

# **A Study of Customary Law in Contemporary Southern Sudan**



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For  
World Vision International  
And The South Sudan Secretariat of Legal and Constitutional Affairs  
March 2004

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**Acknowledgements:**

The report team would like to thank the New Sudan Secretariat of Legal and Constitutional Affairs for assisting with the design and preparation of this report and all of the legal professionals, political officials, traditional leaders, and other stakeholders whose views and opinions provided the basis for much of the research. Appreciation is also given to World Vision Deutschland for providing the financial support to research and write this report. It is our hope that this research contributes to further exploration and appreciation of the cultural diversity of Sudan and support for the positive and stabilizing aspects of legitimate traditional authority.

**Cover photo:** County court trial, Rumbek, South Sudan; January 2004

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## **Table of Contents**

<b>1. Executive Summary.....</b>	<b>5</b>
<b>2. Introduction.....</b>	<b>6</b>
2.1. War and Customary Law.....	6
2.2. Law and Change.....	6
2.3. External Interest and Human Rights.....	6
2.4. Women and Customary Law.....	6
2.5. Change from Within.....	7
2.6. Judiciary, Police and Correctional Services.....	7
2.7. Civil Law and the Military.....	7
<b>3. Aim.....</b>	<b>8</b>
<b>4. Methodology and Format.....</b>	<b>8</b>
4.1. Phases.....	8
4.2. Need to Interview in Different Communities.....	9
4.3. Report Format.....	9
<b>5. Definition and History of Customary Law in Southern Sudan.....</b>	<b>10</b>
5.1. Definition of Customary Law.....	10
5.2. Origins of Customary Law.....	11
5.3. Types of Customary Law.....	12
5.4. Scope of Customary Law in Southern Sudan.....	12
5.5. Historical Development of Customary Law.....	13
5.6. Ethos of Customary Law.....	15
<b>6. Current Customary Law in Southern Sudan - the Major Systems.....</b>	<b>16</b>
6.1. Tribal Distinctions.....	16
6.2. Tribal Groupings.....	16
6.3. Major Commonalities between Customary Law Systems.....	20
6.4. Recording Customary Law Practices in Southern Sudan.....	21
6.5. Future Enterprises to Develop and Propagate Customary Laws.....	23
<b>7. Current Customary Law in Southern Sudan - the Major Issues.....</b>	<b>24</b>
7.1. Overarching Issues.....	24
7.2. Conciliation and Social Stability as a Basis of Customary Law.....	24
7.3. Change at an Acceptable Pace.....	25
7.4. Forces for Change.....	25
7.5. Potential for Conflict between Customary and Other Law Systems.....	28
7.6. Conflict between Customary Law and Sharia Law.....	29
7.7. Conflict between Customary Law and International Law.....	30
7.8. Factors Shaping Customary Law.....	30
<b>8. The Functional Areas of Customary Law - The Key Issues.....</b>	<b>31</b>
8.1. Four Areas of Law.....	31
8.2. Family Law.....	32
8.3. Law of Property.....	34
8.4. Law of Obligation.....	37
8.5. Procedure.....	40
<b>9. The Courts of the New Sudan Judiciary.....</b>	<b>45</b>
9.1. Court Hierarchy.....	45
9.2. Appeals Process – An Example Case.....	46

<b>10. Issues of Customary Law and Human Rights.....</b>	<b>46</b>
10.1. Individual Rights and Customary Law.....	46
10.2. International Human Rights Instruments.....	47
10.3. African Charter of Human Rights.....	47
10.4. Addressing Individual Rights.....	48
10.5. Specific Human Rights Issues that Might be Urgently Addressed.....	48
10.6. A Strategy to Address the Issues.....	48
<b>11. Case Law Illustrating the Changing Nature of Customary Law in S. Sudan....</b>	<b>49</b>
11.1. Precedent as Law.....	49
11.2. Case 1 - Murder During Internecine Fighting.....	49
11.3. Case 2 - Death by Negligence.....	49
11.4. Case 3 - Adultery.....	49
11.5. Case 4 - Custody of Children.....	50
11.6. Case 5 - Property (land) Case.....	50
<b>12. Conclusions.....</b>	<b>51</b>
<b>13. Recommendations.....</b>	<b>52</b>

#### **Annexes:**

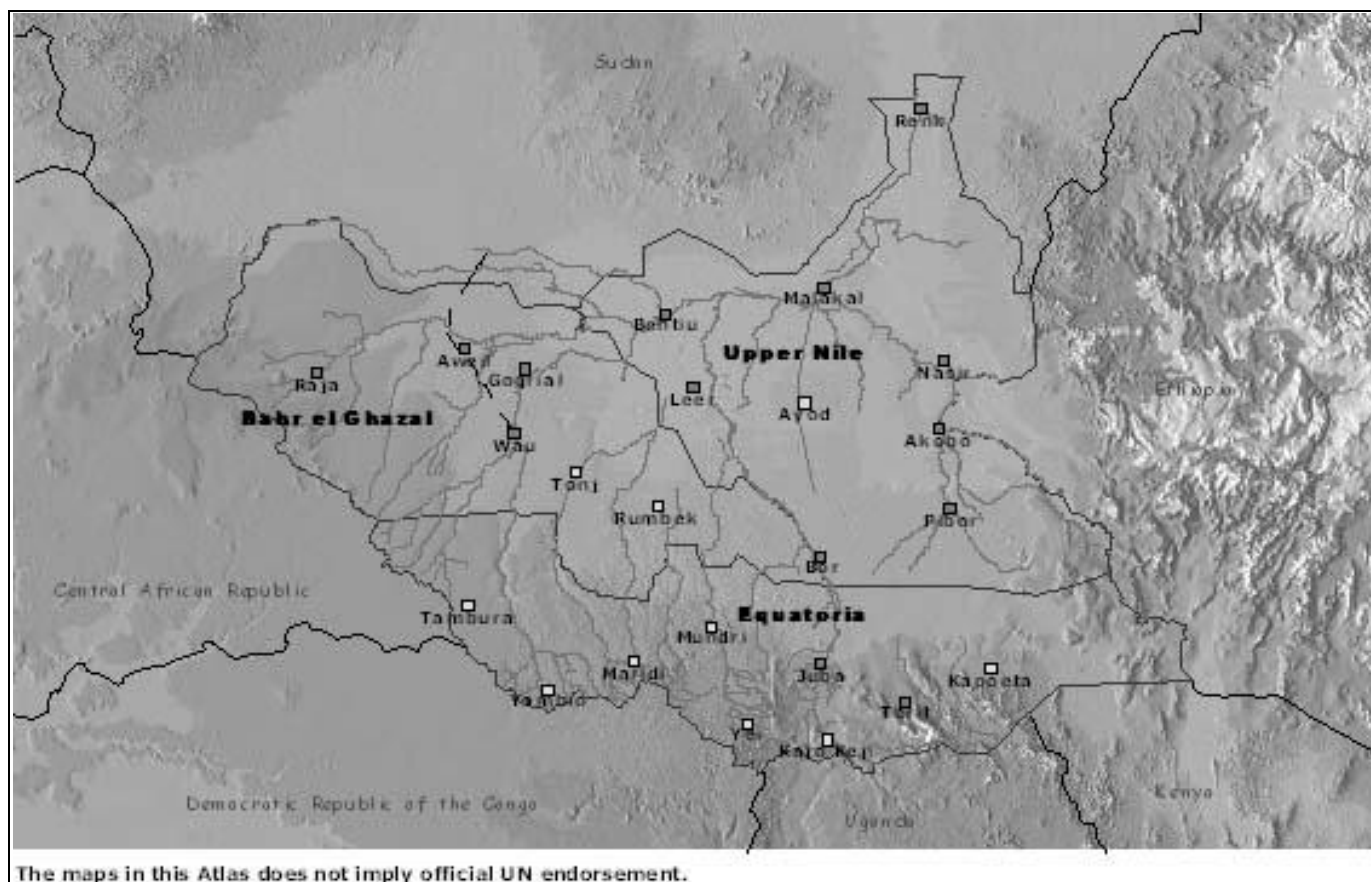
##### **A. Questionnaire**

##### **B. Tribal Map of Southern Sudan**

##### **C. Comparison of Customary Laws, Offences and Punishments**

##### **D. African [Banjul] Charter on Human and Peoples' Rights [Excerpts**

## The Regions and Towns of Southern Sudan



## 1. Executive Summary

This report is a review of Customary Law in contemporary southern Sudan. Its purpose is to examine the history of customary law and the principal customary legal systems currently in use in the region. It also studies how the various customary law systems function, the strengths and weaknesses of customary law and areas where conflict, actual or potential, exists between the different systems, domestic statutory and international law, particularly with regard to human rights. Finally, it considers options available to assist in the capacity building of southern Sudanese legal institutions in respect to customary law in the future.

Customary Law is the expression of the customs, beliefs and practices of the people of southern Sudan. There are over fifty tribes in the region and most have customary law systems, reflecting individual tribal identities. During the past twenty years of civil war [customary law] has been the principal source of social order and stability within the region; it remains the predominant source of law in contemporary southern Sudan. Over 90% of day-to-day criminal and civil cases are executed under customary law.

War has caused massive upheaval and dislocation of people and many tribal areas are no longer homogenous regions. The intermixing of people has brought with it clashes of culture and customs. Some customary law systems have found ways to reconcile cases involving different customary laws whilst for others differences have led to conflict

War has also greatly reduced the power and status of tribal chiefs who are pivotal in the function of customary law and undermined the formal legal infrastructures of southern Sudanese society. The judiciary lacks trained judges and resources. Cases outside the remit of the customary law courts or on appeal from those courts are delayed. Few police are trained to prosecute cases in the courts. Prisons are harsh places, lacking even basic resources. The future rule of law, including customary law, in southern Sudan hinges upon fundamental enhancement of the key infrastructures.

Customary law is currently challenged from many directions, particularly by Statutory Law, Sharia Law, International Humanitarian Law and SPLA military law. There is consensus amongst those interviewed, that change to customary law is inevitable but change must come from within Sudanese society and at a pace, to which society can adjust. Plans to assist the development of customary law must be designed to avoid unintended consequences, which might endanger a fragile post conflict society. History shows the evolution of customary law will be shaped 'from the bottom up' by the opinions and wishes of the people and 'from the top down' through statutory law courts and the opinions and rulings of judges.

The majority of southern Sudanese customary law systems show plainly a conflict between international human rights laws and rights granted to women and children in customary law. The pressure to harmonize customary law with international law will continue to grow and must sooner or later be addressed. A strategy for resolving this issue should be developed by lawmakers, community leaders and the judiciary.

The basic tenet of customary law is reconciliation, a vital tool in conflict resolution. In the immediate post-conflict period, old disputes will resurface and new disputes are inevitable. Conflict resolution through customary law will be essential to a peaceful and fair society.

Very few customary law systems exist in written form, disadvantaging customary law when in dispute with other written laws and opening it to criticism of 'biased interpretation. Traditionally there has been resistance within southern Sudanese society to recording customary law but there is now a strong and growing opinion at all levels, that customary laws should be documented and widely disseminated. There are a number of customary law systems, which lend themselves to being reduced to writing, a task that should be undertaken in the very near future.

## **2. Introduction**

*“Customary Law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we have fought for these past twenty years. It is self-evident that Customary Law will underpin our society, its legal institutions and laws in the future” - Chief Justice Ambrose Thiik*

### **2.1. War and Customary Law**

During the past twenty years of civil war, customary law has been the primary source of social order and stability within southern Sudan. It has been the cement that has held together communities and tribes and a bridge between the many and varied tribal groups that make up the population of the region. It is also, as described by Chief Justice Thiik, a symbolic affirmation of southern Sudanese culture, tradition and indigenous identity.

Given its unique and fundamental importance in southern Sudanese society, it is self evident that customary law will play a vital role in the development of a democratic and open society in future. However, twenty years of war have had a far-reaching and probably irreversible impact upon southern Sudanese society and its customs, which in turn must affect customary law. Moreover, the effects of external forces for change such as ‘globalization’ and the revolution in communications which have taken place during the past two decades and have for the main part passed the Sudan by, are already beginning to shape thinking in the region. As peace takes hold and the country is opened up to external influence, particularly from returning refugees, the forces of change will bring inexorable pressure upon southern Sudanese society, its customs and its laws.

### **2.2. Law and Change**

Although statutory laws have been in use throughout southern Sudan from the days of Anglo-Egyptian colonization, for the past twenty years of conflict they have been for the most part subordinate to martial law and customary law. In July 2003 the SPLM Secretariat for Legal Affairs and Constitutional Development published the Laws of the New Sudan. As moves towards peace and formal recognition of an autonomous region of southern Sudan solidify, the status of the National Liberation Council as a de facto legislature has become a reality. The result is a growing recognition of the Laws of New Sudan and their acceptance as the basis for current governance and nation building. To be successful, it is vital that this new body of statutory law is congruent with customary laws or at least that systems are developed to reconcile conflicts between the two systems.

### **2.3. External Interest and Human Rights**

International involvement in the civil war has brought with it increasing international awareness of and interest in southern Sudanese customs and practices. International bodies and interest groups judge some of these customs to be at odds with contemporary and internationally accepted standards of human and individual rights. In particular, the status of women and children under most customary law systems is the source of much contentious debate.

### **2.4. Women and Customary Law**

Within southern Sudanese society the role and status of women is seen as a reflection of a culture that places a premium on the cohesion and strength of the family as a basis of society. The male is the undisputed head of the family and marriage as means of strengthening the bonds between families and clans within tribes. The role of women in this social pattern is that of cementing family ties through ‘bride-wealth’ and of producing children. To the outside observer, particularly one whose culture is based upon the rights of the individual, the status of women in this role is that of property. Notwithstanding the fact that these cultural practices have evolved over countless generations and survived twenty years of

war, some in the international arena view their effects upon the status and role of women to be repugnant and clamour for change.

## **2.5. Change from Within**

There is no doubt the current status and role of women and children in southern Sudanese society must and will change. There are however, considerable questions concerning how best to bring these changes about. Much of southern Sudanese customary law has evolved to deal with personal issues of family, marriage children and wealth. To attempt to impose revolutionary change in human and individual human rights, particularly those of women, would come in direct conflict with most customary law systems and impact upon the very foundations of the majority of southern Sudanese tribal societies. The consensus amongst southern Sudanese leaders is change must come from within and at a pace that does not threaten to destabilize a society already under pressure from a myriad of external and internal sources.

That may be the preferred option but history shows that change will be outwith the control of South Sudanese society. The forces for change will be external; a combination of the expectations of returning refugees, particularly from the developed world, and the deluge of information that will rapidly follow South Sudan's inevitable communications revolution. If customary law is to survive these revolutionary forces it will have to accommodate rapid and fundamental change.

## **2.6. Judiciary, Police and Correctional Services**

No account of the legal systems of society would be complete without an examination of the instruments necessary to execute the laws, customary and statutory: the judiciary, police and prison services. The study found all three woefully lacking. The judiciary at every level lack trained judges, support staff or resources. Where judges are available, courts are rudimentary and lack even the basic essentials such as recorders and clerks. Records of proceedings are made in long hand often by the judge. Many judges admit to having limited knowledge of customary law. Cases outside the remit of the customary law courts or on appeal from those courts are not being dealt with promptly. The backlog grows and so does the discontent. Justice delayed is justice denied.

The police forces that must maintain and enforce the law are in an even more invidious state. The war took up most of the young able-bodied men including those in the civil police. Those men too old or too injured for combat took their places. Their training in policing skills was minimal. As a result there are few police who know how to investigate crime or to prepare evidence for hearing. Not surprisingly the public complain about a lack of justice.

Where cases reach conclusion and punishment involves imprisonment, there are major logistical difficulties in enforcing sentences. With little or no resources to support them, the prisons of South Sudan are very unforgiving places. Women prisoners suffer particularly as their incarceration usually means total rejection by their families, leaving them without even the basic means of survival. Most depend for their lives upon charity from local CBOs. If the future legal system of southern Sudan, including the application of customary law, is to survive and grow to meet the needs of a new society it will require major investment of resources to produce the trained manpower and resources at every level. The study found strong support, particularly among the senior judiciary, for the creation of paralegal staff within the judiciary system and paralegal training for key members of the current legal structure. This important first step in capacity building would require training in customary as well as statutory law.

## **2.7. Civil Law and the Military**

Not surprisingly, twenty years of war have produced a society where the traditional balance of power has shifted from civilian structures and systems to military. The war involved and impacted upon every member of society. The armed forces were and are a peoples army, the title Sudanese Peoples Liberation



Army (SPLA) defines very clear its origins and roles. The tasks of the SPLA often involved much more than combat with the enemy and increasingly over time it took on the task of maintenance of law and order in the civil community. For the most part it seems that this task was carried out to the satisfaction of the people. In many areas SPLA commanders remain responsible for day-to-day law and order including the dispensation of justice. Worryingly, there are also many reported cases of interference in the application of both customary and statutory law and intimidation of civil courts by the military at local level.

As formal peace approaches there is an urgent need to prepare plans to disengage the military from its involvement in the civil institutions, particularly those of civilian law enforcement and the judiciary. This can only realistically take place if those institutions are re-built to enable them to take on the tasks. Moreover, there is very likely to be great pressure from within the SPLA to divest itself of the complex and politically sensitive issues of civilian law enforcement and to move towards a formal national defence role. This transition from 'people's liberation army' to 'national defence force' would require considerable restructuring and training. It would also require the development of the current SPLA Act 2003 to provide very clear roles, missions and codes of conduct for the new armed forces.

### **3. Aim**

The aim of this study is to undertake a detailed review of Customary Law in contemporary southern Sudan in order to identify:

- The history of customary law in southern Sudan
- The principal customary legal systems currently in use in southern Sudan.
- How the various customary law systems function
- The strengths and weaknesses of customary law
- Where customary laws inter-relate with nascent domestic statutory laws and international laws, particularly relating to human rights.
- Areas where conflict, actual or potential, exists between the different systems, domestic statutory and international law.
- Other contemporary post-conflict factors impacting upon customary law
- Options available to assist in the capacity building of southern Sudanese legal institutions in respect to customary law in the future.

### **4. Methodology and Format**

#### **4.1. Phases**

The study was conducted between 15 Dec 03 and 15 Mar 04 and comprised three phases:

- The first, conducted between 15 Dec 03 and 5 Jan 04, was a detailed search of existing literature on southern Sudanese customary laws and related writings together with the development of a detailed questionnaire for use in subsequent interviews. The questionnaire is shown at Annex A.
- The second phase, conducted between 6 Jan and 16 Jan 04, involved a series of interviews with key stakeholders and experts in southern Sudanese law, statutory and customary. Initial interviews took place in Nairobi and involved a number of key figures in the southern Sudanese judiciary and tribal chiefs who were involved in the peace talks in Naivashia.

The team then moved to southern Sudan and began a series of interviews in Rumbek, the regional capital of Bahr el Ghazal Region. These interviews involved members of the judiciary, legislators,

women's groups, NGOs and CBOs, law enforcement and local government leaders and chiefs. The interviews were enhanced by a number of attendances in both the high court and the country court by the team. Cases ran the gamut from minor property disputes, dealt with under customary law, through rape and murder, dealt with under statutory law.

- The third phase, beginning 19 Jan, involved the drafting of the report. Concurrent activity included further interviews of senior southern Sudanese judiciary members, legislators and political leaders conducted in Nairobi and 'New Site' in southern Sudan.

#### **4.2. Need to Interview in Different Communities**

Rumbek provided a valuable insight into the issues of law and governance affecting the mainly Dinka peoples of Bahr el Ghazal but the homogenous nature of the community was considered to be a limitation. Therefore the team moved to Maridi in Western Equatoria where the society is far more heterogeneous, and continued interviews with a similar range of social leaders and personalities. The varied nature of the society produced more diverse opinions and served to broaden the study. The Maridi visit also involved attendance at local Payam court proceedings and culminated in a workshop attended by sixteen local chiefs.

#### **4.3. Report Format**

The Report resulting from the study has been developed in the following format:

- Definition and History of Customary Law in Southern Sudan: A description of customary law in Southern Sudan and an outline of the history of customary and statutory law in the region.
- Current Customary Law in Southern Sudan - the Major Systems: An analysis of the principal customary law systems of contemporary southern Sudan, illustrating similarities and differences and potential for disagreement and conflict.
- Current Customary Law in Southern Sudan - the Major Issues: A detailed analysis of the major issues identified in the study of the literature and the personal interviews.
- The Functional Areas of Customary Law - The Key Issues: An examination of the four key functional areas of customary law.
- The Courts of the New Sudan Judiciary: An overview of the current judicial system in southern Sudan.
- Issues of Customary Law and Human Rights: An examination of contentious human rights issues in Customary Law.
- Case Law Examples to Illustrate the Changing Nature of Customary Law in Southern Sudan: A series of cases and their finding which illustrate how judge's decisions create precedent, make law and in turn affect customary law.
- Conclusions: A distillation of the major issues and identification of those, which might be best addressed in further work.
- Questionnaire – The questionnaire, which formed the basis of all interviews for the study.

## 5. Definition and History of Customary Law in Southern Sudan

### 5.1 Definition of Customary Law

It is broadly accepted that the term ‘customary law’ as it applies to Africa in general and Sudan in particular refers to the body of traditions, mores, social conventions and rules that through long usage and widespread acceptance direct and govern traditional African society.<sup>1</sup> Customary ‘law’ therefore is as much social convention as it is legal protocol.

There have been many attempts to define custom and with it customary law over the years. A general definition can be found in Osborn’s Concise Law Dictionary. By John Burke, at page 108:

*‘Custom is a rule of conduct obligatory to those within its scope, established by long usage. A valid custom has the force of law. Custom to the society is what law is to the State. A valid custom must be of immemorial antiquity, certain, reasonable, obligatory and not repugnant to statute law, though it may derogate from the common law.’*

In the history of Sudanese jurisprudence much of the controversy over the definition of customary has related more to its scope than meaning. Disagreement existed between the judiciary of the colonial era, which advocated a restrictive definition, and the Sudanese courts, which favoured a wider definition to include the canon law or personal laws of other communities domiciled in Sudan. The former was exemplified in a landmark case *Bamboulis v Bamboulis*<sup>2</sup>. In that case, Chief Justice CJ Lindsay held that:

*‘Custom in [the context of customary law] refers to local custom originating by usage in the Sudan, and is not applicable to the imported rule of law of foreign origin’.*

The preference for a wider interpretation can be seen in the Khartoum High Court in *Maurice Goldenburg v Rachel Goldenburg et al*<sup>3</sup>, the argument centred around a case which held that ‘custom’ for a Jewish couple living in Sudan was defined as the Islamic customs and codes of the community in which they lived rather than the customs shaped by their Jewish religion. (This interpretation seems to be at odds with the spirit of wider interpretation traditionally favoured by the Sudanese courts and probably presaged the restrictive nature of the Islamic courts that was to be the feature of the next 40 years and an underlying cause of the civil war):

*‘The word custom ... includes the personal law and the customs of the religious community concerned where the parties are domiciled in the Sudan’*

Notwithstanding disagreement over interpretation (an essential aspect human discourse and in particular, the practice of law), customary law remains a fundamental aspect of African and Sudanese society. So essential to every day culture and practice that some commentators have argued that to view customary practices as ‘law’ is essentially a Western-centric approach which may not be the most effective approach to understanding African societies and legal systems.<sup>4</sup>

It is however generally accepted that the term ‘customary law’ in southern Sudan refers to the body of custom and tradition that is utilized by, and unites, the majority of citizens in that jurisdiction. It is most important to understand customary law or ‘custom’ in the South Sudanese context also refers to the practice of Islamic law by South Sudanese Muslims. This is a reflection of the southern Sudanese

<sup>1</sup> See definition in: Kur, Dengtiel. A., *Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan*. Workshop on the Legal Protection of Children. Organized by the South Sudan Law Society. 2000. Rumbek, New Sudan.

<sup>2</sup> Per Lindsay CJ. [Sudan High Court and Court of Appeal. 1954]

<sup>3</sup> *Maurice Goldenburg v Rachel Goldenburg et al*<sup>3</sup>, *George Rizkalla Sayis and Edward Michel Sikias* [HC. CS-441, 1958] per Babikir Awadalla J.

<sup>4</sup> Engle Merry, Sally., *From Law and Colonialism to Law and Globalization*. Law and Social Inquiry. Spring 2003 at 569. At 573.

peoples' inclination for the widest interpretation of custom and an expression of their society's preference for religious tolerance.

## 5.2. Origins of Customary Law

### 5.2.1. Criteria for Customary Law

In attempting to explain how customary law originates there are few better explanations than that given by RWM Dias<sup>5</sup>:

*'When a large section of the populace are in the habit of doing a thing over a very long period, it may become necessary for the courts to take notice of it. The reaction of the people themselves may manifest itself in mere unthinking adherence to a practice which they follow simply because it is done; or again it may show itself in a conviction that a practice should continue to be observed, because they approve of it as a model of behaviour. The more people follow a practice the greater pressure against non-conformity. But it is not the development of a practice as such, but the growth of a conviction that it ought to be followed that makes it a model for behaviour.'*

Dias postulates that that certain conditions have to be fulfilled for a custom, usage or practice to be recognised by a court of law as having the force of law. These are:

- The custom must be of immemorial antiquity. The onus of its antiquity being on the person who asserts the application of the custom. The proof becomes easier, however if its origin cannot be remembered. The burden of rebutting it lies upon the party against whom the custom is being applied.
- It must have been enjoyed as of right.
- It must be certain and precise.
- It must have been enjoyed continuously.
- It must be reasonable.

### 5.2.2. Reasonableness

It has been argued that the only criterion required for a particular custom to acquire the binding force of law is for it to pass a test of reasonableness.<sup>6</sup> This is a controversial argument because 'reasonableness' is a highly subjective concept. Over time the courts of Sudan have defined the 'reasonableness' of a custom as its conformity with 'justice, equity and good conscience.' The objection to this definition is that this allows only the judges to decide whether a custom is 'reasonable'. They in turn must make judgments about the concepts or values of a society in the light of their own community's values. The most obvious extrapolation of this position is the judgment of Sudanese customary law by international legal organizations, particularly with regard to human rights.

### 5.2.3. Sources of Custom

It is generally recognized<sup>7</sup> that four primary sources of custom exist:

- 'Practice', defined as a custom or tradition that has been repeated over many generations at the community rather than individual level.
- Binding or persuasive decisions from Courts. This source is particularly broad in that 'Courts' include not just customary courts, but statutory courts which are empowered to preside over customary law cases.
- 'Religious beliefs' have particular import in the treatment of matters such as incest and adultery.
- 'Morality' and moral principles.

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<sup>5</sup> RWM Dias, Jurisprudence, 2<sup>nd</sup> edition., Butterworths, London 1964, p.142

<sup>6</sup> Wuol Makec, John., *The Customary Law of the Dinka People of Sudan*. Afroworld Publishing Co. 1988. At 31. At 26.

<sup>7</sup> Wuol Makec, John., *The Customary Law of the Dinka People of Sudan*. Afroworld Publishing Co. 1988. At 31.

#### 5.2.4. Colonial Law and Living Law

Two other legal sources have shaped southern Sudanese customary law, as it exists today. The first is colonial law, introduced by the Anglo-Egyptian colonists, which has had an enduring and deep impact upon all forms of social practice, statutory and customary law. The second, so-called 'Living law' refers to the currently lived customs of Sudanese peoples. The customs of the time will usually be clearly reflected in contemporary customary laws and it is from this that provides the dynamism and flexibility inherent in customary law.

### **5.3. Types of Customary Law**

#### 5.3.1. Different Tribal Laws

Each different tribal group in southern Sudan has its own discrete body of customary law and there are thought to be over fifty separate tribal groups in southern Sudan. In effect there are fifty separate bodies of customary laws. In the interests of simplifying the study it is reasonable to classify these manifold customary law systems into two generic groups, those that reflect the customs of a central authority system and those of a decentralized system<sup>8</sup>.

Central authority systems include the Zande; Shilluk and Anyuak kingdoms, which tend to be based around powerful, centralized hierarchical structures. Decentralised customary legal systems include the Dinka, Nuer, Bari and Fertit tribes. These systems typically comprise tribes or sub-tribal units where local individuals (chiefs and sub-chiefs) or committees, normally of kinship networks, exercise core social and legal powers.

#### 5.3.2. Common Themes in Customary Law

Variances exist between generic systems, peoples and tribal bodies and even across isolated sub-tribal units; however, there are common themes that cross almost all the customary law regimes. The study has chosen to catalogue the law systems under ten distinct groups of tribes or peoples whose customary law systems are very similar. An attempt to compare and contrast these various groupings to demonstrate major differences in customs, laws and process has been made in section 6.

### **5.4. Scope of Customary Law in Southern Sudan**

#### 5.4.1. Personal Issues in Customary Law

The customary law systems of the Dinka and Nuer tribes of feature throughout the study, principally because their laws have been examined and recorded in far greater detail than any other tribe. The study identified a broad array of personal issues, social interaction and procedural law as being primarily under the ambit of customary law in southern Sudan:

- Marriage; including scope of union, successive marriages, procreation, sexual cohabitation, marriage payments and ceremonies.
- Adultery; including penalties.
- Divorce: including marriage nullification criteria, consent issues and bride wealth.
- Child custody: including choice of law in property distribution.
- Property: including transfer of title, tracing, testate and intestate succession and inheritance, land law, personal property, resource rights (including minerals, water and animals) and loss of title.
- 'Social' obligations; including contractual undertakings, tort liabilities for homicide and liability for injury caused by animals.
- Procedural laws; including foundational principles of customary case management.

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<sup>8</sup> See generally: Kur, Dengtiel. A., *Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan*. Workshop on the Legal Protection of Children Organized by the South Sudan Law Society. 2000. Rumbek, New Sudan. At 2.

#### 5.4.2. Interaction between Customary Law and Statutory Law

It is evident that customary laws do not necessarily aspire to cover all areas of law existing in contemporary societies. The interaction between the body of statutory law recently enacted by Secretariat of Legal Affairs and Constitutional Development and the various bodies of customary law will be a key dynamic in the evolution of a stable and secure society in southern Sudan. This interface, the identification of potential areas of conflict and the development of tools and techniques to resolve these conflicts will be dealt with further in the paper.

### **5.5. Historical Development of Customary Law**

#### 5.5.1. Anglo/Egyptian Colonial Law

Before the 1820 invasion of the Sudan by Egyptian forces, the custom and traditions of the southern Sudanese tribal groups were the primary source of law to those peoples.<sup>9</sup> That invasion was the first in a chain of events, which would bring their own unique influence to bear over traditional customary practices and laws. Successive colonial regimes under the British and Egyptians resulted in the enactment of a series of statutory instruments designed to codify, formalize and ultimately to control application, effect and scope of customary laws throughout the Sudan.

#### 5.5.2. Mohammedan Law Courts

One of the earliest of such instruments<sup>10</sup> was the *Mohammedan Law Courts Ordinance 1902* which sought to empower Sharia Courts to entertain the following matters:

- Any question regarding marriage, divorce, guardianship of minors or family relationship, provided that the marriage to which the question related was concluded in accordance with Mohammedan law or the parties are Mohammedans.
- Any question regarding [wakf], gift, succession, wills, interdiction or guardianship of an interdicted or lost person, provided that the endower donor or the deceased or the interdicted or lost person is a Mohammedan.
- Any question other than those mentioned in the last two successions provided that all the parties, whether being Mohammedans or not, make a formal demand signed by them asking the Court to entertain the question and stating that they agree to be bound by the ruling of Mohammedan law.

Some autonomy was also provided to formal Islamic lawmakers in that the same ordinance authorized the Grand Kadi, pending the approval of the colonial Governor-General, to make regulations governing the decisions, procedure, constitution and jurisdiction of the Mohammedan Law Courts.<sup>11</sup>

#### 5.5.3. Chiefs' Courts Ordinance 1931

In these ways, the first non-Western laws operating in Sudan were formally recognized by colonial powers. Customary laws were also addressed with the passage of the *Civil Justice Ordinance 1929* and the *Chiefs' Courts Ordinance 1931*. The first of these Ordinances is the original predecessor to the current section 5 of the *New Sudan's Civil Procedure Act 2003*. The second ordinance was a novel development in that it formally recognized customary Chief's legal authority to exercise customary jurisdiction in their traditional tribal areas. Section 7 provided that;

*The Chiefs' Court shall administer the Native Law and Customs prevailing in the area over which Court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order.*

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<sup>9</sup> Lufti, G. A., *The Future of English Law in the Sudan*. The Sudanese Judgment and Precedents Encyclopedia. Sudan Judiciary, Khartoum. At 2.

<sup>10</sup> Ibid. At 6.

<sup>11</sup> Ibid.

#### 5.5.4. Strengthening the Power of the Chiefs

*The Chiefs' Court Ordinance 1931* was of huge political and legal significance at the time and has equal import in contemporary southern Sudan. Its enactment was also a pragmatic colonial recognition that the bedrock of a society as heterogeneous as Sudan at that time was the tribe and the focus of leadership and social order was the tribal chief. An ordinance that gave formal recognition to and empowered the chief was a 'capacity building' measure of the day. In bald colonial terms it was an act aimed at ensuring the chiefs allegiance to the colonial administration but it also recognized the realities of traditional Sudanese tribal life. In the opinion of a number of contemporary senior judges, the overall effect was to strengthen the power of customary law within the nation.

#### 5.5.5. The People's Local Courts Act 1977

The sentiments of the *Chiefs' Court Ordinance* and the recognition of the status of customary laws in southern Sudan were also reaffirmed by Sudanese central government legislators post-colonization.<sup>12</sup> The *People's Local Courts Act 1977* repealed the original ordinance, but replaced it with an almost identical mandate. (Any beneficial effects for Southern autonomy and cultural integrity were relatively short-lived due to the commencement of war in 1983.) It is however, interesting to note that the *Sudanese Criminal Act 1991* actually exempted southern Sudanese persons from the application of huddud (Sharia penalties), which were replaced with criminal penalties conforming to the concepts of localized customary laws.

#### 5.5.6. Decline of the Power of Chiefs

It is very unlikely that any attempt to build the capacity of contemporary southern Sudan will succeed without addressing the issue of the tribal chiefs in the modern era. There is no question that twenty years of war has very much reduced the power and status of tribal chiefs. In particular, the presence of military units and organizations in tribal areas and the perceived need for civil laws to be subordinate to martial law in order to meet operational military imperatives, has greatly diminished the ability of the chiefs to exercise power. The diminution or subversion of the Chiefs' authority has brought with it limitations on their ability to execute the law and a consequent weakening of traditional customary systems. The implementation of military tribunals in place of customary courts throughout the civil war was commonplace and typical of the deliberate or inadvertent actions which over time eroded the status of chiefs within their communities.<sup>13</sup>

#### 5.5.7. Rebuilding the Status of Chiefs' Courts

There is genuine cause to believe that the new government will reverse the trend. This is exemplified in the legitimacy and central role customary law has been given in southern Sudanese jurisprudence in the SPLM's statutory reforms of 2003. However, to date, most endeavours to strengthen the legal systems in contemporary southern Sudan have been top down efforts aiming at the higher courts and the judiciary. As laudable and essential as these measures are they will be of little avail if those who must execute the overwhelming majority of day to day legal work in southern Sudan for the foreseeable future, the chiefs are starved of training and resources. A first step might be the enactment of a formal recognition of the powers and responsibilities of the chiefs in the future southern Sudan on the lines of the original Chiefs' Courts Ordinance followed by a concerted effort, funded by international donors, to build capacity at the chief level.

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<sup>12</sup> Wuol Makec, John., *The Essentials for the Re of Customary Law in the Southern Sudan*. The Sudanese Judgment and Precedents Encyclopedia. Sudan Judiciary, Khartoum. At 3.

<sup>13</sup> Kur, Dengtiel. A., *Customary Law and Access to Justice in South Sudan*. [Chapter 9 in: Abdel Salem, A. H., [Editor] *Phoenix State: Civil Society and the Future of Sudan*. 2001. Red Sea Press.]. At 187.

## 5.6. Ethos of Customary Law

### 5.6.1. Differences between Customary and Statutory Law

There are some aspects of southern Sudanese customary law, which are at great variance to Western-based systems of justice, particularly to the English Common law system, which forms the basis of contemporary Sudanese statutory law. It is these fundamental differences that have the potential to produce conflict between customary and statutory law and therefore need to be clearly understood.

### 5.6.2. Criminal and Civil Law in Customary Law

One of the most obvious aspects of Sudanese customary law is the absence of distinction between criminal and civil law. Western law tends to view these bodies of laws as isolated and discrete – prescribing entirely different bodies of procedural law to govern their case management. Customary laws on the other hand tend to combine their treatment of civil and criminal laws. The rationale for this approach has been described as being a strong desire to restore social equilibrium through payment of damages. (For example under Dinka homicide law this would be achieved through the payment called Dia, of 30 cows – per deceased person to the family of that person).<sup>14</sup> This combination of civil and criminal procedure does not however disallow a victim's family from exercising their right to pursue civil damages, or alternatively a full-scale prosecutorial action under statutory law.

### 5.6.3. Reconciliation and Punishment

The combination of civil and criminal law under a single code is demonstration that customary law differs from Western law in a very specific manner. The primary aim of customary law is conciliation and dispute resolution in civil law and in criminal law, reconciliation between the wronged and wrongdoer. In contrast, Western law leans towards attribution of blame [guilt] and punishment; the overall purpose is retribution and deterrence.

While Western Courts aim to obtain an acceptable version of the truth through adversarial presentation of argument, the 'truth' under customary law may often be of secondary concern. In customary law courts the main objective will almost always be to achieve satisfaction for as many parties as possible. The underlying aim, proved through millennia of experience, is to ensure a sense of justice and resolution amongst the disputing parties and though this means, to restore or maintain social stability.

### 5.6.4. Principles of Customary Law Practice

The principle of conciliation, aimed at peace through compromise and reparation for wrongs committed<sup>15</sup> is one of the four principles, identified by John Wuol Makec, which shape customary law practice and development. They are all divergent from Western jurisprudence. The others are:

- In all but the most serious of cases and heinous of crimes, all efforts are made to settle disputes outside of Court.
- All procedures are made as simple as possible, the overall aim being to minimize parties' logistic problems, expenses and collateral losses and to ensure expeditious handling of cases.
- Customary law procedure follows an inquisitorial system with Chiefs or Judges actively engaging the parties during the decision-making process. This differs radically from English-style adversarial systems, where the Judge acts in an observer role.

### 5.6.5 Sustaining Group Cohesion

Modern-day commentators analyzing African customary law have concluded that the goals, principles and fundamental concepts of modern day Western Alternative Dispute Resolution (ADR) (a relatively

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<sup>14</sup> Wuol Makec, John., *The Customary Law of the Dinka People of Sudan*. Afroworld Publishing Co. 1988. At 198.

<sup>15</sup> Ibid. At 220.



new phenomenon) are strikingly similar.<sup>16</sup> In Western nations at least, engagement of ADR is usually linked to a mutual desire to lower legal costs and greater control over a more expeditious process with a better chance of gaining a mutually satisfactory outcome. Within traditional African societies however, the primary motivation for conciliatory approaches to dispute resolution has been identified as ensuring sustainable cohesion of the group.<sup>17</sup> African dispute resolution has been described as placing a premium on improving relations on the basis of equity, good conscience and fair play, rather than the strict legality often associated with Western justice.<sup>18</sup>

#### 5.6.6. Customary/Statutory Interface

It has been argued that southern Sudanese customary legal systems possess inherently advanced ADR processes and mechanisms and the repercussions of this for the overall legal and political systems in future Southern Sudan could potentially be significant and widespread. However, much will depend on the opinions and decisions of judges presiding over cases at the customary-statutory interface at the Crown and High Court level. How these individuals interpret and develop these parallel systems of laws will ultimately determine to what degree southern Sudanese jurisprudence accepts elements inherent to customary laws and integrates them into the overarching legal system<sup>19</sup>.

There is already evidence of a growing dynamic between statutory law and customary law, through the appeals process. Where cases of customary law are referred upwards to the higher courts and those courts rule on the appeal, a judge's decision sets a precedent, which in effect makes law. This process affects customary law in two ways: it causes the case law to be written down and it challenges the particular customary law to change. The process of cases and appeals and the hierarchy established to deal with such cases is shown in detail at Section 9. Examples of precedent in contemporary southern Sudanese case law are shown at Section 10.

## **6. Current Customary Law in Southern Sudan - the Major Systems**

### **6.1. Tribal Distinctions**

The majority of social scientists, anthropologists and historians agree that today there are about fifty tribes in the region of southern Sudan. Each has over time developed unique customs, practices and beliefs that distinguish them from other tribes. Many too have distinct ethnic and language differences, though language divergences are mainly those of dialects rather than fundamental linguistic disparities. Any attempt at producing a comprehensive catalogue of these fifty or so tribes, their customs, practices, beliefs and languages would be beyond the scope of this study. Moreover, given the dynamic nature of southern Sudanese society, it would be a continuous work in progress and one of historical rather than sociological import.

### **6.2. Tribal Groupings**

Anthropologists have traditionally grouped the peoples and tribes of southern Sudan under six distinct groupings, defined by a host of ethnic, historical and linguistic factors:

- Nilotics
- Central Sudanic

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<sup>16</sup> Day, Minh., *Alternative Dispute Resolution and Customary Law; Resolving Property Disputes in Post Conflict Nations, A Case Study of Rwanda*. Georgetown Immigration Law Journal. Fall 2001. Volume 16 at 235. At 248.

<sup>17</sup> Ibid. At 249.

<sup>18</sup> Udombana, N. J., *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*. Brooklyn Journal of International Law. 2003 at 811. At 818.

<sup>19</sup> Danne, Alex, *African Customary Law in Contemporary South Sudan* Draft Paper 2003

- Nilo – Hamids
- Bari Speaking
- Zande
- Anyuak

For the purposes of this study, the tribes have been classified into ten - more narrowly defined – categories, according to tribal groupings, which reflect a mixture of common interests, customs and practices as well as ethnicity, language and proximity. This admixture of social and economic factors has enabled these ten groups to develop common or compatible customary law practices. The geographic disposition of these tribal groups is shown in map form at Annex B.

#### 6.2.1. Dinka

The Dinka, one of the branches of the River Lake Nilotes, are a group of closely related peoples living in southern Sudan, concentrated in the Upper Nile province in southeast Sudan and across into southwest Ethiopia. They are the largest ethnic group in southern Sudan and are made up of a number of smaller tribes, Dinka Malual, Twic, Rek, Ruweng, Bor, Agar, Atwot and Ngok Ablinug. The Dinka peoples speak a series of closely related languages, which are grouped by linguists into five broad families of dialects. The five languages are called Northeastern, Northwestern, Southeastern, Southwestern and South Central. Each subgroup calls its own speech by the group's name and over thirty dialects have been identified among the five language groupings.

The Dinkas are agnatic, semi-nomadic cattle-herders. Cattle-herding in the open plains promotes a special way of life in which tensions between individuality and sociability, between aggression and social control, between generations, between father and son, become prominent. Polygamy is the ideal for the Dinka, though many men may have only one wife. The Dinka must marry outside their clan (exogamy), which promotes more cohesion across the broader Dinka group. "Bride wealth" is paid by the groom's family to finalize the marriage alliance between the two clan families. Levirate marriage provides support for widows and their children. All children of co-wives are raised together and have a wide family identity.

The Dinka believe in a universal single God, whom they call *Nhialac*. Humans contact *Nhialac* through spiritual intermediaries and entities called *yath* and *jak*, which can be manipulated by various rituals. They believe that the spirits of the departed become part of the spiritual sphere of this life. As well as being the fundamental measure of wealth of Dinka society, cattle have religious significance. They are the first choice as an animal of sacrifice, though sheep may be sacrificed as a substitute on occasion. The family and general social relations are primary values in the Dinka religious thought. Unsurprisingly, much of Dinka customary law is inextricably linked to both cattle and the family.

#### 6.2.2. Nuer

The Nuer, the second largest group of Nilotic people in Southern Sudan, live mainly in the east Upper Nile Province around the junction of the Nile River with the Bahr el Ghazal and Sobat Rivers, and extending up the Sobat across the Ethiopian border. The [Nuer] people are related to the Dinka, who live to their west, and their culture is very similar. The Nuer, Dinka and Atwot (Atuot) are sometimes considered one ethnic group. The Nuer language is closely related to the speech of the Dinka and Atwot. The principal tribes of the Nuer are Jikany, Gawaar and Lou.

Like the Dinka, Nuer worldview is built around cattle and prestige is measured by the quantity and quality of the herd a man owns. Men and women take the names of their favorite bull or cow and prefer to be greeted by their cattle names. Parallel to territorial divisions are clan lineages descended through the male line from a single ancestor. These lineages are significant in the control and distribution of resources.

Marriages must be outside one's own clan and are made legal by the payment of cattle by the man's clan to the woman's clan, shared among various persons in the clan. Marriage takes place in stages. A marriage is not finalized until the bride has born at least two children. When a third child is born, the marriage is considered "tied." At this point, the wife and the children become full members of the husband's clan. Women desire to have six children. A man may have multiple wives, who do not necessarily live close to each other. But they will all live in the area of the husband's clan.

Much more is common than different between the Nuer and the Dinka. They may share a common origin as related in a Nuer myth:

'God had two sons and promised his old cow to Dinka and it's calf to Nuer. But Dinka went to God's cattle pen at night, imitating the voice of Nuer and thereby managing to get the calf. When God realized what happened he was very angry and urged Nuer to raid Dinka for cattle as revenge'. This is the state of affairs to date.

The similarities pose greater problems than the dissimilarities. Simply because the Dinka are so very much alike, they are the favourite war object of the Nuer. They can take wives and cattle to be assimilated into their clan. The problems with the Shilluk and other very dissimilar peoples are smaller, warfare being a rare event. In conflicts, it is the Nuer who by tradition take the aggressive role.

Cattle among the Dinka are acquired as a gift from the father or from relatives according to complicated rules. This gives the father and the elders a very strong position. Among the Nuer, cattle raiding from neighbouring non-Nuer is an accepted practice, even promoted among the young warriors. Apart from the social instability it creates, it also makes the position of the patriarch weaker than in Dinka society. Most conflicts involve cattle and the preponderance of Nuer customary law, like Dinka law, is taken up with cattle, feuds and family. In this respect, Dinka and Nuer customary law are very similar.

#### 6.2.3. Shilluk

The Shilluk are the third and smallest group of Nilotic peoples of southern Sudan. They are also uniquely different from the other two in that a king of divine origin rules them. The kingdom of Shilluk is located on the west bank of the Nile. Kingdom, mid-west Upper Nile covers a total area of 600 square miles. The Kingdom is bordered in the east and northeast by the White Nile and in the west by Western Upper Nile. Approximately 100,000 Shilluk live in the Kingdom.

Of the Nilotic people the Shilluk are the most organized but less egalitarian. The four main clans surround their king and some are totally occupied in serving the king, to make the arrangements when he dies and the ceremonies following the installation of his successor. The clans with ritualistic duties live segregated from the "commoners".

The Shilluk have fewer cattle and are more sedentary than the Nuer and Dinka. They organise their societies along the riverside with each boundary running at right angles from the river. This makes for a variety of landscapes for each group: wet and dry gardens and grazing land. Fishing is very important and popular and both sexes take part in the agricultural work. A community is commonly made of several hamlets with an elected headman. A council of the hamlets made up of the dominant lineage in the area elects the headman. Historically they were unified under one King or Reth chosen from the sons of previous kings. Although closely related to the Dinka and Nuer [customary law] systems, Shilluk customary law is more orientated towards an hierarchical government with a single ruler and towards a more sedentary society with less emphasis on cattle as the key measure of wealth.

#### 6.2.4. Zande

The Zande people (singular Azande) are a single ethnic group whose history centres on the geographic region of Western Equatoria, and the regions of the Democratic Republic of the Congo (DRC) and Central African Republic (CAR), which abut southern Sudan. The Zande are agriculturalists with a history of conflict with other tribes, particularly the Dinka, when they have attempted to farm cattle. They

have a reputation for practicing ‘witchcraft’ and other forms of mysticism. The Zande language is distinct to the people. The geography of their traditional tribal areas has exposed the Zande to external influences much more than other peoples and tribes of southern Sudan. Consequently, they are more amenable to the forces of change and modernization. The Zande have mixed more readily with other smaller tribes in the region and their customs, practices and customary laws reflect the heterogeneous nature of their communities. Lacking cattle, their currency in customary law is principally money.

#### 6.2.5. Fertit

The Fertit is a significant minority ethnic group with tribal areas in Western Bahr El Ghazal, centered on the two counties of Wau and Raja. Their communities are agriculturalist and sedentary. The Fertit are made up of a number of tribes, Balanda, Ndogo, Golo, Kreish, Yulu and Bongo. Their language is distinct and their customs, practices and customary laws reflect their agriculturalist ethos. Like the Zande, the Fertit use money as the currency of customary law actions.

#### 6.2.6. Anyuak

The Anyuak people are a single ethnic group with tribal areas in Eastern Upper Nile and southern Ethiopia. Their language is distinct and for many generations they were cattle owners. Conflict between Anyuak and Nuer has resulted in the Anyuak turning to agriculture as a basis for their economy. Thus their customs, practices and customary laws reflect their agriculturalist lifestyle. The use of special beads known as ‘*dimoi*’ as currency in customary law issues, particularly ‘bride wealth’ is a unique feature of the Anyuak. The practice is in decline and money is more commonly used for such transactions.

#### 6.2.7. Murle/Toposa

The Murle and Toposa are the larger and best known of a group of tribes, which inhabit eastern Equatoria. These tribes, comprising, Murle, Jiye, Toposa, Boya, Didinga, Ngalam and Nyangatum are bound by geography, socio-economics (all are cattle-based societies) and language (though each has their own dialect). The relationship between the tribes, particularly the Murle and Toposa has always been stormy. Conflict, invariably over cattle rustling, is a common state. The tribal areas are notorious for their disregard of ‘government’ whether British colonial, GoS or SPLA/M. Moreover, frequent forays across the border into Kenya to steal cattle from the Turkana and their reputation for acts of banditry along the Kenyan/Sudanese border, have earned the tribes and the region a reputation for lawlessness. The establishment of law and order in the region has been a priority for SPLA/M and the establishment of their headquarters in Kapoeta County is a significant step in this process. These issues notwithstanding, there exists a strong system of customary law shared by the tribes, which has acted as an instrument for reconciliation between them and a means of communication and dialogue during the years of civil war.

#### 6.2.8. Latuka/Pari /Acholi

These three are the major tribes of a tribal group which inhabits southeastern Equatoria and across the border into Uganda. Other tribes include Lokoya, Lango, Madi and Lopit. There are language differences but a commonality of dialects provides a lingua franca for the communities. All are agriculturalists. Their customs and practices differ in some respects but there are sufficient commonalities to provide a compatible system of customary laws.

#### 6.2.9. Bari-Speaking

There are a number of tribes inhabiting the southern regions of Western Equatoria, bordering on DRC, which speak a single language – Bari. They comprise the Bari, Pajulu, Kuku, Kakwa, Nyamgwara and Mundari. Their small size, common language and socio-economic status (all are agricultural communities) provide sufficient commonality of customs and practices to enable a compatible system of customary laws.

#### 6.2.10. Maridi Ethnic Group

The counties of Maridi and Mundiri in western Equatoria are also home to a group of tribes, classified by geographic region. They include the tribes of Moru, Mundu, Avokaya, Baka and Makaraka. The tribes are agriculturalists and have a commonality of language with differing dialects. Their customs and practices allow for a compatible system of customary laws.

### **6.3. Major Commonalities between Customary Law Systems in Southern Sudan**

The customary law systems of the fifty or so tribes and the ten groups described above have much more in common than they have differences. Differences tend to be ones of style rather than substance; mostly related to differing values systems and in particular the basis of community wealth. Where communities are cattle herders the currency of the courts is cattle. In agriculturalist communities it can vary from tools, weapons and beads to contemporary money. A comparison of some criminal offences and civil cases under various customary law codes, together with a comparison some criminal offences under statutory and Sharia law, are shown at Annex C.

The single most important commonality is the basis of all customary law, the need to achieve reconciliation and to ensure inter-community harmony rather than to punish. Other common ground can be examined under the four principle subject areas of customary law:

#### 6.3.1. Family Law

##### *6.3.1.1. Marriage*

All southern Sudanese customary law systems have a common recognition of the scope and purpose of marriage. It is recognized as a union between a man and a woman (though polygamy is a legally accepted practice for all tribes) for life, with the purpose of producing children and in doing so both strengthening and ensuring the continuity of the family. In this respect marriage is considered to be between two family groups rather than two individuals.

Marriage under all customary law codes, involves a payment of ‘bride-wealth’ by the man and his family. The complexity of the payment and its distribution is designed in part to make both divorce and adultery socially unacceptable actions. The latter is considered to be so serious an offence that it is both civil misdemeanor incurring a fine in reparation to the husband and also a crime punishable by a jail sentence.

All customary law systems have contingencies for dealing with mixed marriages across tribal groups.

##### *6.3.1.2. Divorce*

The issue of divorce is managed in very similar fashion under all customary law systems. Grounds for divorce are common:

- Repeated Infidelity
  - Neglect of family duties by either party
  - Gross misconduct by the wife
  - Impotence of the husband
  - Physical cruelty
- General breakdown of the marriage

The key action in divorce is to return “bride wealth”. Given the complexity of providing “bride wealth”, particularly cattle, the logistics of returning the wealth often causes severe friction within families and is a strong force militating against divorce.

##### *6.3.1.3. Custody of Children*

Laws dealing with the custody of children are very similar and reflect the ethos of a patrilineal society. Children remain with their mother until they are seven years of age. Thereafter they will go to their father if he has paid dowry and to the maternal uncle if he [the father] has paid nothing.

### 6.3.2. Laws of Property

Customary law systems reflect the importance each tribal group places upon movable and immovable property. The pastoralists, who place great value on land for grazing and on cattle as a symbol of wealth and power, have more complex property laws than sedentary agriculturalists. Nevertheless, all have common laws regarding ownership and inheritance of property. The aim [of customary law] is to ensure that all property stays within the family.

### 6.3.3. Law of Obligations

All customary law systems in southern Sudan have traditionally dealt with homicide as an offence that is both a tort issue (an act that requires the perpetrator/s to pay the injured parties reparations) and also an issue of collective responsibility. The payment of reparations, known collectively by the Arabic term '*dia*', depends upon the custom and values of the community from which the victim comes. Payment may be in multiples of cows, young girls or money. Where one tribal group has committed homicide against another, systems exist within customary law systems to assess reparations in kind.

### 6.3.4. Procedures

Although individual customary courts may conduct their proceedings according to tribal custom, variations are again more style than substance. The reasons for commonality of procedures lie in colonial history. The Constitution of the Chiefs' Courts governs the customary laws of the people of southern Sudan. This structure was established by the Anglo/Egyptian condominium by means of statutory instrument, the Chiefs' Courts Ordinance 1931, which for the most part remains, extant having been revised to reflect the organization and powers of the modern Sudanese judiciary.

The jurisdiction of individual customary courts are determined by the Chief Justice and defined in a warrant issued by his office authorizing their establishment. Invariably, restrictions are placed upon the jurisdiction of each court, which determine such issues as the value of fines/awards, the types of cases that can be heard and the territory within which the court may exercise its powers.

## **6.4. Recording Customary Law Practices in Southern Sudan**

### 6.4.1. Resistance to Written Law

Given its origins and its methodology it is hardly surprising that customary law in southern Sudan is not generally found in written form. Even with the advent of literacy amongst the peoples of Sudan attempts to reduce customary laws to writing were generally resisted. The main reason given for this resistance was a belief that customary law reflects the contemporary customs, practices and beliefs of a community; these customs and practices are given to change and customary laws must be flexible enough to reflect this dynamism. Any attempt to codify, document or reduce these laws to writing, it is argued, would severely limit their flexibility.

### 6.4.2. Reasons for Writing

Although this argument still has proponents, there is a strong and growing belief that customary laws should be written down. This was reflected in the many and varied interviews conducted by the study team. The need to write down the numerous customary laws was common theme. The principal reason given was that whereas all law is prone to interpretation, unwritten law is more susceptible to misinterpretation and bias.

There are a number of other equally compelling arguments for the writing down of customary law:

- First, the huge shift of population both out of and within the regions of southern Sudan has brought peoples of different customs and practices in close contact with each other (this trend is set to increase

as refugees return from abroad). The consequence has been a marked increase in conflict between differing customary law systems. The lack of formal written codes of law has both increased the complexity of the courts' tasks and made the process of reconciliation amongst parties who more often than not are ignorant of their respective customary laws, more difficult.

- Second, if customary law is to continue to thrive in southern Sudan it must be included within the domain of the judiciary. Judges at every level must have at least equal access to and knowledge of the body of a particular customary law code as they do to domestic statutory law or any other body of law. It is hard to imagine how this can be achieved unless it is in easily accessible, written form.
- Third, it is clear that the customary law systems of southern Sudan will, in the future, have to be reconciled, on a frequent basis, with other bodies of law, particularly: domestic statutory law, Sharia law, international humanitarian law and, at least in the short term, military law. All these bodies of law are to be found in written form. A written form of customary law would be better understood by external organizations and enable a closer harmony between the various bodies of law.
- Fourth, the appeals court process already has the effect of causing individual customary laws to be reduced to writing when higher court judges make decisions. Rationalizing precedent law with customary law would be much more effective where bodies of law are already written.

#### 6.4.3. Contemporary Written Codes

In recent years a number of significant steps have been taken to produce some of the customary law practices of southern Sudan in written form. The most notable has been the efforts of John Wuol Makec, who as Speaker of the Bahr el Ghazal People's Regional Assembly, helped draft and enact the Bahr el Ghazal Customary Law Act 1984. This Act comprises three customary law codes: Dinka, Luo and Fertit. This action was remarkable in that it provided not only a basis of common customary law for Dinka and Luo (a Nilotic people closely related to the Dinka, more commonly found in Kenya and Uganda) but also for the Fertit who are a people quite different from the Dinka and Luo in that they are agriculturalists. Dr Makec went on to write a comparative study of the Dinka customary law<sup>20</sup>, widely quoted in this study, to which the three customary law codes in question have been appended. Such was the impact of the passing of the Act that in 1998 a conference was held in Aweil, Bahr el Ghazal at which it was agreed by both Dinka and Luo represented, their respective codes of law should be completely harmonized, in effect to be one body of law.

In 1984, at Wanhalel in Tonj County, the three principal tribes of Upper Nile, the Dinka, Nuer and Shilluk, recorded their respective customary law codes in written form. The results, the Dinka and Nuer customary law codes are available and extant, though the Nuer code is in need of revision and elaboration. The Shilluk code is not easily found in written form.

There also exists in written form, a body of customary law that serves a number of tribes of the Central Sudanic people, the Kakwa, Kuku, Pajulu, Kaliko and Luguara tribes found in Yei and Kajo-Keji Counties of Equatoria Region. The document has an approximate date of 1996 (not verifiable) and in the expert opinion of one of the authors (a Sudanese Appeals Court Judge) probably outdated in some areas. It is however, a key legal tool for County Court judges in a number of counties in the Region.

During the course of research and interviews, the Commissioner of Kapoeta County informed the authors that during 2003 a conference was held to record the customary laws of the Taposa people. To date a final written draft is still awaited.

#### 6.4.4. Laws Still to Be Written

The study team found only a mention of 'ongoing anthropological work on Anyuak customary law' but could not find evidence to substantiate the story. It can be recorded with reasonable certainty that of the

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<sup>20</sup> Wuol Makec, John., *The Customary Law of the Dinka People of Sudan*. Afroworld Publishing Co. 1988. At 220

ten tribal groups described at the beginning of this section the following have yet to reduce their customary laws to writing:

- Latuka/Pari/Acholi
- Bari Speaking (Exempt Kakwa, Kuku and Pajulu)
- Maridi Ethnic Group
- Murle
- Anyuak
- Zande

## **6.5. Future Enterprises to Develop and Propagate Customary Laws**

With regard to future enterprises to reduce the other ten tribal group's customary laws to writing, develop and propagate those laws, a number of options are open. The Study Team, having consulted with key stakeholders in the southern Sudanese administration and judiciary together with subject matter experts in a number of southern Sudan-based NGOs, consider three options as being the most viable and cost-effective within the near future.

### **6.5.1. Revisit Nuer Customary Law**

Although a major step has been taken to reduce Nuer Customary Law to writing, efforts were limited by the political circumstances at the time and the resources available. There is much scope for further development.

Advantages –

- A major tribal group of political importance
- Initiative to develop written laws already begun
- Homogenous society
- Strategically important tribal area
- Partnership with southern Sudanese groups who have begun initiative

Disadvantages –

- Currently politically unstable geographic area
- Very large tribal area will involve high logistic effort
- Nuer are subject to much external aid efforts, may be seen as favoritism
- Homogenous nature of society and poor accessibility has limited internal pressure for change and threats to traditional social order – no urgency to act
- Currently no members of south Sudanese judiciary serving in the tribal areas

### **6.5.2. Revisit Bari-speaking Peoples' Customary Law**

The written customary law serving the Kakwa, Kuku, Pajulu, Kaliko and Luguara tribes in Yei and Kajo-Keji Counties is currently in use at every level up to and including the County Court. The Study Team witnessed the written laws in action at Payam Court level and examined it in detail. In the expert opinion of one Study Team member, an Appeals Court Judge, the document, although valuable, was out-of-date and incomplete. There would be much to be gained by revisiting the document, updating and expanding it to include the laws of the balance of the Bari-speaking peoples of the region. The final document would be used as a tool to propagate and develop the customary law system.

Advantages –

- Geographically important area – includes major commercial and administrative center of Yei
- Heterogeneous society with developed systems for peaceful coexistence
- Highly accessible area with much social movement has increased expectations and internal pressure for change



- Comparatively small geographic area, easy access and major town of Yei, relatively uncomplicated logistical task
- Politically stable and peaceful area of southern Sudan
- Written framework already in use in local courts
- Judiciary in the area active in legal process, particularly in Yei and keen to be involved in development of customary law

Disadvantages –

- Relatively small target population compared to Nuer or other tribal groups
- Heterogeneity of population may complicate development

### 6.5.3. Develop Maridi Ethnic Group Written Customary Law

Also known as Maridi and Mundiri tribal groups, they include the Moru, Mundu, Avokaya, Baka and Makaraka tribes and are centred on the towns of Maridi and Mundiri. Though they are currently not served by a formal written customary law system, the tribes coexist very closely and have well tried systems for dealing with social issues. There would be much to be gained by developing a written body of customary law to serve the community.

Advantages –

- Politically important region, particularly the town of Maridi
- Very heterogeneous society with large numbers of IDP and returning refugees in the area
- Highly accessible area, much social movement, increased expectations and internal pressure for change
- Comparatively small geographic area, easy access and major town of Maridi, low logistic liability
- Politically stable and peaceful area
- Judiciary in the area active in legal process, particularly in Maridi and Yambio

Disadvantages –

- Complex population structure may hinder development of written laws

## **7. Current Customary Law in Southern Sudan – the Major Issues**

*The social consciousness of the traditional society expressed in customary law, is so deeply ingrained that any developmental scheme, which disregards it cannot find its way into the hearts of the people...Francis M. Deng*

### **7.1. Overarching Issues**

A number of key issues and common themes related to customary law have emerged from the literature searches and personal interviews conducted by the study team. In the interests of brevity and clarity the issues have been condensed and listed in this section. A digest of the interviews is contained at Annex E to the paper.

Two issues in particular have been given pre-eminence by the study team for they deal with the very nature of southern Sudanese customary law and the issue of change.

### **7.2. Conciliation and Social Stability as a Basis of Customary Law**

#### 7.2.1. Customary Law Different to Western Law

The study team reached the conclusion few external observers understood that South Sudanese customary law differs fundamentally from Western law (and from southern Sudanese statutory law, which is based

on Western law). Moreover, this misunderstanding is the basis of much contemporary criticism demonstrated in the international media and by international human rights and other activist groups. Western law systems approach the issues of civil law and criminal law using two separate and distinct procedures. In customary law, both civil and criminal issues are dealt with under the same body of law using the same procedures.

This is possible and successful because the philosophical basis, aims and objectives of customary law differ essentially from Western law, particularly in regard to criminal issues. In Western law the theoretical underpinning is that crimes against individuals or the community should be dealt through punishment of the offending party. This in turn should provide satisfaction for the aggrieved party and deter potential offenders. (It does, however, require an elaborate and expensive penal system to deal with the incarcerated and removes individuals - often valuable breadwinners - from the community. southern Sudan cannot afford either).

#### 7.2.2. Ethos of Reconciliation

The fundamental ethos of African and specifically southern Sudanese customary law is to achieve conciliation in civil law and reconciliation between the wronged and wrongdoer in criminal law. This requires a philosophical outlook, rules and procedures manifestly different to Western law or even southern Sudanese statutory law. The overarching aim is to achieve a sense of justice and resolution amongst the disputing parties and in turn to restore or maintain social stability.

A system of law that has, as its central aim the maintenance of social order and cohesion must often act in a manner that places the good of society above the rights of the individual. It is this basic philosophical difference that puts African and particularly southern Sudanese customary law at odds with elements of the international community, particularly those individuals and organizations whose central ethos is based upon the rights of the individual. There is no doubt that some aspects of customary law, as they relate to the rights of the individual and in particular women, must and will change. However, if the argument that customary law is designed first and foremost to protect and strengthen social cohesion holds true, change can only safely come from within.

### **7.3. Change Must Come from Within and at an Acceptable Pace**

To paraphrase Chief Justice Ambrose Thik's comment at the beginning of this paper, customary Law is a manifestation of the customs, beliefs and practices of the people of southern Sudan. These [customs, beliefs and practices] are what the people of the south fought to preserve and they cannot be expected and are for the most part unwilling to abandon or have radical change imposed upon these laws in the immediate aftermath of war. The overwhelming consensus of those interviewed in the study is that change to customs, beliefs and practices throughout southern Sudan is inevitable. The only variance is in the scope of change, which ranged from cosmetic 'improvements' and amendments in penalties and awards to need to fundamentally change the 'bride wealth' system.

There is however, universal consensus on a second point, which not only must change come from within Sudanese society, it must come at a pace to which individuals and society can adjust. It is the firm belief of the study team that whatever interventions are planned - to impact upon the issues which follow- must be designed against the essential need to avoid jeopardizing a fragile post conflict society.

### **7.4. Forces of Change**

Historians and social anthropologists alike agree that, in the 19<sup>th</sup> and 20<sup>th</sup> Centuries war has galvanized social and technological change around the world. Sudan is no exception. Twenty years of conflict has undermined and perhaps irredeemably altered the traditional balance at least of power and systems of governance at the community and tribal level throughout southern Sudan. It could also be argued that 20 years of war has, in terms of technological advancement, left southern Sudan frozen in the last Century.

But change is already beginning to happen at almost every level of society and as the region opens up and peace and stability return the pace of change will rapidly increase. Some of the key forces for change are considered below. The list is illustrative but by no means complete. Predicting the future, though amusing, is at best a wasteful occupation.

#### 7.4.1. International Community

The involvement of the international community, particularly those organizations whose ethos is rooted in individual and human rights, has brought with it a very close scrutiny of Sudanese society, its customs, practices and laws. The result is growing international criticism (particularly in the form of NGOs that have donor resources and control of development and aid programs) of Sudanese society's attitude to and practice of individual human rights (In both north and south of the country). Some of this criticism is directed at southern Sudanese customary law and its perceived poor treatment of women and children. The pressure for change from these institutions, particularly in respect to the roles and status of women in southern Sudanese society is inexorable and given that it [social change] is increasingly the focus of aid programs, is probably irresistible.

#### 7.4.2. The 'Diaspora' Returns

Almost all those interviewed recognized an even greater force for change and awaited its impact with varying degrees of apprehension or enthusiasm, depending in the main on age and level of education. It is generally known as the 'return of the Diaspora' and describes the millions of southern Sudanese driven out of the country by war and who have lived, often for many years, in an array of host countries around the world. These people have slowly but surely been influenced by the customs, laws and culture of their host nations and cultural influence has in many cases crossed generations.

As the region poised to embrace peace, the return of the Diaspora, with its inevitable impact upon society, has begun and millions of people are expected to 'return home' from around the world over the coming years. The expectations of the overwhelming majority of returnees are perforce manifestly different from the cultural norms of those who remained behind and whose culture has been little affected by external influences during the past twenty years. The result can only be a clash of cultures. History shows in this particular battle the returnees have the advantage of what might be called 'soft power' - money, education and communications - and will almost certainly win out.

The social revolution sparked by the returnees will not be without casualties though these will probably result from domestic and family conflict rather than community. Many of the returnees, unable to adjust to the strictures of 'the old customs' may leave again; it is more likely that they will gravitate to the urban areas and begin a demographic shift in the region. Southern Sudanese society will most likely follow the pattern of almost all developing countries and become increasingly urbanized. Whatever the long term effects of the returning Diaspora, there is little doubt the pace and scope of social change is set to increase exponentially.

#### 7.4.3. Technology

The third great force for change, which will influence customary law, is technological, global and irresistible, the information revolution. In a region of the world where there is as yet not one mile of paved road, indigenous electrical power generation bigger than a diesel generator, nor indigenous electronic media, telephone systems and only rudimentary local 'newspapers' it is hard to imagine the impact of the impending arrival of modern communications and information technology, but history suggests it is only a short time away.

The very lack of technology is a huge advantage to the region; it will allow what might be called 'technology jumps'. There will be no need replace old communications and information technology with new, the jump will be straight to new. Signs of this revolution can already be seen in the widespread use of solar generated electrical power to run an array of technology from ultra low power lighting systems,

water pumps, radios, computers and satellite communications. The coming wave will follow the model of other countries in Africa but skipping the interim technology. There will be no 'copper wire' telecommunications and probably no postal service other than for packages. Personal communications will be by mobile phone and email using private or government satellite communications.

The influence of this information revolution upon the traditional tribal structures, customs and practices is impossible to predict at this point, but if history is any judge it will be rapid and far-reaching. In particular it will revolutionize education and in doing so change the traditional balance of social power at the family level. The young will have unfettered access to bodies of knowledge completely foreign to their elders. Their understanding and expectations will consequently be manifestly different from their elders. 'Old' customs and practices will be questioned and maybe even abandoned by the young. The potential for family and community conflict will be great and the effect on customs and customary law will be fundamental.

#### 7.4.4. Transition from Military Rule

Twenty years of martial law and military influence upon society has greatly affected customary law. At the community and tribal level the role of the chiefs, their ability to affect power and execute local governance and laws has been severely constrained by military imperatives. In many areas military courts have supplanted local courts and military law has replaced customary law. Military commanders have replaced tribal chiefs in the execution of justice and the AK47 and olive green uniform has become the visible totem of power.

This is the inevitable and expected result of war, particularly one as protracted and brutal. However, and worryingly, there are daily signs that, despite a lengthy cease-fire and increasing moves towards a lasting peace, the military at the local and regional level at least has not relaxed its grip on law enforcement and execution of due process. To the contrary, it is increasingly interfering in the day-to-day aspects of governance, the prosecution of crime and the execution of laws. There exist both anecdotal and substantiated reports ranging from interference in minor civil cases at the Payam court level to intimidation judges dealing with serious crime. The long-term consequence of this military interference will be the further erosion of community leadership structure and with it the systems of customary law. Continued military interference in the judicial process at the level of county court and above is not compatible with the transition to an open and free society and needs addressing at the highest level.

The most elemental questions regarding the future of the SPLA must be urgently addressed. As a military force it has been the undisputed catalyst for social change in Sudan, against the odds it has used military force to defend its people and bring about an end to hostilities. It has employed the classic strategy of guerilla warfare to achieve this end and well deserves the appellation 'peoples liberation army'. The question now concerns the future roles and missions of the SPLA. Is it to continue with its current structure and missions or transition to a national defence force? The former role seems at the least anachronistic and discordant with the aims of long term peace. If it is to be the latter the SPLA will have to undergo fundamental change.

Such change will require a complete change of role from guerilla army to formal defence organization. This will involve restructuring (almost certainly a reduction in manpower and even an end to conscription) re-equipping, re-training and re-location of forces. This can only be achieved by disengaging the military from its adopted roles as local defence, government and law enforcement roles. A radical review and change of the military's current roles and missions would have a beneficial effect upon the traditional governmental structures and instruments of customary law.

#### 7.4.5. Social Dislocation and Internally Displaced Persons

Whereas the war caused large numbers people to flee the country a considerable too fled their homes for other areas in the south, so called Internally Displaced Persons (IDPs). Many also returned from abroad

but were unable or unwilling to go home and settled temporarily in other tribal areas; for many of these their settlement has become permanent. The result of this pattern of long-term and widespread internal displacement is that the homogenous nature of traditional tribal areas has been significantly disrupted. Given the extent of this movement of peoples it is unlikely to be reversed. The impact of this social dislocation upon customary law is quite considerable in that minority tribal groupings (individuals and families) with differing customs and laws are appearing in traditionally homogenous tribal areas. For the most part, those responsible for executing the law have developed very good coping systems to overcome the potential for conflict of custom.

## **7.5. Potential for Conflict between Customary Law and Other Systems of Law**

### **7.5.1. Potential for Conflict Between Customary Law Systems - The Maridi Model**

The region of Western Equatoria has a particularly mixed population, partly as a result of the wartime movement of peoples but also historically it has been a region of small tribes and much movement of peoples between areas now known as the Democratic Republic of Congo (DRC) and Uganda. The town of Maridi provides an ideal insight into the issues of different peoples and tribes living in close proximity. There are five major tribes, Avokaya, Baka, Moru, Mundu and Zande together with IDPs from Nuba Mountains and Upper Nile. The complex ethnic grouping and the lack of a large majority tribal group means that no single customary law system can apply. Consequently a compromise system has been developed which works to the satisfaction of the majority of the population.

The courts, regional, Payam and county, all convene with tribal representatives of each person appearing before the court. Their task is to support the judge and ensure each party receives a hearing and treatment compatible with their own customary laws. The aim again being to create an environment where all parties are reconciled. Where there is a conflict of custom the customary law of the aggrieved party has pre-eminence. Where a crime has been committed against another party it is commonplace to charge the accused under the New Sudan Penal Code and if found guilty, to award both punishment under the Code and Dia according to the victim's customary laws.

### **7.5.2. Reduce the Laws to Writing**

The study team found that those who execute the law do not consider the potential for conflict between differing customary law systems, although a real day-to-day issue, an intractable or even major problem. This is probably because the issue has been a reality for a long time in some areas such as Western Equatoria and a less common event in more homogenous areas such as Bar El Ghazal. Nevertheless it is an issue with a potential to create growing conflict, particularly as the number of returnees grows. The study team was offered two realistic suggestions for the management of potential conflict between customary law systems. The first is to develop a 'lessons learned' study of the day-to-day management of customary law cases in mixed tribal areas. This tool would then be used as a teaching tool for courts and legal personnel in other regions where the issue was not yet common. The second option, favoured in particular by the many chiefs interviewed, is to begin a national initiative to reduce the numerous customary laws to writing. This [reducing the various laws to writing] was a recurring theme throughout the many interviews conducted by the study team. In recent years there has been much debate amongst those involved in the legal process as to the necessity and wisdom of formalizing in written form customs and rules that traditionally have been in oral form. The subject will be dealt with in greater depth further in the paper.

### **7.5.3. Conflict between Customary Law and Statutory Law**

The question of conflict between customary law systems and statutory law in the guise of the New Sudan Penal Code, the New Sudan Civil Procedures Act and the Court of Criminal Procedure is an altogether more problematic issue. At the time of writing, the nascent statutory law system has very limited effect

upon the overall legal process, in part because it is new and also because the courts, judges and supporting structures are inadequate in number and resources to significantly impact on day to day judicial events.

#### *7.5.3.1. Opinion of Judges*

It is the considered opinion of those members of the judiciary interviewed that as the judiciary grows in size, and experience, the influence of statutory law upon society at every level will increase. Inevitably, customary law systems and statutory law will be in regular conflict. Moreover, history, much in evidence in the literature, adds weight to the argument that customary law and statutory law are by their very nature bound to come in conflict. A system based upon reconciliation must routinely clash with one based upon punishment and deterrence. This is even more likely if the judges who interpret statutory law have a manifestly different cultural viewpoint from those who interpret and execute customary law.

#### *7.5.3.2. 'Repugnance'*

This [clash between legal systems] is evinced throughout Sudanese legal history from at least the time of colonization, by the use of terms such as 'reasonableness, 'justice equity and good conscience' as caveats by the judiciary on the utilization of customary law and 'repugnance' as a means of describing some crimes as being beyond the remit of customary law. All these terms are essentially subjective and any measure as to what is reasonable or repugnant will be influenced by the cultural norms of the individual judges. For example, a judge trained in Khartoum who has spent years as a refugee in Western Europe may very well find the practice of incest between father and daughter, which is not considered an offence in Zande customary law, repugnant and insist upon the application of statutory law to deal with the case.

#### *7.5.3.3. Appeals Courts, Judges and Precedents*

Historically the theatre of conflict between customary and statutory law has been the appeals court. It will most likely be so in the future. Lower courts using customary laws deal with currently about ninety five percent of all legal cases in southern Sudan. Where parties cannot accept the outcome they are entitled under due process to appeal to higher court. This process will become increasingly used as the statutory system grows in influence and scope and individual expectations rise; with a consequent increment in conflict between systems and courts.

There is general consensus amongst those interviewed that the natural tension between customary law and statutory law has historically been an essential and creative process, giving dynamism to both systems and an key force for beneficial change. There is no reason to doubt that this will be so in the future providing there are in place systems to ensure checks and balances on the power and influence of the judiciary. Key to this will be the education of the judiciary in the various customary laws systems of southern Sudan. Also vital will be a system that records and distributes case findings, vital when precedents have been set regarding both customary and statutory law.

### **7.6. Conflict between Customary Law and Sharia Law**

Of all the factors affecting southern Sudanese customary law, Sharia Law has traditionally been the greatest threat to its continued existence. The civil war has its very origins in the attempts by the Government of Sudan to impose 'Islamisation' upon the peoples of the southern regions. An 'Islamisation' that historians argue began in the days of the Ottoman Empire and only temporarily halted by the period of British colonization.

The subject of Islam and Sharia Law in Sudan is vast, complex and beyond the scope of this paper. It is however a vital issue in not only the political future of southern Sudan but also its cultural destiny. The plain facts are that within the whole of Sudanese population of over 30 million, North and South, Islam is the majority faith and Sharia Law the major law. Moreover, Sharia Law does not easily accommodate other forms of law. The potential for conflict is twofold: a resumption of 'Islamisation' through the

Government and courts of the northern regions. Secondly, conflict between the authorities of southern Sudan and the not insignificant Muslim communities indigenous to the southern regions.

At this stage in the post-conflict era it would be ill advised to develop arguments regarding the future accommodation between Islam and the customs, practices and beliefs of the southern peoples. It is sufficient to recognize the potential for conflict between them and the need to find an enduring and mutually acceptable solution.

## **7.7. Conflict between Customary Law and International Law**

### **7.7.1. 'Old v New'**

The potential for damaging conflict between customary law and the body of international laws concerning individual and human rights has already been alluded to at the beginning of this section. It is a recurrent theme amongst the interviewees, a source of resentment amongst some and apprehension in others. Many of those interviewed believe that those elements of the international community highly critical of the effects of customary laws upon individuals and certain sections of the community, particularly women and children, have a superficial understanding of southern Sudanese society.

They also view the clamour for urgent change with suspicion and hostility. Those in the international community on the other hand, consider what they see to be an extremely patriarchal society as being anachronistic in the modern world and imposing severe and unacceptable constraints upon the rights of the individual, particularly women and children. In many respects the situation has echoes of the *"confrontation between theistic and traditional cultures in countries little different from Europe in the Middle Ages and the secular material values of the Enlightenment"*, argued by Huntington in his 'Clash of Civilizations'.<sup>21</sup>

### **7.7.2. Community Good and Individual Rights**

This fundamental difference of opinion stems on the one hand from the lack of understanding amongst some in the international community of the underlying ethos of customary laws, that set the good of the community above the rights of the individual. On the other hand war has isolated southern Sudanese communities from the outside world and petrified the forces of change which otherwise might well have reconciled customary law with individual rights years ago.

Notwithstanding the conflicting positions of the two bodies of law over individual rights, there are reasons to believe that customary laws will change to accommodate contemporary mores on human and individual rights in the near future. But equally importantly, customary law holds as its basic tenet, reconciliation, which arguably is a force for social good and a vital tool for peaceful transition in southern Sudan that must not be lost in the change. Specific areas of customary law that most obviously are in conflict with international human rights laws and what action might be taken to deal with these issues, is examined more closely in Section 10 of this paper.

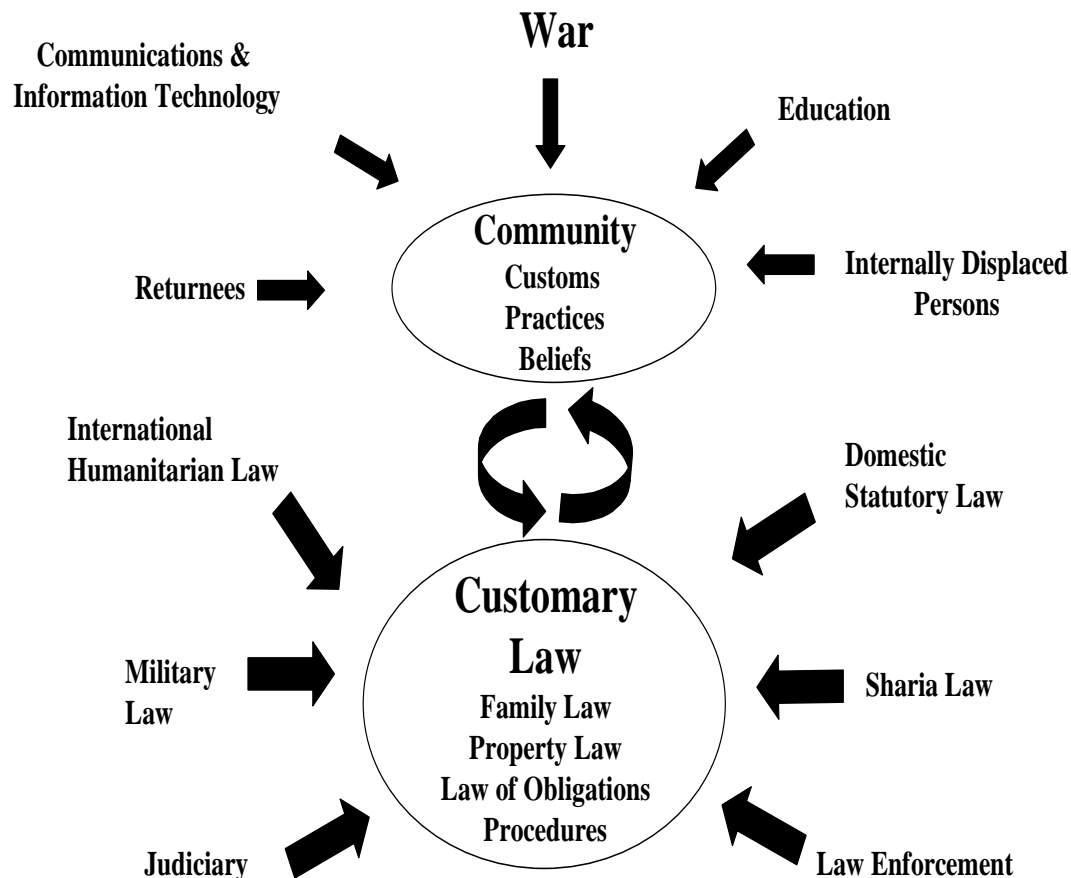
## **7.8. Factors Shaping Customary Law in Contemporary Southern Sudan**

The forces of change, described in this section are manifold and complex. Individually they might be withstood or accommodated. History suggests that collectively they are irresistible. In an ideal world change should come from within and at a pace with which the people can cope. It is improbable that this will happen in southern Sudan, change is more likely to be rapid, outwith the control of individuals or communities and for many, extremely disconcerting. These forces for change are shown in diagrammatic form on the following page.

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<sup>21</sup> The Clash of Civilizations and the Remaking of World Order. Samuel P Huntington. Touchstone 1996

## Factors Shaping Customary Law in Contemporary Southern Sudan



### **8. The Functional Areas of Customary Law – The Key Issues**

#### **8.1. Four Areas of Law**

Southern Sudanese customary law systems reflect the customs, practices and beliefs of the various tribes, which develop and use those laws. Notwithstanding the large number of tribes [over fifty], their disparate origins, and practices, the bodies of law which each use, have considerable similarities. An examination of the few, which have been reduced to writing, show that the respective bodies of law are broadly divided up into four functional areas, best illustrated in John Wuol Makec's definitive account, The Customary Law of the Dinka People of Southern Sudan:



- Family Law
- Land Law
- Law of Obligations
- Procedure

## 8.2. Family Law

### 8.2.1. The Family

The issue of the rights of women and children under southern Sudanese customary law can only be fairly judged within the context of the family and that part of customary law known as Family Law (or Personal Law). An understanding of Family Law must begin by recognizing that the traditional Sudanese concept of family differs markedly from the Western institution. Classically, the former recognizes polygamy, the latter is monogamous, but the differences are far more subtle and complex.

Sudanese conceive of the family “as consisting of a large number of people, many of whom are dead, a few of whom are living and countless numbers yet to be born.”<sup>22</sup> This concept is probably best explained by Green, quoted in same paper by Francis Deng.

*“Personalities live long after their bodies die. The relation between the living and deceased relative is no matter of sentiment to be brushed aside as valueless. It is as real as between living members of the family. And once it is recognized that the family relation continues after death, and that in the relation is found one of the dearest and most valued interests known to human beings, there should be no difficulty in reaching or articulating judgments.”*

### 8.2.2. Levirate and Wife Inheritance

In many African societies, including southern Sudanese society, there exists a custom known as *levirate* under which women remain married to their dead husbands and cannot marry again unless they obtain a divorce from their dead spouse. Children continue to be born to them by the deceased husband’s surviving kinsmen but bear the name of and are considered in all respects progeny of, the dead man. This custom results in a practice, known as ‘wife-inheritance’. When a man dies his immediate kinsmen, brothers or paternal uncles, are required to offer marriage to his widow and to care for her and her children. Any future children that kinsman may have with the widow will bear the dead man’s name. Moreover, men who die before marrying are given wives, through ‘ghost marriages’, again to the man’s brothers or paternal uncles. Children born of these marriages also bear the dead mans’ name not the biological father’s.

By these and other customs, the living are linked inextricably with the dead and procreation gives permanence and continuity to the institution of the family. The living too strives to add to this continuity by ensuring they have children ‘to leave behind when they die’. These customs are also designed to strengthen and expand the family through the retention of property and material wealth within the male lineage. Additionally they have an indirect effect of “providing a constant supply of man-power as an insurance against the insecurities inherent in their traditional way of life.”<sup>23</sup>

### 8.2.3. Marriage as an Alliance of Families

The family is founded upon Ruai or the institution of marriage. It is fundamental to any debate about the status of women and children in southern Sudanese society, to recognize that marriage is seen as “not simply a union of a man and a woman; it is an alliance of two families or bodies of kin<sup>24</sup>”. In this way it [marriage] binds a large number of people together so the consequences, both good and bad, of the union,

<sup>22</sup> Francis M. Deng. The Family and the Law Torts in African Customary Law. Undated paper

<sup>23</sup> Ibid

<sup>24</sup> Radcliffe. Brown, A Modern Introduction to the Family, P231 (1960)

affect a large number of people. The cause and effect of this is to strengthen social bonds which in turn is aimed at increasing community wealth and security and limiting the chances of conflict between communities. The roots of customary African marriage have been described as:

*"In seeking to identify the outstanding characteristics of African customary marriage, we may justifiably include the collective aspects of marriage transactions and relationship. There considerable weight of authority to the statement that, from the viewpoint of indigenous law and custom, a marriage is to be regarded primarily as an alliance between two kinship groups and only in a secondary aspect as a union between two individuals."*<sup>25</sup>

This collective aspect of the marriage union is one of the fundamental differences between African [Sudanese] marriage and the archetypal Western marriage. Notwithstanding the perceived and real inequities of the institution, particularly with regard to the status of women, there are also real strengths. Close examination shows that, as with all Sudanese customary law, the main aim is to create and reinforce communities. This ethos has been described as:

*"The human solidarities of Africa do not depend upon the changes and chances of affection. The family is a delicately poised and interlacing organism in which each knows to whom he owes particular duties, from whom he can expect particular rights and for whom he bears particular responsibilities."*<sup>26</sup>

#### 8.2.4. 'Bride Wealth'

The classic and arguably most misunderstood and contentious aspect of southern Sudanese customary marriage is the institution of '*bride wealth*'. It is also variously and erroneously called 'dowry' or 'bride price'. The former, described in the Oxford dictionary, as '*Money or property brought by a woman to a marriage*' is the antithesis of 'bride wealth' as it is the man who brings the wealth; the latter connotes some form of commercial contract and is totally misleading.

The form of this 'bride wealth' depends upon tribal custom. For the major peoples and tribes of southern Sudanese, the 'wealth' takes the form of cattle and occasionally donkeys, sheep and goats. For a minority tribes, usually non-pastoralists, 'wealth' takes the form of tools, weapons and beads. Recently and increasingly, money is being used as 'bride wealth' and the likelihood is that the practice will become commonplace as cash returns to the southern Sudanese marketplace and the returnees of the Diaspora bring with them new social values and needs. This is an example of the effects of post conflict change on custom and customary law.

There are a number of reasons given for the institution of 'bride wealth'. John Wuol Makec lays out the most cogent<sup>27</sup> in his book as:

- Compensation to the relatives of the girl or woman who have brought her up at expense to them and reimbursement of the expenses the family incurred at the marriage of her mother.
- Consideration for the services the bride will renders to her husband and relatives and the children she will bear.
- 'Bride wealth' brings stability to the marriage since the parents and relatives acquire economic benefits through such payment. The Dinka go further to stabilize the relationship by requiring the bride's family to conduct a reverse payment in kind called *arueth*.
- The institution of 'bride wealth' involves an element of prestige for the spouses as well as relatives.

#### 8.2.5. 'Bride Wealth' and the Family

It is important to understand how 'bride wealth' is accumulated and its effect upon the wider family, particularly amongst those tribes where cattle are the currency. It is rare that an individual, particularly a

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<sup>25</sup> A. Phillips, Survey of African Marriage and Family, Oxford University Press, 1953, pp.xi-xii

<sup>26</sup> Taylor. The Primal Vision 1963

<sup>27</sup> Wuol Makec, John., *The Customary Law of the Dinka People of Sudan*. Afroworld Publishing Co. 1988

young man, will have the wealth to pay for the bride from his own resources and in fact he will be actively discouraged from doing so. The wealth is donated by as many members of the family group as can and wish to contribute. In this way, the couple is seen to have responsibilities to a wide number of people.

In the event of a failure of the marriage through divorce or desertion, all or part of the 'bride wealth' may have to be repaid. Where cattle are the currency, this is a hugely costly and disruptive affair, frequently leading to damaging dispute and even conflict between and within family groups. It can be seen that any action, which threatens family cohesion, is viewed with great disdain within the community and dealt with harshly under customary law.

### **8.3. Law of Property**

#### **8.3.1. Conflict and Resources**

Conflict, between peoples, tribes and communities has been a feature of Sudanese society for millennia. The origins of these disputes are many and various but invariably the main issues have been those of resources: land, water, animals and other property. Competition and conflict is hardly surprising among a predominantly pastoral people living in a country where resources are often scarce.

Moreover, as the size and expectations of the population has increased the chances of conflict over finite resources as increased. This is particularly true amongst those peoples and tribes whose societies are based upon livestock and specifically cattle. Introduced technology, such as vaccination, has reduced the effect of disease upon cattle and as herds have grown competition for grazing has increased.

It could be argued that the civil war between north and south began as a conflict over custom – Sharia versus traditional African custom but soon crystallized into a war over resources, particularly the fossil fuel in the Upper Nile region.

#### **8.3.2. Development of Property Law**

This social tendency for conflict has led to the development, over time of a considerable body of customary law designed to deal with the issues of property and conflict over property, particularly contracts and torts (any wrongdoing for which an action for damages may be brought).

#### **8.3.3. Title and Ownership**

In English (and other Western) law, property can also mean ownership. Southern Sudanese peoples make very specific distinctions between property and ownership and their customary laws reflect the distinctions. In Customary law as in English Law property can be defined as moveable and immovable but further classification is irrelevant to customary law. What really matters in the law is whether a wrong has been committed with respect to the property owned or legally possessed by another person and the remedy to be awarded the aggrieved party. Most customary law systems have elaborate and detailed procedures for dealing with:

- Transfer of title or ownership and tracing of property
- Intestate (not disposed of by legal will) and testate succession and inheritance
- Land law including resource rights (minerals, water and animals)

In respect of transfer of title and ownership of property, Sudanese customary law reflects the same principle as English law which in turn borrows from Roman Law "Nemo dat quod non habet" Translated as, 'No one can give a better title than his own; he can give possession but not a title which is not vested in him'<sup>28</sup>.

From this it is clear that in customary law as in English Law, it is ownership rather than possession that qualifies an individual to transfer title of property to another. Moreover, 'the true owner is not deprived of

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<sup>28</sup> Crossley Vaines; On Personal Property, 4<sup>th</sup> ed., Butterworths, London, 1967

title when possession of such property has been transferred through (i) theft, (ii) robbery, (iii) breach of trust, (iv) deceit or fraud and (v) any other wrongful means'<sup>29</sup>

Like Dinka Customary Law, other customary law systems also dictate that the innocent third party buys property at his risk. The fact that the innocent party was unaware that the seller had no title does not (with few exceptions) entitle the buyer to any protection under the law, caveat emptor.

#### 8.3.4. Right to Trace Property

A unique feature of most customary law systems is the right of individuals to trace their property when it has been passed on legally from owner to owner and to reclaim it. This law reflects the complex nature of marriage, bride-wealth and divorce. The same property may pass through many hands due to subsequent marriages but when the original marriage breaks down the title reverts to the original owner and the right to tracing arises. In an instance where bride-wealth of hundreds of cows has been paid five years previously and all have to be traced and either returned or a comparable beast in lieu, the size of the task would be huge and the potential for dispute over individual cattle, endless. In a society where livestock is the most important property, constituting both economic and social value, disputes over ownership of livestock are very commonplace and extremely complex, taking up a great deal of customary court effort. Intimate knowledge of the laws is essential to male adulthood and property ownership.

#### 8.3.5. Inheritance

Succession is a key issue in the transfer and acquisition of property and plays a vital role in both Family Law and Law of Property under customary law. Sudanese customary law systems provide in detail for all aspects succession and inheritance. These law systems agree to two forms of passage of property from a deceased person to another by succession: intestate, where the deceased has made no will for distribution of estate; and testate, where the deceased has made a will before death.

There are very specific constraints upon who may inherit property, aimed at protecting the family and the custom of patrilineage. For example, laws exist preventing the head of the family from disposing of his estate outside the family. Dinka Customary Law<sup>30</sup> is typical in this respect in that it rules that:

*'Where a person dies intestate, the following persons may be heirs:'*

*Wife (or wives) and children*

*Parents or brothers if there are no wife (or wives) and children*

#### 8.3.6. Estate of the Deceased

There are four main principles to be observed when dealing with a deceased's estate, all designed to protect the family and ensure patrilineage:

- Every male must have a family to continue his lineage. A man who dies without a wife and children can expect his living kinsmen to raise a family for him using his estate or part of it.
- Property provides the means for raising a family and ensuring its future survival and growth.
- Property is not owned by individuals but by the community. Joint ownership of all property, even in the largest families, provides security, a sense of ownership and responsibility for all. Families will use their property in discharging major obligations such as bride-wealth for marriage and Dia for compensation for wrongs done.
- The estate of the deceased male must remain within the family of the deceased, if it is to provide for the family, living and dead.

#### 8.3.7. Property Must Remain in the Family

The consequences of these principles are:

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<sup>29</sup> The Re-statement of the Bahr el Ghazal Customary Law Act [Dinka Customary Law] 1984, Section 56

<sup>30</sup> The Re-statement of the Bahr el Ghazal Customary Law Act [Dinka Customary Law] 1984, Sections 51 and 52

- Though a man may make a bequest to person or persons outside his family he may not dispose of all or even a major part of his estate to anyone outside the family. The justification for this is that the property belongs not to him but the family.
- To ensure patrilineage, the trustee for the estate has a duty to raise a family for the deceased who dies without a family. His duties will not terminate until he has married a wife for the deceased and transferred the balance of the estate to her as the wife of the deceased man rather than as his own
- Daughters cannot inherit any part of the estate as they are considered potentially part of another family.
- Divorced wives cannot inherit from a deceased ex-husband. Whilst this may be self-evident in that she is no longer part of the family, it also applies to widows who, in customary law remain married to the deceased. If a widow chooses to divorce her deceased husband she must give up any part of the estate she has inherited.

#### 8.3.8. Exceptions

Notwithstanding the duty of every male to ensure his property remains within the family, there are caveats to succession. Certain rights allowed to an individual cannot be bequeathed, for example fishing in tribal lakes or grazing on tribal lands. The reasons given are that these are tribal or public rather than individual rights. Moreover, property may be inherited with restrictions or limitations placed upon them. This is particularly true of so-called usufructuary rights such as grazing for other members of the tribe or stretches of water upon which other people have fishing rights.

#### 8.3.9. Land Law

The subject of Land law, ownership and possession of land is complex and contentious issue throughout Sudan but particularly in the South. Despite the huge size of the region and its relatively small population, the amount of land suitable for an agricultural and pastoralists way of life is relatively small. As a consequence, good land is hotly contested and the subject of regular internecine conflict. Not surprisingly, there exists a comprehensive body of both statutory and customary law dealing with the issue.

#### 8.3.10. Statutory Land Law

Land in the Sudan is regulated through the Land Settlement and Registration Act 1925, which remains extant and the Unregistered Land Act 1970, repealed by the Civil Transactions Act 1983. The latter is particularly important in that deals with the concept of state and private ownership. In this respect it declares that:

*'All waste, forest, occupied, unoccupied and unregistered land is deemed to be Government property and to be registered under the Land Settlement and Registration Act 1925.'*

In practice these statutory provisions operate in certain towns and developed areas but government ownership of rural lands is theoretical. In most rural areas, rights over land are still regulated by customary laws. Statutory law also recognizes private ownership:

*'The Sudan Land Law, being influenced by Islamic Law and custom, recognizes the doctrine of ownership of land. In this respect it is different from English Land Law where there is no doctrine of ownership of land; there is a doctrine of possession, the owner being the Crown.'*<sup>31</sup>

However, ownership is not deemed absolute and land ownership has liabilities such as: land tax, housing tax, sanitary and other regulations, rights of way, rights of water and other easements. Most of these liabilities only apply in practice in urban areas.

#### 8.3.11. Customary Land Laws

<sup>31</sup> Dr Saed El Mahdi, (1971) SLJR p260

Over time, complex customary laws have been developed related to the rights of communities and individuals regarding land. The purpose of these laws can only be appreciated by understanding that to most southern Sudanese peoples, the concept of ownership of land (or water) in the strictly legal sense as described in statutory law is irrelevant. It is owning the rights to use the land (or water) for a specific purpose, such as grazing, fishing and farming that is fundamental to Sudanese practice and customary law. As a consequence, much of customary land law is designed to determine whether a wrong has been committed with respect to the property owned or legally possessed by another person and to deal with the consequences.

#### 8.3.12. The Example of Dinka Customary Land Laws

Dinka customs and laws related to them are typical of most southern Sudanese peoples. The territory of a Dinka tribal community usually comprises two geographical features known as *baai* and *toc*. Each has special social significance. *Toc* is generally low land usually close to lakes and rivers. It is the most fertile area and it is where the Dinka graze their cattle, fish and hunt game. *Baai* literally means ‘home’ and it is that part of the territory suitable for building permanent settlements and for agriculture.

The legal importance of the distinction between the two areas rests on the fact that (with very few exceptions) *toc* is subject to communal use. Private rights in this area are deemed subordinate to communal rights under customary law. In *baai* apart from areas recognized as for communal use, private interests in land or rights are recognised and respected. Communal ‘ownership’ of *toc* or its other tribal equivalent is achieved mostly through historical conquest and continual use.

In the interests of social harmony, surrounding communities generally recognise the status quo but most internecine conflict results from disputes over ‘ownership’ and use of *toc* or its equivalent. Private ‘ownership’ or title is normally gained through occupation and use, such as building and agriculture. Continued use is recognized as proof of ownership within the community.

#### 8.3.13. Statutory Proof of Ownership in Future

It has been traditionally rare in rural areas for ownership to be proved by legal documents such as deeds. However, as the population has grown and statutory land laws imposed, the use of these laws and their instruments of ownership have increased. The major feature of the civil war has been the displacement of the population. There is anecdotal evidence that IDPs have generated significant dispute in some areas over land ownership.

As the number of returnees grows it is probable that they too will generate much legal dispute with regard to land ownership. If as seems probable, these returnees resort to statutory law to prove and assert rights of ownership it may very well bring these laws into conflict with customary law, particularly if the dispute centres upon private ownership of land in use by the whole community. This would be yet another example of pressure to assert the rights of the individual over the good of the community.

### **8.4. The Law of Obligation**

#### 8.4.1. Uniqueness of Law of Obligation

The third element of customary law is known as the Law of Obligations. This body of law covers both social duty and liability within southern Sudanese society. A useful dictionary definition of obligation is:

*‘Subjection to a legal obligation or the obligation itself. He who commits a wrong or breaks a contract or trust is said to be liable or responsible for it.’*

#### 8.4.2. Combining Contract and Tort Law

Customary Law of Obligations is unique in that it combine two aspects of law that in statutory law are considered separate branches of law: contract law and tort law. The distinction between contract and tort

being that duties in contract are fixed by the parties themselves and are owed to a particular person or persons; in tort the duties are imposed by law and are owed to the public generally.

#### 8.4.3. The Example of Dinka Law of Obligation

Within the Law of Obligations, some applications of both contract and tort law are peculiar to the custom and practice of different tribal groups. They are worthy of examination for they exemplify the social values of the society. Again, Dinka customary law is typical of the customary laws of obligation throughout southern Sudanese society and therefore a very useful example. The commonest form of contract law within Dinka society is known as *Amuk*. It is defined as<sup>32</sup>:

*'Amuk is any property delivered by a debtor (raankoony) to a creditor (amekony) as a form of security or guarantee for the repayment of a debt (keny) or discharge (cuot) of existing obligation.'*

*'If the debtor fails completely to repay the debt at the fixed time, the secured creditor is entitled to own the property he possesses as amuk at a reasonable period after the expiry of the said period, or at the period, which the court may consider to be reasonably long in the circumstances, if no fixed period for discharge of the debt was agreed upon at the time of the contract.'*

In Dinka and other Nilote peoples the *amuk* usually involves cattle and as the law requires that creditor exercise reasonable care for the safety of *amuk*, it is consequently the subject of much litigation in southern Sudanese courts.

#### 8.4.4. Liability for Animals

Not surprisingly, a predominantly pastoral society like the southern Sudanese peoples, have comprehensive customary laws dealing with tort issues and liability for animals. The laws deal with damage done by one animal to another, damage done by an animal to a human and damage done by an animal to property other than animals. The basis for liability for the acts of animals are deemed under the laws to be threefold:

- To put the claimant in the economic position he was before the act was committed.
- The keeper of an animal has a duty of care to members of the public and their property.
- The keeper of the animals enjoys economic and social benefits from them and must therefore expect to be liable for their actions.

In addition to detailing responsibility and liability, the various bodies of customary law also lay down the awards for each particular act of damage. Examples are laid out in a further section of this paper, comparing different customary law systems.

#### 8.4.5. Obligation, Reconciliation and Homicide

Of the many differences between customary law and statutory law, particularly Western statutory law, arguably the most contentious is the issue of homicide. South Sudanese customary law considers some acts to be both a crime and a tort. Homicide falls into this category, in that the law considers there to be both criminal and civil aspects to murder. The law traditionally has -allowed the relatives of the victim to decide whether they wish to seek justice through criminal proceedings or to seek damages through tort action.

The basis for this argument lies in the Southern Sudanese peoples' belief that the purpose of any legal action in regard to crime is to restore the social equilibrium rather than to punish the wrongdoer. *'The principle of a life for a life rarely leads to a permanent peace.'*<sup>33</sup>

#### 8.4.6. Dia

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<sup>32</sup> The Re-statement of the Bahr el Ghazal Customary Law Act [Dinka Customary Law] 1984, Section 64(a)

<sup>33</sup> P.P.Howell, A Manual of Nuer Law, Oxford University Press, 1954, p41

Reconciliation is sought through the payment of damages by the family of the guilty party to the family of the victim. Such damages, known generically in southern as well as northern Sudan by the Arab term *Dia* are paid in a 'currency' and according to a scale laid down under individual customary law systems. In Dinka society such damages, known as *apuk* are always paid in cattle and range according to the social status of the victim and the circumstances of the murder but normally are around thirty cows for a person's death.

#### 8.4.7. Collective Responsibility for Killing

It is very common for the customary courts to decide that the circumstances of the act [of murder] are such that there is collective responsibility for the killing and that the person who carried out the act should not alone have to pay *Dia*. Although the individual is tried alone, when guilt has been ascertained the courts determine collective responsibility. The amount of *Dia* does not change but the total is divided amongst a number of groups deemed by the courts as being in part responsible for the act. The tribal chief is then required to confirm responsibility, inform the relevant parties and organize collection. Liability for the act may fall on some or all of the following:

- The guilty party's family
- The kin group of the guilty party
- The guilty party's tribe or sub-tribe
- Where his father has not claimed the guilty party: the maternal uncles.

The reasons for assigning collective responsibility are twofold and key to understanding why customary law courts often provide a more socially acceptable (for southern Sudanese society at least) means of dealing with homicide:

- Where an individual has killed another whilst involved in an internecine dispute, the courts and the community recognize that the individual was acting as part of a family or community in carrying out the act and that the family or community bear collective responsibility.
- It [collective responsibility] is a clear recognition of the solidarity of the family and the responsibility the family has for the actions of one of its members.

#### 8.4.8. Differing *Dia* Payments

Where murder is committed by the member of one tribal group upon another tribal group with differing customary laws, then the laws of the victim's tribe are preeminent. Compromise may have to be reached with regard to payment where different 'currencies' are used.

#### 8.4.9. Advent of Statutory Law and Homicide

With the Anglo/Egyptian colonization came statutory law and in particular criminal laws dealing with a raft of issues that had hitherto been the remit of customary law. Although the judiciary allowed the customary law systems great leeway in dealing with day to day legal matters (*Chief's Courts Ordinance 1931*) allowed:

*The Chief's Court shall administer the Native Law and Custom prevailing in the area over which Court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order.*

The key issue was the subjective nature of what was deemed 'contrary to justice, morality or order'. Murder, particularly where the circumstances of specific crime was deemed 'repugnant' [by the British-influenced colonial administration,] or where the killing was likely to threaten 'order' (i.e. create or increase inter community conflict) became increasingly a matter for the statutory courts rather than customary. The resulting punishment, which was often the death sentence for the guilty, contributed little to the reconciliation of the communities and was unpopular.



#### 8.4.10. New Sudan Penal Code and Murder

South Sudanese society's preference for dealing with murder by traditional means of Dia has been an enduring theme in the legal process since colonization and remains so today. Such is the strength of feeling on the subject, the New Sudan Penal Code, 2003, Section 251, which deals with murder and other crimes of homicide, contains the provision:

*'Provided that if the nearest relatives of the deceased opt for customary law blood compensation "Dia" the court may award it in lieu of death sentence.'*

#### 8.4.11. Punishment and Reconciliation

The stark contrast between the approach to murder in customary and statutory law courts, exemplifies the differing philosophies of southern Sudanese and Western-orientated societies. Whereas the ethos of punishment and deterrence exists in both systems, customary law takes a more pragmatic and arguably humane approach. It recognizes the need to find reconciliation between the families and communities of victim and perpetrator and recognizes that imprisonment or death rarely achieves conciliation. Moreover, punishment costs the community in terms of further lives lost from the workforce and/or the cost of lengthy incarceration. Finally, it fails to address the previously described issues of community and family responsibilities for the act.

#### 8.4.12. Defamation

Southern Sudanese customary law systems also contain, under their laws of obligations, clear descriptions of what constitutes defamation and provisions for dealing with it. The reasons for such explicit legislation are best explained by Francis Deng<sup>34</sup>

*'Spoiling a man's name by unjustifiable defamatory statement is considered a serious matter in African societies...the maintenance of one's name is the primary purpose of the family in African thought, and anything that spoils a man's name threatens to reflect on the family. Protection of the family is therefore an important factor in the law of defamation.'*

Specific laws and awards of compensation exist in most customary law systems to deal with defamation in the written and spoken word and, importantly in song. The latter, it is argued, is the more serious because it spreads more quickly and is more enduring.

The issue of defamation is a serious issue amongst many communities and is often held to be the cause of conflict and violence. However, the counter argument also prevails, that no one bothers to criticize a person of low status. "You look very important or noble when people tend to criticize you, whether rightly or wrongly".<sup>35</sup>

### **8.5. Procedure**

#### 8.5.1. How v What

Every legal system has its procedural rules and customary law is no exception. To demonstrate how these rules work in a customary law court it is necessary to understand how rules of procedure differ from rules of substantive law. This has been described as:<sup>36</sup>

*'On of the differences between the two systems is that the rules of substantive law define the rights and duties or liabilities of people, while the rules of procedure regulate how the rules of substantive law are to be defended and enforced by a court of law...Rules of procedure mostly answer the question 'how'? – For example how does a litigant open his case or enforce his right against a defendant? – While the rules of substantive law answer the question 'what'? For example, what is the right of an original owner when a thief who stole his property has been convicted?'*

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<sup>34</sup> Dr Francis Deng, SLJR 1965, p 560

<sup>35</sup> Quoted in Wuol Makec, John., *The Customary Law of the Dinka People of Sudan*. Afroworld Publishing Co. 1988.

<sup>36</sup> Ibid

There are a number of rules of procedure in customary law that sets it apart from statutory law. These issues are discussed in the following paragraphs.

#### 8.5.2. Adversarial v Investigative Systems

In English Common Law and many other statutory law systems, the procedure used is a so-called 'Adversarial system' where the judge or court takes no part in the judicial contest, that is undertaken by the litigants, usually through their counsels. The judge assumes a position of neutrality designed to confirm to the public his or her impartiality. In customary law, the function of the judge is 'investigatorial'. The duty of the judge in this forum [customary law court] is to elicit the best evidence from the litigants in order to pass a correct judgment. The investigative system of customary courts is justified on three key counts: advocates are not entitled to appear before customary law courts, there are few trained counsels and advocates available to present the litigant's case and the litigants tend to be ignorant of what facts and statements of witnesses may shape the outcome and the judge has a role in drawing out all the issues.

#### 8.5.3. Role of Judges

The key role assumed by the judge in customary law courts makes it vital that the individuals appointed to the task are trained to the highest possible standards. This training must include, customary law, laws of evidence and rules of procedure. Given the very small numbers of trained judges available at the time of this report and the need for a considerable increase in numbers, there is a clear requirement to develop a comprehensive training program for customary law judges as an essential element of civil society development.

#### 8.5.4. Court as Arbitrator

It has already been stated that customary law has at its core, the principle of conciliation. The aim of the court is to achieve community peace and social harmony through a process of compromise and reparation for wrong committed. This desire for reconciliation shapes every court action and attitude. The court will assume a persuasive role and shape arguments to the point where it closely resembles a Western arbitration tribunal.

Sudanese customary law assumes that all legal disputes should be settled outside of the court; a judicial proceeding is a last resort, signifying a deadlock that the council of elders cannot resolve. Even when the dispute comes before the judge the doors are not shut to settling the case outside of court. The elders who first heard the case will continue in court to try and find a compromise acceptable to both parties. Litigation, in the Western sense, is a contest where the court aims to find for one party over another, is concept foreign to southern Sudanese society.

#### 8.5.5. Simple Procedures

Given that customary law courts require that individuals present their arguments without the specialized assistance of trained advocates, the rules of procedure within these courts must of necessity be simple and comprehensible to all who would use them. Complicated procedures may lend themselves to complex arguments and cases but they are rare in Sudanese society. Moreover, the aim of reconciliation is seldom served by complicated rules. Customary law is in its very nature simple and aims to achieve speedy settlement and satisfaction for all parties at the minimum of physical effort and expense.

#### 8.5.6. Authority of Courts

The Constitution of the Chiefs' Courts governs the customary laws of the people of southern Sudan. This structure was established by the Anglo/Egyptian condominium by means of a statutory instrument, the Chiefs' Courts Ordinance 1931. It was the first time the state had involved itself in the traditional judicial

system;<sup>37</sup> The *People's Local Courts Act 1983* repealed the original ordinance, but replaced it with an almost identical mandate, which remains, for the most part extant in southern Sudan today, modified under the Laws of Procedure of the New Sudan.

The Ordinance established there be the following courts:

- Chief sitting alone
- Chief as president with sitting members
- Special Court

The first two Chief's courts listed are permanently established by means of warrants issued under the hand of the Chief Justice.

The most common type of customary law court is that with the chief as president and with sitting members. There are two types of court established in southern Sudan under this structure: a Chiefs' court, also known as an A-court, and a Regional court, also known as a B-court.

Slightly confusingly for the initiate, the Regional or B-court is higher than the Chiefs or A-court.

#### 8.5.7. Jurisdiction of Customary Courts

The jurisdiction of courts is a key subject in any judicial system southern Sudanese customary courts are no exception. When a case appears before a court the first step is to determine whether that court has the jurisdiction to hear it. Jurisdiction as been defined as:<sup>38</sup>

- *The power of the court or judge to entertain an action, petition or other proceeding*
- *The district or limits within which the judgments or orders of a court can be enforced or executed.*

The jurisdiction of individual courts are determined by the Chief Justice and defined in the warrant of their establishment. Invariably, restrictions are placed upon the jurisdiction of each court, which determine such issues as the value of fines/awards, the types of cases that can be heard and the territory within which the court may exercise its powers. The original Chiefs' Court Ordinance provides detailed and complex guidelines, still in use but modified under the Laws of Procedure for New Sudan, for the Chief Justice regarding what subjects and over whom the individual court has jurisdiction.

#### 8.5.8. Rights, Limitations and *Res Judicata* in Customary Law

Customary law, in common with other modern legal systems, recognizes where a person has a cause of action, that is where he can show a *prima facie* case against the defendant, he is legally entitled to raise a civil suit against that defendant. This is known as a right of action. In modern legal systems there is usually a statute of limitations governing every action, setting a strict timeframe within which action must be taken if at all. Customary law does not recognize such a period of limitation for action and with the exception of certain specific circumstances; right of action will prevail over the passage of time.

The Chiefs' Courts Ordinance and now the Laws of Procedure of the New Sudan are subject to the common law doctrine of *res judicata*, which dictates that where a court has finally decided a case, the same case cannot be the subject of litigation between the same parties or between their successors or trustees of their estates and families again in the future. Raising a case that has already been decided upon as if it were a new fresh case - renewal - is forbidden in customary law. A case can, however, be revisited if new facts emerge after the passing of the first decision and every individual has a right to appeal his case to a higher authority.

Under customary law a case raised by or against an individual is case raised by or against a family or group of families. Every member of the family or families is entitled to attend court hearing. However, since it will almost certainly be impossible for all members to appear before the court, those who actually

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<sup>37</sup> Wuol Makec, John., *The Essentials for the Re of Customary Law in the Southern Sudan*. The Sudanese Judgment and Precedents Encyclopedia. Sudan Judiciary, Khartoum. At 3.

<sup>38</sup> Osborn's Concise Law Dictionary, John Burke.

attend and contest the case do so as representatives of the whole family or families. The action is in effect a representative action. Any member of the family can attend at any point in the hearing as he or she is party to the suit by virtue of family membership. The principle of family unity also dictates that an individual may be subject to a court decree even if they have not been parties to the case.

Customary law allows that where a party to a case dies whilst the case is pending before the court, the party's legal representative or heir is entitled to take up the case. Moreover, as all members of a family are considered to be party to the case, survival of actions is implicit in customary law.

#### 8.5.9. Power of Court

It is common practice in customary law, for the court to order a defendant to produce the subject of litigation or an equivalent, in court. This is particularly so if the court has grounds to believe the defendant may transfer the subject of the dispute to a third party, may conceal the subject or may abscond. Failure of the accused to action the court order is treated as contempt of court, which attracts a penalty. The courts will also order seizure of the subject property, which will be held in safe keeping by a court-appointed trustee.

#### 8.5.10. Bringing a Case to Court

A party may begin proceedings by means of an oral or written petition addressed to the court, court's president or member of the court. There is no strict format but the petition must show a right of action otherwise it will be rejected. The petition may be presented:

- Directly to the court President or member at any time
- Through the clerk of the court to the President, by way of petition
- By attending and addressing the court from an area reserved for complainants

Once the President of the court has examined the litigant and determined there is a case to answer, the case is admitted and summonses issued to the defendant and witnesses. The court retainer, an individual authorized to carry out specific policing duties on behalf of the court, will present the summonses. Failure to attend court at the time specified may result in arrest and seizure of property.

#### 8.5.11. Ceremony

Most customary law courts conduct proceedings in a similar fashion. An examination of the rules of procedure of the Dinka court, described by John Wuol Makec<sup>39</sup>, provides a good illustration of typical customary court proceedings. The hearing is simple. There are no pre-trial proceedings, once a petition is admitted to the court and a date is fixed and on the day, if all parties appear the trial takes place. Makec describes in detail the makeup of the court and the roles of its members.

*'The court President and members are seated in a semicircle at one side of the court. The President sits in the middle and members sit on either side according to seniority till the line ends on either side with the most junior member. Traditionally court membership was elastic, its size depending upon the numbers of chiefs present in court. But contemporary practice is for the Chief Justice to fix the size in the warrant of establishment. ...Bahr El Ghazal Region courts comprise five members including the President. Three members amongst whom is the President, constitute a quorum.'*

*'...The court clerk and police are seated facing the court. They put on record the summary of proceedings or the evidence given during the hearing...Agam-long is seated in the middle between the court members and the clerk...No trial takes place unless he is present to play his traditional ceremonial role...Every person who speaks in court, including the President and court members, speaks through him. Agam-long repeats aloud the words of each speaker. He is an orator who has command of the language of the*

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<sup>39</sup> Wuol Makec, John., *The Customary Law of the Dinka People of Sudan*. Afroworld Publishing Co. 1988.

*court...it is part of his duty to direct the parties and witnesses and the court as to what steps to take at each stage of the proceedings...The plaintiff and his witnesses sit in front of the court at one side of Agam-long. The defendant and his witnesses at the other side...Retainers and court's agents who maintain order, stand around the court...At the outer ring...members of the of the public who are always attracted by court proceedings, sit or stand.'*

#### 8.5.12. Hearing

The process of hearing the case follows a similar pattern to statutory law courts except that *Agam-long* is the master of ceremonies. The oath is taken using a spear and is accompanied by an elaborate ceremony. There is little attempt to reduce the evidence given by plaintiff, witness or defendant, even if it appears irrelevant. This tends towards very long and tedious trials. Investigation and cross-examination are a continuous process, led by the court President. When the case is complete, each member of the court, starting with the most junior member gives his judgment. Finally the President addresses the court, analyzing the other members judgments and giving his own. The decision of the court is given as a consensus by a majority of the members. The clerk of the court reduces decisions to writing, the President signs and the judgment is dated.

#### 8.5.13. Revision

There exists within customary law, the power of revision. Courts can be requested to revisit and revise a decision for the following reasons:

- To correct errors of facts in judgment
- To correct errors on points of law. For example where a chiefs court tries a case it is not competent to try in law.
- To correct decisions made in excess of the court's powers or jurisdiction under its warrant of establishment
- When fundamental new evidence has been discovered subsequent to the trial, which might signally alter the outcome

#### 8.5.14. Execution of Court Orders

When a court passes a decree or judicial order, litigation is not deemed complete until the decree or order has been executed. Court bailiffs and retainers are empowered to demand payment from those parties against whom findings have been made. Where those parties fail to meet the court's findings, property may be seized and individuals brought again before the court and charged with contempt.

#### 8.5.15. Appeals

The concept of an appeal and the development of a system to enable appeals are new phenomenon in southern Sudanese customary law. The Chiefs' Courts Ordinance 1931 introduced the system. Prior to that date, the chief who heard and judged the case was the final authority. The 1931 Ordinance allowed appeal as a right rather than a privilege. It also provided an extensive system of appeal through the higher courts. The [Chiefs Court] Ordinance amended in 1983 and retained under the Laws of Procedure of New Sudan, lays out a comprehensive system for appeals. An appeal from the Chiefs Court – Court B can be heard at the Regional Court – Court A. This decision can then be heard at the Payam Court and then up to the Country Court. Current practice is to skip Court A and the Payam Court and go direct from Court B to Country Court. Appeals above that level go to the High Court Judge and finally to the Court of Appeal, the highest level an appellant can petition.

The problem with such a comprehensive and inclusive system is that it is prone to over-use. The fact that there is no time limit for appeals adds to the likelihood that they will be made. Since its introduction the appeals in customary law cases have grown steadily. On current evidence this growth is increasing rapidly

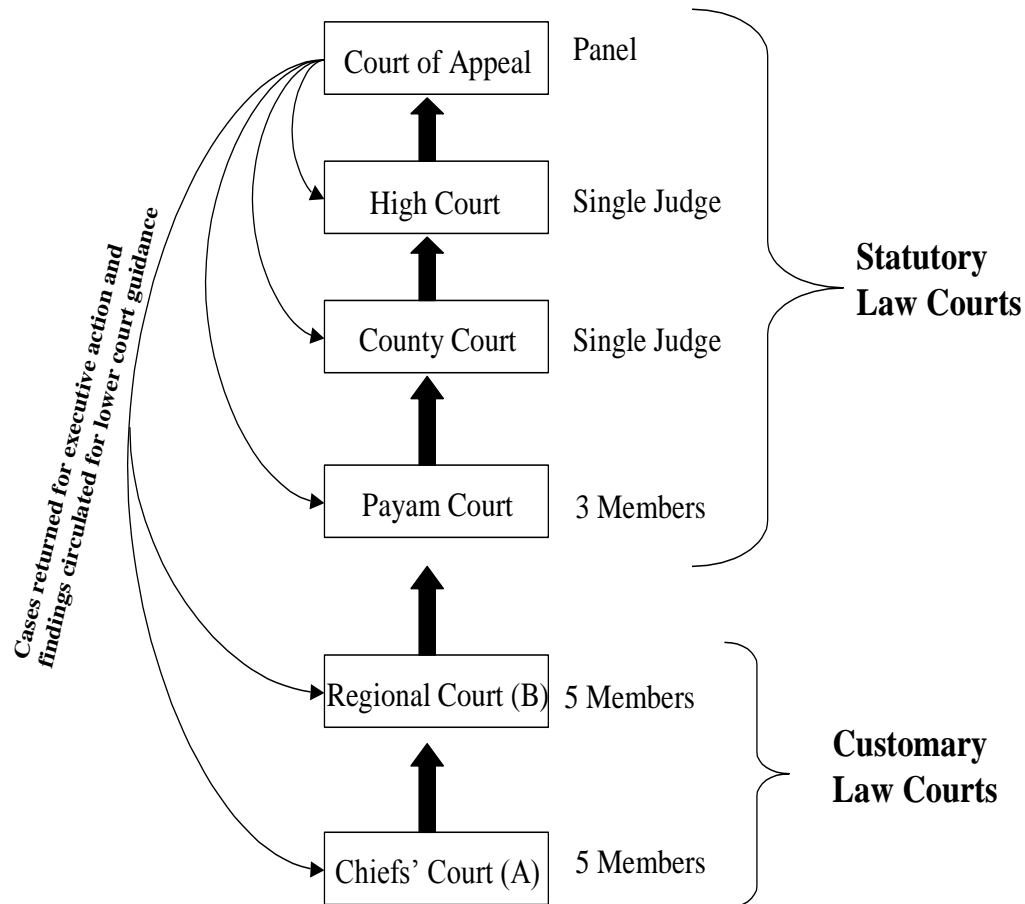
in the immediate post conflict stage. There is currently serious deliberation amongst the judiciary and administration of New Sudan to limit the level to which appeals of customary law cases can be heard.

## 9. The Courts of the New Sudan Judiciary

### 9.1. The Court Hierarchy

The New Sudan Judiciary comprises a six-tier court system shown in the diagram below:

#### New Sudan Judicial System –Court Hierarchy\*



\* See Chapter 11 of the New Sudan Code of Criminal Procedure 2003

**Fig2. New Sudan Judicial System**

#### 9.1.1. Chiefs' and Regional Courts

The two lower courts, Chiefs' Court (known as 'A' Court in Equatoria) and Regional Court (known as 'B' Court in Equatoria) are local courts dealing in the main with customary law. They are empowered to deal with both criminal and civil cases as dictated in the warrant of establishment issued by the Chief Justice. These courts have remarkably wide powers to deal with both criminal and civil cases. In the case of the former they may use customary law to deal with crimes ranging from theft through criminal breach of trust to murder (particularly where the killing(s) result from tribal or sectional fighting). In the latter cases may range from marriage through custody of children, incest and divorce. Appeals from the Chiefs' Court should go to the Regional Court but in practice appeals from both go direct to the Payam Court.

#### 9.1.2. Payam Court

The Payam Court is the lowest court in the hierarchy of statutory law. It currently comprises 3 members and is empowered to deal with both customary and statutory law cases to deal with criminal and civil cases. The Payam Court is little different from the local courts but does have the power to settle appeals resulting from local court decisions

#### 9.1.3. Country Court

The Country Court is currently the lowest court where a legally qualified judge is appointed. County Courts are empowered under the Laws of the New Sudan Criminal and Civil Procedures Act<sup>40</sup> to hear and settle most criminal and civil cases under statutory and/or customary law. County Courts are focus for appeals from the lower courts.

#### 9.1.4. High Court

The High Court is empowered to hear and settle major criminal and civil cases exempt those matters related to the Constitution. It also receives appeals from the High Court and lower courts and is required to deal with both statutory and customary law cases

#### 9.1.5. Court of Appeal

The Court of Appeal is the highest court in the New Sudan Judiciary structure. It is the final point of appeal and is empowered to confirm capital punishment and may be asked to pronounce upon Constitutional matters of law. It deals with appeals under both statutory and customary laws, which have been passed up through due process.

### **9.2. The Appeals Process – An Example Case**

Chol Bayic (Appellant) v Majacdit Makoi (Respondent) Case No 62002 dated 14 Oct 02. Court of Appeal decision in Rumbek.

The case began in the Chiefs' Special Court and came to County Court by way of appeal. It concerned the custody of a child contested between her legal father Majacdit Makoi (Respondent) and her biological father Chol Bayic (Appellant). The Respondent caused a [un-named] girl to become pregnant but was unable to marry her. In due course the girl was given in marriage to the Respondent who paid 'bride-wealth'. A child was subsequently born in wedlock to the now-married girl and the Respondent.

When the child, a girl, had grown some years, the Appellant claimed the child before the Chiefs' Court but was rejected and the child was awarded to the care of the Respondent. The case was appealed to the County Court, which overturned the Chiefs Court decision. The case was appealed in turn through the High Court to the Court of Appeal, which eventually found in favour of the Chiefs' Court decision and overturned the County Court verdict. The case has become a precedent in case law.

## **10. Issues of Customary Law and Human Rights**

### **10.1. Individual Rights and Customary Law**

Any debate about the rights of the individual and in particular women and children in traditional southern Sudanese society must be conducted against a background of complex, interlacing social structures, checks and balances designed over many millennia to establish, expand and protect the community. There

<sup>40</sup> Laws of the New Sudan – Criminal and Civil Procedures 2003 – Chapters 3 in both Procedures

are undeniably a number of egregious inequities, particularly in respect to women's status and they should be addressed. The question, raised often within this paper, concerns the process for dealing with both real and perceived inequities. Change must come at a scope and pace that society can adapt to without serious internal conflict at the community and family level. The forces for change described in this paper are already exerting their effect on the family and marriage. The increasing use of money for 'bride wealth' is evidence of such change.

## **10.2. International Human Rights Instruments**

There exists an armamentarium of international human rights laws and other instruments under the aegis of the UN Office of the High Commissioner for Human Rights. Many [of these instruments] are reflected in a more appropriate and useful form [for the purposes of this Study] in a document produced under the auspices of the Organization for African Unity (OAU) (since renamed the African Union (AU)) known as the *African [Banjul] Charter on Human and Peoples' Rights*, which was adopted by all member nations on June 27, 1981 and came in to force on Oct 21, 1986.<sup>41</sup> An excerpted version of the document is at Annex D.

## **10.3. African Charter on Human Rights**

Of the many and various rights, duties and freedoms recognized under the Charter, a number are key to the arguments regarding the particular rights of women and children outlined in this Paper. The relevant Articles are detailed below:

### ***Article 2***

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

### ***Article 3***

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

### ***Article 4***

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

### ***Article 5***

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

### ***Article 13***

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

### ***Article 17***

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.

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<sup>41</sup> African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986:



3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

#### **Article 18**

1. The family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

#### **10.4. Addressing Individual Rights**

Even the most liberal interpretation of the majority of southern Sudanese customary law systems, particularly in the area of Family Law, show clearly a conflict between the rights enshrined in the Charter and those allowed women and children in customary law. It seems reasonable to assert that with regard to many aspects of individual human rights, women and children in southern Sudan have international law on their side. The pressure for customary law to come into harmony with international law will continue to grow and must sooner or later be addressed.

#### **10.5. Specific Human Rights Issues that Might Urgently be Addressed**

Danne argues in an as yet unpublished paper<sup>42</sup> that a number of the more obvious and contentious issues of human and individual rights under the application of some aspects of customary family law might be addressed urgently without great risk of social disruption and to the benefit of women and children in particular and society in general. These include:

- According equal status for women before the courts particularly with regard to addressing forced marriages.
- Amending adultery laws, which potentially encourage unscrupulous husbands to use their wives as wealth-creation entities through abuse of Court imposed penalties.
- Amending adultery laws, which result in children being unfairly incarcerated by the action of Courts in punishing one or both of their parents.
- Outlawing the betrothal of children against their will, when motivated by personal gain, rather than the child's best interests.<sup>43</sup>
- Amending customary laws forbidding widows living on in the deceased husband's estate unless they consent to 'inheritance by the deceased's kinsman.
- Outlawing customary laws, which sanction physical abuse of women.
- Amending customary inheritance laws, which may prevent female children inheriting property from their family.<sup>44</sup>

#### **10.6. A Strategy to Address the Issues**

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<sup>42</sup> Danne, Alex, *African Customary Law in Contemporary South Sudan* Draft Paper 2003

<sup>43</sup> Kur, Dengtiel. A., *Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan*. Workshop on the Legal Protection of Children Organised by the South Sudan Law Society. 2000. Rumbek, New Sudan. At 9.

<sup>44</sup> For an investigation of this issue see generally: Zimmerman, Jill., *The Reconstitution of Customary Law in South Africa: Method and Discourse*. Harvard Black Letter Law Journal. Spring 2001 at 197.

If the basic premise of this Study that ‘change must come from within’ is an acceptable hypothesis then any future strategy should be aimed at facilitating that change rather than attempting to impose it from the outside. A workable strategy might include a combination of three tactical approaches:

- A social marketing initiative utilizing the standard tools for achieving public and community awareness of the issues in contemporary southern Sudan.
- A focused campaign on the issues aimed at particular stakeholders; chiefs, lawyers, police, local government officials, community leaders and community activists.
- An initiative by the judiciary to bring pressure for change through court decisions on case laws which in turn become precedent.

To achieve a synchronized strategy, it would be necessary to involve an array of experts from both within and without southern Sudan. A workable approach might be to use the medium of developing and propagating written customary law systems as a tool to focus upon the key stakeholders and to enlist the judiciary in the development of such a program.

## **11. Case Law: Illustrating the Changing Nature of Customary Law in Southern Sudan**

### **11.1. Precedent as Law**

With regard to the issue of case law and precedent, there exist a number of examples of precedent as law in the New Sudan legal system. Some examples are provided as illustration.

### **11.2. Case 1 - Murder During Internecine Fighting**

The case concerns an outbreak of internecine conflict between neighboring Lou and Konjok of Dinka Rek sub-tribal group in Tonj County in 1983. The fierce fighting, over grazing lands, resulted in the deaths of 114 in tow days. Subsequent investigations and judicial hearings were conducted under customary laws and findings resulted in a number of awards of *Dia* to relatives of the slain.

When details of the case reached the higher court judge, he found the standard customary law practices in this case, to be encouraging the wealthier families and clans to acts of violence with impunity; they could afford to pay *Dia*. The judge introduced additional penalties from the statutory laws including imprisonment, fines and land-default. The findings in this case have become precedent against which subsequent cases have been managed.

### **11.3. Case 2 - Death by Negligence**

The case, Madut Achiil Cikoc v Maguor Aken Aterswey, MSI/CA/CV. APP/5/2002 before the Court of Appeal settled date 17/4/2002 – Rumbek County.

The case is of an alleged killing by negligence. The accused was alleged to have administered extracts of a particular plant to act as a ‘love charm’ to ‘an old man’. It was alleged that the initial result [of the administered plant] was the ‘old man’ lost his teeth. He was then alleged to have died ‘two years later’. Despite the dubious nature of the evidence, the length of time between the administration of the drug and death and the deceased being an ‘old man’, the lower court awarded *Dia* to the relatives of the deceased. The decision was upheld on appeal to Payam, County and High Courts.

The appeal moved to the Court of Appeal, which overturned all previous findings and dismissed the case against the accused. *Dia* was rreturned. The precedent set enables all future awards of *Dia* from customary courts to be appealed to Court of Appeal for scrutiny.

### **11.4. Case 3 - Adultery**

Adultery, long a contentious subject in southern Sudanese society, is currently a major concern for courts at every level. Despite the social opprobrium and swingeing penalties it attracts in many communities such as Dinka and Nuer, the incidence has increased dramatically in recent years. Close scrutiny by the courts has drawn attention to the practice of some unscrupulous husbands conspiring to engage their wives in adulterous relationships with men in order to gain compensation in a court of law.

A typical case was *Magot Kok v Dongrin DS/221/74*. The appellant, Magot Kok, sued the defendant, Dongrin claiming adultery and demanding compensation. The court, having ascertained that Kok's wife had been found guilty of committing adultery on [at least one] previous occasion, dismissed the case. The case set a precedent that allows the courts, under customary law, to award compensation for only one [and the first] case of adultery presented by a particular husband to the court. Any subsequent case presented by that husband will only allow the husband to plead for and obtain a divorce, which does not provide compensation.

### **11.5. Case 4 - Custody of Children**

Custody of children is traditionally a contentious subject in southern Sudanese society, much more so than in the northern communities where Sharia Law, like Western law, is very clear on the issue. In southern Sudanese communities custody of children is a more complex issue than in other societies, being bound up with marriage payment of 'bride wealth' and divorce. The most complicated aspects concern girls who might attract considerable 'bride wealth' to a family upon marriage. It is not uncommon for a young woman to become pregnant and the man refuse to marry her. She and her child would remain with her parents. Where the child is a girl and grows up to be an attractive, marriageable [and valuable] individual, biological fathers commonly claim these girls as daughters in customary law courts.

Such a case appeared before the Court of appeal in Rumbek County: case number CIC-APP/56/2002: *Akol Machar Manok (Appellant) v Manjouei Kuany Macuol (Respondent)*. Nyibol Mayen the mother of the child in dispute, is the sister of [the appellant] Akol Manok, she became pregnant to Macuol who failed to marry her. She was later married to Kuany Macuol, the father of the Respondent. He paid 40 head of cattle as 'bride-wealth'. When the child [a girl] grew up she was about to be married (for more than 40 head of cattle 'bride wealth' from her suitor's family) when the Appellant claimed custody as the biological father.

The Payam Court of Maper found in favour of the Appellant but the County Court judge set this aside. He was in turn over-ruled by the High Court who found in favour of the Appellant. In turn the case appeared before the Court of Appeal, which found in favour of the Respondent who was proven to be the legal guardian of the child. The findings were strongly caveated that in future cases a time limit of ten years should be placed upon all claims for paternity and redemption of children. This limitation would, the court believed, discourage unscrupulous men neglecting their biological children until they were able to make financial gain from them.

### **11.6. Case 5 - Property (Land) Case**

The case *Gabriel Mathiang Rok (Appellant) v Matur Ajaj and others (Respondents)*: before the Court of Appeal in Rumbek County 31<sup>st</sup> Dec 2001.

Facts of the case were that the Appellant's father had land in Rumbek town he had long-since gifted to an Islamic scholar's group who had constructed a school and teachers' residence on the site. When SPLA/M captured the town in 1998, the school and other buildings were found abandoned and remained unclaimed for some time. Eventually, the land was re-allotted by SPLA/M to a number of applicants including Ajaj, who was allotted plot No 12 in dispute. The Appeals Court found that the Appellant's claim to the land could not be upheld because of a break of usage of the land in question. Had there been any continuous

usage of the land by the Appellant or any of his family then the court would have upheld his claim. The case sets precedent in that in future cases those claiming land must show continuous use in at least some way. This case law will have considerable significance in the future as returnees look to re-claim lands.

## 12. Conclusions

There are a number of conclusions stemming from this research. They are listed below, in no order of priority.

1. Customary Law is the manifestation of the customs, beliefs and practices of the people of southern Sudan. These [customs, beliefs and practices] are a key component of what the people of southern Sudan fought to preserve. They cannot be expected (and are for the most part unwilling) to abandon or have radical change imposed upon these laws in the immediate aftermath of war.
2. Customary law remains the predominant source of law in contemporary southern Sudan. Over 90% of day-to-day criminal and civil cases are executed under customary law.
3. Customary law is not in and of itself a source of inter-tribal conflict. To the contrary, the basic tenet of customary law is reconciliation, which makes it a vital tool in conflict resolution. In the immediate post-conflict period, as populations return to old tribal areas, old disputes, dormant for many years will resurface and new disputes are inevitable. Conflict resolution through customary law will be essential to developing a peaceful and fair society.
4. War has greatly reduced the power and status of tribal chiefs who are pivotal in the function of customary law. In particular, the implementation of military tribunals in place of customary courts, a commonplace action throughout the war, has over time, significantly eroded the status of chiefs within their communities. It is very unlikely that the development of a stable society in contemporary southern Sudan can succeed without addressing the issue of the roles and authority of tribal chiefs in the modern era.
5. War has undermined the key infrastructures of law throughout southern Sudanese society, in particular, the judiciary, police and prison services, to the detriment of customary law. The judiciary at every level lack trained judges, support staff or resources. Cases outside the remit of the customary law courts or on appeal from those courts are not being dealt with promptly. The backlog grows and so does the discontent. Justice delayed is justice denied. Few police are trained to in the basic skills required to prosecute cases in the courts. Prisons, where they exist, are harsh places, lacking even basic resources and women prisoners fare particularly badly. The future rule of law, including customary law, in southern Sudan will depend upon fundamental enhancement of the key infrastructure
6. Of the approximately fifty customary law systems in southern Sudan only a handful exist in written form. This puts customary law at a disadvantage when it is in dispute with other systems of law, which are written down. It also leaves customary law open to criticism of 'biased interpretation.
7. Traditionally there has been resistance within southern Sudanese society to recording customary law. However, there is now a strong and growing opinion at all levels of southern Sudanese society that customary laws should be documented and widely disseminated. There are a number of customary law systems, which lend themselves to being reduced to writing, the task should be undertaken in the near future.
8. There is overwhelming consensus amongst those interviewed, that change to customs, beliefs and practices throughout southern Sudan and with it customary laws, is inevitable. There is considerable

evidence that southern Sudan's customary laws are already being challenged from many directions, but particularly by Statutory Law, Sharia Law, International Humanitarian Law and SPLA military law.

**9.** The only difference in opinion is in the scope of change, which ranges from cosmetic 'improvements' and amendments in penalties and awards through the need to fundamentally change the 'bride wealth' system to the outlawing those customary practices perceived to blatantly abuse human rights.

**10.** The majority of southern Sudanese customary law systems, particularly in the area of Family Law, show plainly a conflict between human rights laws and those granted to women and children in customary law. The pressure for customary law to come into harmony with international law will continue to grow and must sooner or later be addressed. A strategy for dealing with this issue should be developed by government officials, community leaders and the judiciary in the very near future.

**11.** Historically [from British colonization and after] Sudanese statutory law has influenced customary law. This is evinced by the use of terms such as 'reasonableness', 'justice equity and good conscience' as caveats by the judiciary on the utilization of customary law and 'repugnance' as a means of describing some crimes as being beyond the remit of customary law. Statutory laws that allow crimes such as murder to be dealt with by either customary or statutory courts are a recent and important example of judicial ruling affecting customary law.

**12.** History shows the evolution of customary law will be shaped 'from the bottom up' by the will and opinions of the people, expressed through meetings, conferences and the traditional systems of communications. It will also be driven 'from the top down' through the mechanism of statutory law courts, the appeals process and the opinions and rulings of judges. History shows, such decisions will create precedent and case law that will in turn shape customary law.

**13.** There is universal agreement that change [in customs, practices and beliefs] must come from within Sudanese society and at a pace, to which individuals and society can absorb and adjust. Plans to assist the development of customary law must be designed against the need to avoid unintended consequences, which might jeopardize a fragile post conflict society.

### **13. Recommendations**

From the conclusions listed above, the Study Team was offered many options for capacity building of the current legal system in southern Sudan with particular emphasis upon customary law. The Team settled upon three:

1. Training the southern Sudanese police forces in the investigation and prosecution of offences under both customary and statutory law.
2. Development of a formal curriculum for teaching the key customary law systems of southern Sudan to paralegal staffs within the judiciary system
3. The reduction to writing of key customary law systems, the development of a curriculum for teaching written customary law and a programme of workshops to propagate written customary law

## **The Role of Customary Law in Southern Sudan – Questionnaire for the Interviews of Key Stakeholders**

### Judiciary

1. Is Customary Law in general, relevant in modern S. Sudan?
2. What are the imperatives for Customary Law?
3. Why the need for Customary Law when we have Statutory Law?
4. Which Customary Laws are in regular day-to-day use and have real value and relevance in contemporary Sudanese society?
5. Would it be possible and desirable to integrate key aspects of Customary Law into Statutory Law?
6. If so, how could we best resolve local conflicts in Customary Law?
7. Which Customary Laws should be retained and which abandoned?

### Chiefs

8. How do we best reconcile the differences between different Customary Law regimes?
9. How can Chiefs best play a role in reforming Customary Law?
10. What aspects of Customary Law do Chiefs believe should and could be integrated in Statutory Law?
11. What aspects of Statutory Law could and should be integrated into Customary Law?
12. How can Chiefs and the higher courts judiciary best reconcile disagreements over decisions and appeals?
13. What problems do Chiefs experience/envisage in applying Customary Law in a changing society with rising expectations?

### Women's Groups

14. What are the key expectations for the future of women in Southern Sudanese society?
15. What problems do they envisage in achieving change?
16. How does Customary Law and its application affect the roles and status of women in South Sudanese society?
17. What aspects of Customary Law do they believe negatively affect women?
18. What aspects of Customary Law would they wish to see retained and what abandoned?

### Law Enforcement

19. What are the expectations of the future of Customary Law?
20. What is the individual policeman's knowledge of Customary Law?
21. What are the routine key problems of enforcing Customary Law?
22. What Customary Law issue are key in the prosecution of cases?

What imperatives affect police decisions to prosecute under Statutory Law?

23. How do law enforcement organizations and individuals reconcile conflicts between Customary Law and Statutory Law, particularly over heinous and prevalent crimes?

### Legislators

24. What aspects of Customary Law do they view as currently politically difficult to support?
25. What aspects of Customary Law do they envisage as problematic in the future?
26. What political limitations will affect the future use of Customary Law as opposed to Statutory Law?

27. What aspects of Customary Law might need to be reconciled with future plans for the integration of the whole of Sudan?



## Tribal Map of Southern Sudan





# A Comparison of Some Criminal Offences Under Various Customary Law Codes\*

## Annex C to

Offence	Zande	Fertit	Dinka	Nuer	Shilluk	Taposa	Anyuak	Bari
Murder	Dia -money	Dia - money	Dia – cattle (31 hd)	Dia – cattle (80 hd)	Dia - Cattle¶	Dia – cattle ¶	Dia - money	Dia- money
Robbery	Refund property + fine	Refund property + fine	Refund property + fine or imprisonment	Refund property + fine or imprisonment	Refund property +fine or imprisonment	Law is silent practice is widespread	Refund property +fine or imprisonment	Refund property +fine or imprisonment
Adultery	Compensation for husband (money)	Compensation for husband (money) + fine	Compensation for husband (cattle) + fine or imprisonment	Compensation for husband (cattle) + fine or imprisonment	Compensation for husband (cattle) + fine or imprisonment	Cases not usually brought to court	Compensation for husband (money) + fine or imprisonment	Compensation for husband (money) + fine or imprisonment
Rape	Compensation (money) for father + fine or imprisonment	Compensation (money) for father + fine or imprisonment	Compensation (cattle) for father + fine or imprisonment	Compensation (cattle) for father + fine or imprisonment	Compensation (cattle) for father + fine or imprisonment	Compensation (cattle) for father - if reported	Not Known	Compensation (money) for father + fine or imprisonment
Incest	Not an offence common between girl and father	Law is silent	Ritual cleansing – recently fine or imprisonment	Ritual cleansing – recently fine or imprisonment	Ritual cleansing – recently fine or imprisonment	Not Known	Not Known	Ritual cleansing – recently fine or imprisonment
Theft	Refund property + fine or imprisonment	Refund property + fine or imprisonment	Refund property + fine or imprisonment	Refund property + fine or imprisonment	Refund property + fine or imprisonment	Refund property + fine or imprisonment	Refund property + fine or imprisonment	Refund property + fine or imprisonment

¶ Numbers not known

\* Most offences can also be dealt with under statutory law

### A Comparison of Some Civil Cases Under Various Customary Law Codes

<b>Case</b>	<b>Zande</b>	<b>Fertit</b>	<b>Dinka</b>	<b>Nuer</b>	<b>Shilluk</b>	<b>Taposa</b>	<b>Anyuak</b>	<b>Bari</b>
Divorce	Dowry returned to husband	Dowry returned to husband	Dowry returned to husband	Dowry returned to husband	Dowry returned to husband	Dowry returned to husband	Dowry returned to husband	Dowry returned to husband
Custody of children	Children remain with father if dowry paid. With maternal uncles if not	Children remain with father if dowry paid. With maternal uncles if not	Children remain with father if dowry paid. With maternal uncles if not	Children remain with father if dowry paid. With maternal uncles if not	Children remain with father if dowry paid. With maternal uncles if not	Children remain with father if dowry paid. With maternal uncles if not	Children remain with father if dowry paid. With maternal uncles if not	Children remain with father if dowry paid. With maternal uncles if not
Wife Inheritance	Not Practiced	Not Practiced	Practiced and fully enforced	Practiced	Practiced	Not Practiced	Not Practiced	Not Practiced
Forced Marriage	Not Practiced	Not Practiced	Practiced	Practiced	Not Practiced	Not Practiced	Not Practiced	Practiced

### Laws of Obligation and Tort

Offence/Event	Zande	Fertit	Dinka	Nuer	Shilluk	Taposa	Anyuak	Bari
<b>Defamation</b>	Payment of monetary compensation	Ditto	Ditto	Ditto	Ditto	Ditto	N/K	Monetary compensation
<b>Mishap by Fire</b>	Refund of property and fine	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
<b>Injury/Death by Cattle/Goat/sheep</b>	Monetary compensation	Ditto	Animal involved given as compensation	Ditto	Ditto	N/K	N/K	Monetary compensation
<b>Injury/Death by Horse/Donkey/Dog</b>	Monetary compensation	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

### Punishment of Common Offences Under Domestic Statutory and Sharia Laws

Offence	Murder	Robbery	Theft	Adultery	Rape	Incest	Blasphemy
Statutory Law	Death or Life imprisonment	Death or life imprisonment	Imprisonment or fine	Imprisonment and/or fine	Imprisonment and/or fine	Imprisonment and/or fine	Imprisonment and compensation
Sharia Law	Death or Dia compensation	Death	Amputation of limbs	Stoning to death of man and woman	Stoning to death of man	Law is silent	Lashing

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986: [excerpts] . . .

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*Preamble*

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

*Recalling* Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

*Considering* the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

*Reaffirming* the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

*Taking into consideration* the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

*Recognizing* on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights;

*Considering* that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

*Convinced* that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

*Conscious* of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

*Reaffirming* their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

*Firmly convinced* of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

*Have agreed as follows:*

**Part I: Rights and Duties**

## **Chapter I -- Human and Peoples' Rights**

### **Article 1**

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

### **Article 2**

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

### **Article 3**

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

### **Article 4**

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

### **Article 5**

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

### **Article 6**

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

### **Article 7**

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

### **Article 8**

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

### **Article 9**

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

#### **Article 10**

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

#### **Article 11**

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

#### **Article 12**

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. 3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. 4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. 5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

#### **Article 13**

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

#### **Article 14**

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

#### **Article 15**

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work

#### **Article 16**

Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

#### **Article 17**

1. Every individual shall have the right to education. 2. Every individual may freely, take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

#### **Article 18**

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.



2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

#### **Article 19**

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

#### **Article 20**

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

#### **Article 21**

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

#### **Article 22**

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

#### **Article 23**

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for

subversive or terrorist activities against the people of any other State party to the present Charter.

**Article 24**

All peoples shall have the right to a general satisfactory environment favorable to their development.

**Article 25**

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

**Article 26**

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

**Chapter II -- Duties**

**Article 27**

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

**Article 28**

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

**Article 29**

The individual shall also have the duty: 1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; 2. To serve his national community by placing his physical and intellectual abilities at its service; 3. Not to compromise the security of the State whose national or resident he is; 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened; 5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law; 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; 7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society; 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

