually sets back the cause of legal reform.*

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people said I was a bad judge. So when I became unpopular I had to step down.  
(Interview by Leonardi with elders and chiefs, Lasu *Payam*, Yei County)<sup>76</sup>

### *Are There Alternatives to Ascertainment?*

The findings of this project suggest that ascertainment in any of its forms, on the whole, would not meet the needs identified by litigants, justice providers, and local people regarding modifications to the system of local justice in Southern Sudan. There is little evidence of a desire for greater certainty in the law itself; what is expressed is a preference for flexibility and negotiation. The main issue that seems to generate local demand for fixed laws is the difficulty of translating different compensation practices, in particular so that justice is not weighted toward groups that are more wealthy in cattle.

A more feasible and targeted alternative to community-based ascertainment would be locally and annually negotiated agreements in particular localities, concerning variations in practices of compensation between ethnic groups and other fixed penalty and compensation scales. Such agreements were negotiated in large-scale chiefs' meetings in the colonial period, such as the conferences held at Wanh Alel in Tonj District; the latest of these in the 1970s and 1980s led to the codified Dinka laws, as one elder recalled:

People say now that the Wanh Alel laws were made by the British, but they weren't. In those days the chiefs used to come every year from Gogrial, Tonj, everywhere, to revise the laws. They were the ones to make Wanh Alel—the laws came from the community, not from the British. Every year the court clerks used to bring reports of the cases from that year, and then if they find that raping or stealing is particularly high, they can decide to increase the penalties. So the laws come out from those case summaries and the chiefs' discussion. (Elder man, translated from Dinka)

Chiefs also claim that regular border meetings and courts that used to be held in the colonial period were an important means of building good relations between chiefs of neighboring areas and of preventing and resolving conflicts across their borders. The councils of traditional leaders (COTALs) currently being established in each of the ten states might function along similar lines. But the draft COTAL bills prepared by each state in 2010 suggest that the councils will primarily be forums for dialogue with government and for conflict resolution, and that they will advise and make proposals directly to the state governments.

It would therefore seem desirable to enable more flexibly defined, periodic meetings of chiefs and other court members to discuss the key issues and problems they face in their courts and how they might address them. Measures could include temporary agreements on scales of penalties and compensation. The aim would be an organic mechanism for the court members to advise one another and improve their capacity to handle changing and interethnic cases, rather than necessarily to produce binding agreements or fixed definitions of law. Such meetings would need to take place at least annually to revise and adjust the strategies and procedures of the courts in line with changing circumstances.

The other relevant need, expressed by a few of our local informants, is for guidance to government judges on handling the customary aspects of cases in their courts. Again, ascertainment would not necessarily assist them as much as they believe, because their reliance on written customary laws would not allow for the negotiated, contingent nature of customary law in practice. Instead it would be preferable to strengthen the mechanisms outlined above, by which judges consult local specialists in customary law on a case-by-case basis. When judges are appointed to a new area, it would also make sense for them to engage in dialogue with local chiefs and other people to understand local socioeconomic and legal systems better. The

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advantage of drawing on these human rather than written resources is that the contingency and discursive aspects of customary law can also be incorporated. To replace these with simple codes of customary law would in effect mean introducing a new form of statutory law, with the accompanying loss of the effective practices of customary justice.

## Criminal Justice

The Local Government Act of 2009 stipulates that only the C chiefs' courts at the county level should settle criminal cases, and then only when referred by the county judge. If enforced, this is likely to cause considerable confusion: Providers and litigants alike are often unclear as to the distinction between civil and criminal cases.

As this report shows, there is considerable amalgamation of criminal and civil procedure in the chiefs' courts and even some judges' courts. The majority of chiefs' court decisions include both punitive and compensatory aspects. The chiefs currently hear a range of criminal cases, some of which exceed their formal powers of sentencing. Most litigants do not understand the formal distinctions that the government courts make between civil and criminal cases. One police prosecution attorney stated that many of the people who bring cases to him have to be sent to the county courts instead because their cases are actually civil cases—and these people are likely to live in the town and be familiar enough with police and court procedures to have approached the prosecution attorney in the first place. Outside the towns there is rarely sufficient police presence, let alone judiciary presence, to handle criminal cases. Preventing the chiefs from doing so would leave a real gap. Even in the towns, litigants often prefer to take criminal cases to chiefs because justice is speedier, more accessible, and ensures an award of compensation. Even serious cases, such as traffic accident deaths, may be settled privately outside the courts with chiefs or elders as mediators, and a resulting payment of compensation. It would likely be unhelpful to try to remove the long-standing powers of chiefs to try criminal cases. The chiefs themselves do not necessarily want these powers to be increased; they are wary on the whole of settling cases of violence or death, although they do so at times. But higher judges should recognize the value of bringing chiefs or other respected individuals to assist in mediating serious criminal cases, particularly where compensation is a possibility.

One area where the criminal-civil blurring may be a particular problem is in relation to rape. The attempt to criminalize rape and attach heavy prison sentences has tended to deter people from bringing rape cases to the judges, especially where there is some hope that the rape may ultimately lead to marriage. The issue is complex, and definitions of rape vary considerably. There is clearly a need for more effective dissemination of information, so that consenting intercourse is not punished as rape, and so that victims of rape can find the most appropriate form of justice. Such cases once again underscore the value of living customary law and its capacity to account for the particular context of a case.

The increasing popular demand for state courts and policing is significant, reinforcing the need to target initial reform in this direction. However, overly restricting litigants' ability to choose chiefs' court or other avenues of settling criminal cases would cut off an effective means of peacefully resolving cases that might otherwise escalate into local conflict. Governmental interventions need to be carefully calibrated to local needs and conceptions of justice.

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## Human Rights and Local Justice

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*Reform of the courts and the laws they apply should be approached as a gradual process, requiring long-term vision and sensitivity from international partners.*

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The English term “human right,” unfortunately, has acquired generally negative popular connotations in Southern Sudan in recent years. Sudden, poorly coordinated, and poorly disseminated attempts to reform the courts in line with human rights principles have had limited effect at best, and at worst, have actually set back the cause of human rights. Reform of the courts and the laws they apply should be approached as a gradual process, requiring long-term vision and sensitivity from international partners. The process should begin with the government judiciary personnel and law enforcement agencies before any attempt to overhaul the existing system of courts. As a recent Human Rights Watch (HRW) report showed, and as ordinary people are only too aware, the greatest threats to human rights come from the military and security forces, the weakness of the police, wrongful detention, and poor detention facilities, rather than from customary justice in itself.<sup>77</sup>

What I know is that people rely more on the traditional justice. Of course it is not up to international standards, but even the conventional courts are not up to international standards. (UN officer)

The HRW report also highlighted inherently discriminatory practices in customary law regarding women and marriage. In general, human rights interventions have tended to see the problem as one of education: If chiefs and others are trained in human rights principles, they will then apply these in their courts. But this underestimates and misunderstands the fundamental problem, which is that some of the principles regarding individual rights of criminals, women, and juveniles conflict starkly with local norms and social and economic systems based upon patrilineal structures, collective responsibilities and obligations, and payment of bride wealth. Even if chiefs seek to apply human rights laws in certain cases, they risk alienating people, who will seek alternative venues in which to settle their disputes, or undermining faith in the wider legal and judicial system. The UNDP-GoSS strategy for customary law therefore proposes a “soft” human rights approach, emphasizing the need for gradual change from within, and for education of chiefs and the wider public.<sup>78</sup>

There are no easy answers to the problem of implementing human rights, but the existing pattern of overly ambitious and rushed interventions, involving workshops and training sessions that include representatives of only some sectors of society, are unlikely to achieve their objectives. Historically, change in principles and practices within societies in Southern Sudan has come about as a result of social and economic change, through migration, exposure to communications media, and the advance of mass education. These factors have led to long, ongoing debates among individuals as well as different generations and genders. Change has not come about through legal or outside impositions of directives. For those aspiring to assist in this transition, it makes more sense to support broader education and access to information, and provide resources that individuals or groups can use in their own internal struggles to reform or change their societies.

In the current context, if laws are passed that members of the public largely oppose, there is simply not the capacity—nor, often, the will—in the judicial and law enforcement agencies to enforce those laws. They will exacerbate the backlash against the human rights agenda. This is not to say that legal protection and reform should be abandoned as a goal, but that its aims should be modified in line with local moral and legal realities, related to the wider security and governance context, and pursued in response to, rather than in advance of, local awareness and demand.

Clearly litigants and disputants will frequently seek, in the words of Monyluak Alor Kuol, to “mobilize all the resources at their disposal.”<sup>79</sup> These may sometimes include constitutional law and international principles as well as any symbols of officialdom, such as forms and papers. There is therefore scope for supporting this demand through advisory and information centers, as well as legal aid as it becomes available. The South Sudan Law Society conducted important work of this nature in the past, advising and assisting women and children in particular. The freedom of litigants to choose to take their case to a county judge or police station may be an important means of protecting rights against any biases or abuses in the lower court.

If individuals, particularly women, seek to resist family and community decisions in their marriage or other cases, they are likely to face the removal of support and subsistence, if not serious threats of violence or death. Attempts to intervene in laws or court cases alone will not necessarily help such individuals to find a lasting solution, and they need wider mechanisms of refuge and support. Those running human rights interventions should be aware that isolating individual rights can also lead to isolation of the individual person, and the consequences beyond the court of any intervention must therefore be planned for as well. Also, the constitutions already provide a means to challenge incompatible aspects of local justice, which will be contested and gradually revised through individual court cases. Supporting litigants who wish to make such challenges may be the best way to revise customary laws and prevailing norms.

## Priorities for Reform

Bearing the above analysis in mind, it becomes clear that the most important thing for the local justice system in Southern Sudan is not codification or radical intervention, but the preservation of continuity and flexibility. This is all the more important given the political and military uncertainties that Southern Sudan is currently experiencing. The vagueness of the GoSS's commitment to customary law, and the confusions in the system in practice, may in fact prove advantageous: They are likely to be the best means of safeguarding the existing practices of local justice, while not fixing any rigid and potentially archaic customs in stone. Any external interventions should be careful not to impinge on the process by which the local justice system responds to changes in social and economic conditions and corresponding changes in popular demands for justice.

The most important principle to be observed is to do no harm. To use another well-worn but apt phrase, this study's most important recommendation may be to not try to fix a system that is not broken. However, there are still areas where targeted assistance and reform could be beneficial:

- *Annual chiefs' meetings* were frequently mentioned by respondents in this study, particularly by elders who remembered their value in the past as an (often interethnic) arena for discussion of court cases and difficult issues in the local justice system. An annual opportunity to discuss penalties and amounts of compensation was also a means of ensuring flexibility and responsiveness to economic change and shifting currencies of value. The desire for such meetings may be partly met through the COTALs being created in each of the ten states. But these councils are more likely to become political bodies and attempt to produce formal legislation. It should not be assumed that chiefs are the straightforward or sole custodians or creators of customary law. Their particular authority is executive and judicial rather than legislative. It would be more useful to hold

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a separate meeting of chiefs and court members to make temporary and flexible agreements on principles and procedures. Such a meeting could take place once or twice a year at the county and state levels, and in key state border areas, specifically to discuss issues arising from the court cases of the period. It would include representatives of a wider constituency than chiefs alone, notably women. Any agreements, such as on fixed penalties, would be reviewed at the next meeting. They would not entail a comprehensive recording of laws.

- *Multiethnic court panels* in towns and *payam* centers already exist and should be encouraged and supported. Even where there is considerable ethnic tension, individual chiefs from different ethnic groups can be respected as judges, and the interaction among the different chiefs in the court helps to generate unity and cross-ethnic understanding. As an increasing proportion of Southern Sudan's population lives in towns, it is important to support mechanisms for urban, cosmopolitan dispute resolution. That such mechanisms already exist is a positive aspect of the local justice system, and interventions should build on them.
- *Mechanisms for courts to call upon other chiefs*, whether as temporary members, advisers, or expert witnesses, are another important means of dealing with interethnic cases and avoiding accusations of bias. In some areas, when a case is heard in the court of the chief of the first party, there is an established practice of calling the chief of the other party to a dispute, to ensure that the judgment is perceived to be fair. County judges have also been overcoming their limited understanding of local law by calling chiefs or elders to advise on cases, and some have set up formal panels of elders for this purpose. All of these represent ways to draw on human resources to overcome lack of documentation. They also preserve the essence of living customary law, that is, its contingency—particularly important in serious cases such as deaths in sectional fights. In such cases, panels of chiefs should be involved in achieving a lasting resolution through compensation payments in the courts.
- *Legal advice and information dissemination* could be an important resource for litigants to enable them to challenge aspects of the living customary law. Evidence from Southern Sudan and elsewhere suggests that litigants appeal to constitutional and rights legislation if they are aware of it and it suits their purpose; the key is to meet this kind of demand for information rather than trying to incorporate abstract principles *de haut en bas* into the justice providers. In the longer term, legal aid centers might be created, but in the current context of a shortage of lawyers, legal advice and paralegal assistance is a more realistic provision.
- *The appeal process* is an existing mechanism for the review of chiefs' court decisions, and the notion of an appeal hierarchy has taken hold at the local level. One suggestion is that county judges should not hear customary law case appeals because they are too busy with statutory law cases.<sup>80</sup> But as this and other studies have shown, the vast majority of cases that are seen in the county courts, whether appeals or first hearings, do not involve statutory law, but are actually customary law cases; this suggestion thus lacks force. It is important, however, that litigants retain the right to opt out of the chiefs' courts in favor of the judiciary courts. The current opportunities for such forum-shopping ensure that litigants have choices as to which forum to approach with their case, which in turn generates competition and popular accountability among the courts. However, the number of



different courts can be confusing, and the prominent role of government courts and police prosecutors in the towns can be off-putting, costly, and intimidating. So there is a need to clarify the appeal hierarchy, not to restrict litigants' choices, but to clarify to them where they can go if they are unhappy with a decision. The appeal process, as well as other procedures, also benefits from the provision of simple resources, such as referral, summons, and arrest forms for the courts.

- *Women court members* were appointed under the SPLM in many areas, and those who remain on the courts have clearly gained respect and a more permanent role. The token appointment of women runs the risk of setting back the cause of women's rights if the appointed women remain silent, passive court members. But many women court members are vocal and influential, although they rarely enjoy powers of final judgment. They are also able to speak privately with female litigants on personal matters. In general, this policy should be restrengthened with government support, as part of a gradual process of change.
- *Guidance for government judges* should be produced through research into the socioeconomic systems and norms in each county, using anthropological methods rather than legal ascertainment. Instead of producing a set of written customary laws for judges to apply, the aim would be to inform them of local social and economic systems so that they could understand the roots of the principles applied in the chiefs' courts. Most judges already learn these things when they first start working in a particular county, and it might be more feasible to simply support and encourage informative discussion with local chiefs and people when a judge is transferred to a new area.
- *Continuing reform of police and prisons.* The majority of those interviewed for this project see the central government—in all its institutions—as in greater and more urgent need of reform than any aspect of local justice. The obvious immediate need is for continuing reform, as well as resources and monitoring of the police and prison services, particularly detention facilities. Providing sanitation, food, water, and beds, as well as separating male, female, and juvenile inmates, are all urgent requirements. But long-term policy regarding prisons should also seek to reduce rather than increase the numbers of prisoners. On the one hand, local people, especially chiefs, want more reliable detention capacity, but this is primarily pretrial—the greatest concern is that suspects escape before they have been tried, which also relates to delays in case-hearing in the higher courts. On the other hand, imprisonment is not usually seen as a productive outcome of cases. There is an urgent need to address the problem of the large number of prisoners held because they cannot pay fines or compensation. They are unlikely to develop a greater ability to pay as a result of being detained. Instead, better systems to follow up the execution of settlements are needed, in which imprisonment should be the last resort. Such systems in turn require strengthening communication links between chiefs' courts, government, and police, including the official papers to aid this communication.
- *Wider arenas for dialogue and debate* on law and custom should be supported, particularly where there are crises over accusations of poisoning, witchcraft, or antisocial youth behavior. As a chief in Kajokeji protested when harangued by a judge for holding elections to identify a suspect in a poisoning case, "In the past, we were allowed to discuss community issues of this type." This is an area where it is important to understand the intimate relationship between local judicial procedure and the ritual moral health of the

community. Indigenous local rituals and cultures could be harnessed to regain a sense of protection and health for the community, for instance, by symbolically cleansing the land and collectively cursing those who would bring harm. Such practices may no longer be as effective as in the past, but recognizing them might at least reassure people that the government intends to protect them. There has been little attempt so far, by government or others, to encourage post-conflict restorative or healing ceremonies. Some of the current sources of crisis and conflict in local society are linked to the deeper effects of the long war from which the South has only just emerged; suppressing them will not help to solve them.

- *Land* is a highly contentious issue in Southern Sudan, both in individual ownership of land in the expanding urban areas and in communal rights to grazing, water, and other natural resources. It is another area where customary systems of rights and access may be at odds with statutory law, as in private ownership and female inheritance. In urban and rural areas, land can be a key source of serious conflict. The scale of the land question puts it beyond the scope of this report, but it requires urgent attention and research.
- *Better coordination among international organizations* working on rule-of-law and access-to-justice reform is needed. Chiefs and others perceive an endless series of different research visits and training workshops, and a failure to provide clear, consistent messages as to their powers and functions. “We are still waiting” is a common refrain among chiefs, who have been promised much since 2004. At the higher level, there is a need to agree on a strategy with the relevant GoSS ministries.

## Conclusion

We are conscious that this report does not endorse the strategy currently most commonly proposed to address the field of local justice in Southern Sudan. Instead, it proposes a more nuanced approach, based on a close examination of particular indigenous histories and a historically rooted view of emerging practices of local justice. A debate on this issue must take place now, before programs are established based on a premature conceptualization of the challenges that the communities in question face. Our investigation tests key concepts in this field; our conclusions are intended to contribute to this much-needed policy debate. When it has taken place, it may be possible to develop a new common strategy, one that is fully informed by the insights of historical and anthropological studies and has the endorsement of the communities that it seeks to benefit. We hope this report will contribute to a fruitful open debate on policy and practical solutions to justice reform in Southern Sudan.

## Notes

1. See, e.g., Monyluak Alor Kuol, *Administration of Justice in the (SPLA/M) Liberated Areas: Court Cases in War-Torn Southern Sudan* (Oxford: Refugee Studies Programme, 1997); F. Mading Deng, *Customary Law in the Cross-Fire of Sudan's War of Identities* (Washington, DC: United States Institute of Peace, 2006). In fact, the SPLM/A claimed to be fighting for national political reform and the creation of a “new Sudan,” as well as addressing marginalization across the country, not simply in the South. See D.H. Johnson, *The Root Causes of Sudan's Civil Wars* (Oxford: James Currey, 2003); O. Rolandsen, *Guerrilla Government: Political Changes in the Southern Sudan during the 1990s* (Uppsala: Nordiska Afrikainstitutet, 2005).
2. Justice Reuben Madol, speaking at the Strategy Workshop on Strengthening of Southern Sudanese Customary Law as a Source of Law, Juba, October 7, 2009, as recorded by Andrew Harrington.
3. M. Hinz, “To Develop the Customary Laws into the Common Law of the Sudan...’ Customary Law in Southern Sudan: A Strategy to Strengthen Southern Sudanese Customary Law as a Source of Law in an Autonomous Legal System,” draft report for GoSS, MoLACD, and UNDP, Juba, 2009.
4. While the SPLM Customary Law Strategy of 2004 attempted to set out a common framework for ascertainment, the organizations that have made these efforts have utilized a variety of methodologies: e.g., S. Chivusia and C. Jones-Pauly (Juba: UNDP, 2008); GoSS MoLACD and World Vision, *A Study of Aspects of Zande Customary Law* (Juba: MoLACD, 2007); Aleu Akechak Jok, R.A. Leitch, and C. Vandewint, *A Study of Customary Law in Contemporary Southern Sudan* (Monrovia, CA: World Vision International and SPLM Secretariat of Legal Affairs and Constitutional Development, 2004); Deng Biong Mijak, *The Traditional System of Justice and Peace in Abyei: A Study of the Traditional Institutions, Laws, and Values for Peace Building in Abyei Area* (Juba: UNDP, 2004).
5. These similarities are corroborated by Leonardi’s prior research in other areas of the Lakes and Central Equatoria States, 2004–07 for a UNDP-funded study of traditional authorities (2004–05) and a Leverhulme Trust and British Institute in Eastern Africa-funded research project, *The Culture of Survival* (2005–07). See the five UNDP reports: F. Gulooba-Mutebi and Adak Costa Mapuor, *Traditional Authorities in South Sudan: Chieftainship in the Bahr El Ghazal Region* (Juba/Nairobi: UNDP, 2005); S. Harrington and N. Arou Man, *Traditional Authority in South Sudan. Upper Nile Team B report* (Juba/Nairobi: UNDP, 2005); A. Ismael and M. Aiken, *Report on Traditional Authority in Southern Blue Nile and Eastern Equatoria* (Juba/Nairobi: UNDP, 2005); C. Leonardi, Deng Biong Mijak, and Eli Achol Deng, *Traditional Authorities in Western and Central Equatoria, Southern Sudan* (Juba/Nairobi: UNDP, 2005); P. Otim, *Traditional Authority Study: Report for Upper Nile Region* (Juba/Nairobi: UNDP, 2005); and Cherry Leonardi, “La justicia local y el poder de la oficialidad en el Sudán Meridional,” *Revista CIDOB Afers Internacionals*, vol. 87 (2009), 65–93.
6. Underneath the ten federated state governments in Southern Sudan, the local government system currently uses the terminology of *boma* for the smallest administrative unit (a large village or chiefdom), *payam* for the intermediate unit, and county for the highest administrative unit.
7. See S.E. Hutchinson, *Nuer Dilemmas: Coping with Money, War, and the State* (Berkeley: University of California Press, 1996), which provides the best recent account of the complexity of human-cattle relationships in Southern Sudan, and the resulting importance of the individual identities of cattle.
8. See, e.g., B.Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global,” *Sydney Law Review*, vol. 30 (2008), 375; W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006).
9. J.L. Comaroff and S. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago: University of Chicago Press, 1981), 14.
10. See a succinct summary in S.F. Moore, “Certainties Undone: Fifty Turbulent Years of Legal Anthropology,” *Journal of the Royal Anthropological Institute*, vol. 7, no. 1 (2001), 95–116, especially 102.
11. Comaroff and Roberts, *Rules and Processes*.
12. For an early summary of the literature, see S.E. Merry, “Law and Colonialism: Review Essay,” *Law and Society Review*, vol. 25, no. 4 (1991): 889–922; for a more recent revisionist view, see T. Spear, “Neo-Traditionalism and the Limits of Invention in British Colonial Africa,” *Journal of African History*, vol. 44, no. 1 (2003), 3–27.
13. Monyluak Alor Kuol, “The Anthropology of Law and Issues of Justice in the Southern Sudan Today,” MPhil Thesis, University of Oxford, 2000; Kuol, *Administration of Justice*.
14. On general SPLM civil administration in this area, see Rolandsen, *Guerrilla Government*; A. Branch and Z.C. Mampilly, “Winning the War but Losing the Peace? The Dilemma of SPLM/A Civil Administration and the Tasks Ahead,” *Journal of Modern African Studies*, vol. 43, no. 1 (2005), 1–20.
15. See E. Scheye and B. Baker, “The Multi-Layered Approach: Supporting Local Justice and Security Systems in Southern Sudan,” Draft Report for DFID Strategic Development Fund, 2007.
16. Manyang Mayom, “Lakes State Caretaker Closes Down All Illegal Courts in Sudan’s Rumbek State,” *Sudan Tribune*, March 7, 2010. See also Scheye and Baker, “The Multi-Layered Approach,” on the lack of formal legal status of local courts and the resulting disjuncture between justice and legality.

17. The historical narrative is drawn from C. Leonardi, "Knowing Authority: Colonial Governance and Local Community in Equatoria, Sudan, 1900–56," PhD Thesis, Department of History, Durham University, 2005, and C. Leonardi, "Violence, Sacrifice, and Chiefship in Central Equatoria, Southern Sudan," *Africa*, vol. 77, no. 4 (2007), 535–558.
18. Presentations recorded by C. Leonardi on December 3, 2009 at the Council of Traditional Authority Leaders (COTAL) workshop organized by the local government board (LGB) of the GoSS with the support of the Federal Department of Foreign Affairs of Switzerland (FDFA), South Sudan Hotel II, Juba. December 2–4, 2009.
19. LG Act Section 99 (5): the C chiefs' court president is answerable to the county commissioner; Section 105: the county judge is to preside over selection of chiefs and high court president to confer judicial powers on them; but Section 106: power to discipline and remove court members lies with the county customary law council and county commissioner.
20. See Hinz, "To Develop the Customary Laws."
21. Again, the historical points come from Leonardi, "Knowing Authority."
22. Governor Mongalla Province to Governor Upper Nile Province, "Notes on Native Courts," September 7, 1932, National Records Office, Khartoum: Civil Secretary 1/13/42.
23. H. Kuyang Logo, "Legal Pluralism in Southern Sudan," paper presented at the Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, hosted by the United States Institute of Peace, George Washington University, and the World Bank, Washington, DC, November 17–18, 2009.
24. J. Wuol Makec, *The Customary Law of the Dinka People of Sudan, in Comparison with Western and Islamic Laws* (London: Afroworld, 1988); F. Mading Deng, *Tradition and Modernization: A Challenge for Law among the Dinka of the Sudan* (New Haven, CT: Yale University Press, 1971).
25. C. Jones-Pauly, cited in *Gurtong*, "Big Decision on Chiefs' Powers Needed, Says Local Government Top Man," March 16, 2007.
26. Scheye and Baker, "The Multi-Layered Approach."
27. Phrase taken from T. Mennen, "Legal Pluralism in Southern Sudan: Can the Rest of Africa Show the Way?" *Africa Policy Journal*, vol. 3 (spring 2007). Available at [http://www.hksafricapolicyjournal.com/sites/default/files/Legal\\_Pluralism\\_in\\_Southern\\_Sudan\\_-\\_Can\\_the\\_Rest\\_of\\_Africa\\_Show\\_the\\_Way.pdf](http://www.hksafricapolicyjournal.com/sites/default/files/Legal_Pluralism_in_Southern_Sudan_-_Can_the_Rest_of_Africa_Show_the_Way.pdf) (accessed June 30, 2010).
28. B. Oomen, *Chiefs in South Africa: Law, Power, and Culture in the Post-Apartheid Era* (Oxford: James Currey, 2005),
29. In this section, the chiefs' courts encompass the subchiefs/headman's courts, executive/A chief's courts, town quarter chief's courts, and regional/B chiefs' courts.
30. See Jok, Leitch, and Vandewint, *A Study of Customary Law*, 42.
31. See also Kuol, *Administration of Justice*, 18.
32. This section encompasses *payam* and county chiefs' courts as well as town bench chiefs' courts.
33. Scheye and Baker, "The Multi-Layered Approach," 19.
34. A. Sebit Lokuji, A.S. Abatneh, and C.K. Wani, *Police Reform in Southern Sudan* (Ottawa: North-South Institute and Centre for Peace and Development Studies, University of Juba, 2009), 5; see also B. Baker and E. Scheye, "Access to Justice in a Post-Conflict State: Donor-Supported Multi-Dimensional Peacekeeping in Southern Sudan," *International Peacekeeping*, vol. 16, no. 2 (2009), 171–185.
35. For example, in Kajokeji, a *boma* court and the county chiefs' C court use the same office. See also Hinz, "To Develop the Customary Laws," 53–54.
36. D.H. Johnson, "Judicial Regulation and Administrative Control: Customary Law and the Nuer, 1898–1954," *Journal of African History*, vol. 27 (1986), 59–78.
37. The Child Act sets the minimum age for criminal responsibility as twelve, with special consideration between the ages of twelve and fourteen, and no sentence of imprisonment for those under sixteen.
38. T. Mennen, *Adapting Restorative Justice Principles to Reform Customary Courts in Dealing with Gender-Based Violence in Southern Sudan* (San Francisco, DPK Consulting for UNFPA, 2008), 17.
39. South Sudan Law Society, *New Sudan Law Reports*, March–September 2004, Yei (Copy in author's possession).
40. Interviewed by C. Leonardi, January 28, 2007, Yei, during a research project funded by the Leverhulme Trust and the British Institute in Eastern Africa.
41. Scheye and Baker, "The Multi-Layered Approach," 17–18; Mennen, *Adapting Restorative Justice Principles*, 20; Jok, Leitch, and Vandewint, *A Study of Customary Law*, 29.
42. UNDP/RLPA, first field report on customary court observations in Juba, 2006, cited in Hinz, "To Develop the Customary Laws."
43. Jok, Leitch, and Vandewint, *A Study of Customary Law*, 21, 27–29.
44. Johnson, "Judicial Regulation"; Leonardi, "Knowing Authority."
45. Hinz, "To Develop the Customary Laws," 73.

46. See also Mennen, "Legal Pluralism in Southern Sudan."
47. See also Scheye and Baker, "The Multi-Layered Approach," 26: "The team heard no reason pertinent to a judicial development program to write down customary law."
48. H. O'Sullivan, Senior Inspector Upper Nile Province, "Dinka Customs and Laws," March 13, 1907, in *Sudan Intelligence Report* no. 162, January 1908, National Archives, London, WO 106 231. Oomen, *Chiefs in South Africa*, 210.
49. Oomen, *Chiefs in South Africa*, 210.
50. Interviewed by C. Leonardi during a research project funded by the Leverhulme Trust and the British Institute in Eastern Africa.
51. Summarized and quoted from the case record in South Sudan Law Society, *New Sudan Law Reports*.
52. In reality, the Dinka are composed of many different tribes and sections.
53. See Comaroff and Roberts, *Rules and Processes*, 130.
54. For a historical discussion of the meaning of *hukm* in Northern Sudan as "the ability to punish through a government-recognized court," see J. Willis, "Hukm: The Creolization of Authority in Condominium Sudan," *Journal of African History*, vol. 46 (2005), 29–50.
55. The former governor of the Lakes State raised the compensation and fine for homicide from thirty-one to fifty-one cows. Many other people have called for similar amendments as bride wealth has inflated from the 1970s and 1980s.
56. Deng Biong Mijak, *Code of Customary Laws of the Kakwa, Kuku, Pajulu, Kaliko, and Luguara Ethnic Groups of Yei/Kajokeji Counties of Equatoria Region*, 1994, available from author.
57. Hinz, "To Develop the Customary Laws"; Kuyang Logo, "Legal Pluralism."
58. Baker and Scheye, "Access to Justice," 182.
59. Justice Reuben Madol, speaking at the Strategy Workshop on Strengthening of Southern Sudanese Customary Law as a Source of Law, Juba, October 7, 2009. Notes on file with the authors.
60. F. Deng, *Customary Law in the Modern World: The Crossfire of Sudan's War of Identities* (New York: Routledge, 2010), 157.
61. Hinz, "To Develop the Customary Laws."
62. Hinz, "To Develop the Customary Laws," 81–82.
63. Hinz, "To Develop the Customary Laws."
64. The term "restatement" was adopted in 1959 for the long-term project to record African customary law at the School of Oriental and African Studies at the University of London, led by Anthony Allott.
65. Hinz, "To Develop the Customary Laws."
66. Jok, Leitch, and Vandewint, *A Study of Customary Law*.
67. Interim Constitution of Southern Sudan, Article 37.
68. Mennen, "Legal Pluralism in Southern Sudan" and *Adapting Restorative Justice Principles; Scheye and Baker*, "The Multi-Layered Approach."
69. Jok, Leitch, and Vandewint, *A Study of Customary Law*.
70. Hinz, "To Develop the Customary Laws," 79–80.
71. See Merry, "Law and Colonialism"; Oomen, *Chiefs in South Africa*.
72. This has been the case in Kenya. Although the colonial government in Kenya specifically rejected the project of codification, it undertook a form of restatement. While not intended to be used as a code in a court of law, there is evidence that the written restatements are sometimes used as such even today. See Andrew Harrington, "Key Issues in Customary Justice: A Comparative Study," research report written for USIP, February 2010 (on file with the authors).
73. This has been the case in both Tanzania and South Africa (Natal and Kwazulu), where codified versions of customary law trumped more progressive practices in court. See Harrington, "Key Issues in Customary Justice."
74. E.g., S.F. Moore, "Politics, Procedures, and Norms in Changing Chagga Law," *Africa*, vol. 40, no. 4 (1970): 321–344.
75. For example, Tanzania's policy on codification envisioned the need for regular updates, but this was never carried out. Similarly, the Natal codes in South Africa failed to reflect updates in practice. See Harrington, "Key Issues in Customary Justice."
76. This interview was conducted as part of the SPLM-UNDP study of traditional authorities in 2005, cited above in note 5.
77. Human Rights Watch, *"There Is No Protection": Insecurity and Human Rights in Southern Sudan* (New York: Human Rights Watch, 2009); see also Sebit Lokuji, Abatneh, and Wani, *Police Reform*.
78. Hinz, "To Develop the Customary Laws," 82.
79. Kuol, *Administration of Justice*, 18.





Members of Alama thiith Them Tong's court

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The Rift Valley Institute is a nonprofit organization working with communities and institutions in Eastern Africa, including Sudan and the Horn. RVI programmes connect local knowledge to global information. They include field-based social research, support for local educational institutions, in-country training courses, and an online digital library. Fellows of the Institute are regional academic specialists and practitioners in the fields of development, conservation, media and human rights.

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This report analyzes the current justice system in Southern Sudan, focusing on the relationship between customary chiefs' courts and government courts and the ways that litigants navigate both types of courts in practice. Based on extensive interviews with litigants, chiefs, and court officials, the report argues that the line between chiefs' and government courts is blurred and that litigants prize the system's hybridity and flexibility, as they often seek restorative and consensual dispute resolution over retribution. The report's analysis suggests that current justice reform efforts, aiming at stricter jurisdictional limitations and the ascertainment of customary law, may reduce litigants' abilities to achieve the justice they want, undermine fairness, and exacerbate local conflict. Interventions should keep the current system's flexibility intact and focus on long-term education and information efforts. Where such knowledge resources are available, there is evidence that individual litigants deploy them in their disputes and cases, contributing to the gradual processes of change that the flexibility of local justice engenders.

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