

Justice in Practice: South Sudan

Spring 2015

Is justice being delivered
by South Sudan's courts?

Reporting on the
administration of justice

Lawyers' Caseload Reports

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EDITORIAL

Is justice being delivered by South Sudan's statutory and customary courts?

This report is concerned with the routine experiences of people who seek justice or are brought to court, accused of a breach of the law. It also describes cases handled by human rights lawyers who are striving to make justice meaningful and accessible to citizens. The report provides a snapshot of everyday justice as it is functioning in practice. This is part of an effort to document citizens' views and experiences of the justice system. The aim is to contribute to information-sharing in support of South Sudanese individuals and civil society groups seeking justice, working within the justice system, or making to efforts to improve it.

Fifteen years ago, when Justice Africa and the Committee of the Civil Project reviewed the administration of justice in Sudan, we found an urgent need for legal reforms and a judiciary whose professionalism and independence had been devastated by interference from the National Islamic Government and decades of war. At the time, less than ten percent of legal practitioners were southern Sudanese, access to the statutory system was limited and, while customary courts had been remarkably resilient and continued to function in very difficult circumstances, they too were 'battered' by war.

As we hoped, peace brought radical structural changes aimed at improving access to justice. The inherited hybrid conjunction of Sudanese sharia law and civil law, with proceedings conducted in Arabic, was replaced with a common law system in 2006, giving greater scope for oral argument, interpretation and the role of judicial precedent, with proceedings in English. A swathe of new legislation has been enacted, before and since independence, institutionalising new commitments to human rights, such as the Child Act 2008. In 2011, South Sudan's Transitional Constitution and its Bill of Rights established an overarching framework for the law, and enshrined the principle that all are equal before the law and are entitled to its protection without discrimination. Customary courts have also been subject to review and reform initiatives; they continue to be valued as crucial to the delivery of justice.

However, the justice system remains under construction and both legal practitioners and citizens still face great difficulties in making the law work for them. Likewise the government, its partners and South Sudanese civil society groups have recognised the need to identify and address its shortfalls, including with regard to the rights of women and children. The College of Law at the University of Juba embarked on a full-scale revision of its curriculum to align with the South Sudan legal system. A South Sudan Law Reform (Review) Commission was established to promote uniformity and harmonisation, and to identify and address problems of access to justice, and the conduct of the judiciary and lawyers. The South Sudan Law Society (SSLS) and the South Sudan Women Lawyers' Association (SSWLA) are engaged in vigorous efforts to improve access to and delivery of justice. But the rapid reforms have advanced and entrenched legal pluralism, and present numerous challenges for legal practitioners and citizens. These include a general lack of knowledge of new legislation, difficulty in delivering appropriate sentences and flaws in processes. There is still a shortage of trained and experienced lawyers and great diversity in the proceedings and judgements of the various customary courts.

Somehow, South Sudanese citizens and legal practitioners have been navigating this plural, opaque and evolving legal system. Over the last ten years, South Sudanese lawyers and activists and those who support them have made important contributions to documenting and analysing the justice system and proposing measures to enhance it. There have been reports from human rights organisations which have raised concerns about decisions made in both statutory and customary courts and delays and obstacles in obtaining access to the courts. Citizens have spoken of regular injustices at all levels. Lawyers, and in particular the SSLS and SSWLA, have worked to try to address the shortcomings and overcome the deep-seated problems of lack of capacity, widespread ignorance of the law, a history in which the administration of justice was a privilege exercised by the powerful, and the abiding legacy of unresolved past injustices.

South Sudan currently faces a political crisis and the attention of its people and the world community are



directed at making peace and documenting, and demanding accountability for, war crimes, crimes against humanity and other human rights violations committed during the civil war. There are calls for transitional justice, including documentation and truth-telling. But there is also a need to respond to everyday justice issues. We believe that it is essential that there is ongoing everyday work to improve the justice system in areas which are not directly affected by the conflict and that there is recognition of the ongoing efforts by South Sudanese to uphold the law.

The everyday work by South Sudanese to improve the justice system, to promote the rule of law and to monitor the administration of justice must not be neglected. By documenting court cases we can better understand whether and how the system is evolving, and identify the various ways in which legal practitioners and chiefs administer justice, despite uncertainties about jurisdiction and gaps in the law. In this way, we can reach a better understanding of the barriers that they confront; and the impacts upon ordinary citizens. This report does not set out to present a comprehensive picture of the challenges – existing evidence from a range of reports (reviewed on page 3) is suffi-

cient to demonstrate the systemic deficiencies and entrenched patterns of abuse. Instead, we are concerned with the routine practices of justice, observed in randomly selected locations and times. We include no names or dates to protect identities and to emphasise the illustrative nature of the cases. We do not explicitly try to document violations, and we include equally any cases where the law and human rights appear to be upheld. We hope this will serve as resource for those striving to understand and to promote justice in South Sudan.

The customary court reports and lawyers' case-load reports in this publication are the product of research conducted in five of South Sudan's ten states – namely Central Equatoria, Eastern Equatoria, Western Bahr el Ghazal, Warrap and Lakes state – between 1st November 2014 and 1st March 2015. The research was carried out by a team of journalists and lawyers who were participant observers of customary and statutory court processes, encompassing a range of cases and issues.

¹ See: Salam, A. H. A. and de Waal, A. (Eds.) (2001) *The Phoenix State: Civil Society and the Future of Sudan*. Eritrea: The Red Sea Press Inc.

REVIEW

Studies of Justice in Practice

South Sudanese and international human rights organisations have investigated various aspects of the justice system over the years immediately prior to independence, and since. Their reports identify systemic weaknesses and specific abuses; they also highlight inconsistencies within the system, including between statutory and customary law. This review identifies some of these previous findings which contribute to our understanding of ongoing practices in South Sudan's courts.

Local Justice in Southern Sudan (the United States Institute of Peace (USIP) and the Rift Valley Institute (RVI), 2010) examined the relationship between customary courts and the state judiciary, analysing the possibilities for codifying the informal laws used by chiefs in customary courts and harmonising them with those of the statutory courts. The researchers found that 'Customary law itself is not simply a set of rules and sanctions, but a contextually defined process, involving flexibility, negotiation, and reinterpretation of a dynamic body of knowledge to reflect what is considered reasonable under the circumstances'. Importantly, many of those they interviewed deplored the prevalence of corruption, favouritism, bribery and inefficiency in both customary and statutory courts, particularly within the latter.

The politics of customary law ascertainment in South Sudan, (Leonardi, Isser, Moro and Santschi, 2011) noted contradictions within the system, finding that the supposed distinction between parallel customary and statutory legal processes is not upheld consistently in practice. Instead, the two systems are blurred and amalgamated, at times producing tensions.

Studies of customary courts generally seek to uncover their utility as well as identifying significant limitations. *Lessons from Yambio: Legal pluralism and customary justice reform in Southern Sudan* (Mennen, 2010) surveyed the customary justice system in a region of Western Equatoria state, observing that customary justice 'places a premium on transparency and community participation, whilst chiefs without credibility lose prominence on the court panel'. Meanwhile the South Sudan Law

Society (SSLS) report, *Challenges of Accountability: an assessment of dispute resolution processes in South Sudan* (2013) used household surveys to document experiences of the plural justice system in six rural counties. Regarding the customary courts' role in mitigating intercommunal and politically motivated violence and enforcing accountability for its perpetrators, the surveys found that such systems 'have been almost completely unable to pursue accountability for the inter-communal violence that has taken the lives of thousands in the post-war period'.

The issue of gender inequalities has also been a focus for policy research. Mennen's study (2010) noted that whilst instances of gender-based violence featured heavily in customary court proceedings, they rarely resulted in punitive accountability for the perpetrator. Likewise, a report entitled *Women's Security and the Law in South Sudan* by the Small Arms Survey in 2012 observed that 'domestic violence is often condoned by a court if a wife is found to be "behaving badly" or not fulfilling her duties'. A propensity to favour men over women in disputes over land and property ownership was also found. The SSLS (2013) report detailed instances of the discriminatory treatment of women, echoing earlier reports in noting that 'the manner in which local justice systems settle marital disputes and sexual crimes often serves to reinforce patriarchal power structures at the expense of women's and girls' rights'. It is noteworthy that whilst a range of reports have investigated the barriers to justice for women in the customary courts, there have been fewer studies of gender discrimination in the statutory courts.

International human rights reports describe broad failings in the justice system. Human Rights Watch's recent reports (2012; 2013) document injustices and a lack of accountability within the justice and security architecture, and argue that such systems breed violent conflict. Amnesty International and International Crisis Group are among the organisations calling for justice for crimes committed in the recent conflict, with the latter concluding that 'Investigating what happened, how to prevent it from occurring again and holding those responsible to account will need to be addressed as part of a mediated agreement to break the cycle of violent ethnic conflict'

(2014). This impunity reinforces the ‘frail’ status of the rule of law, as observed by the Office of the United Nations High Commissioner for Human Rights (OHCHR, 2013). The OHCHR report finds a lack of accountability across the spectrum of human rights abuses, including for arbitrary arrests and intimidation. It acknowledges difficulties resulting from a shortage of qualified personnel and poor infrastructure. It also expresses concern about the dependency upon customary courts, including for criminal cases, on the basis that these may neither meet international human rights standards nor conform to

national law. As such, the report concludes that the justice system in South Sudan is ‘weak and ineffective’.

The existing research on the administration of justice in South Sudan is sufficient to demonstrate the urgent need to address its flaws. The reports also illustrate the merits of careful documentation of people’s experiences in both customary and statutory courts in order to identify serious problems, including corruption and abuse, and any advantages, such as the transparency of proceedings in customary courts and the ongoing efforts to transform and harmonise the justice system.



LAWYERS' CASELOAD

CASE 1: ALLEGED ROBBERY

The following criminal case regards two security guards arrested without charge following an alleged robbery. Handled in the statutory justice system, it reveals practices of systemic corruption, police favouritism and the miscarriage of constitutionally mandated legal process.

In early November 2014, two young men were working as security guards for a security company, which had contracted them out to a supermarket in Tong Ping, Juba Town. On the day in question, the guards were stationed on duty inside the supermarket.

Two customers drove to the supermarket, parked their car outside the premises and went inside. During the time that they were in the supermarket, their car was broken into, with the windows being smashed. The customers left the supermarket, saw their car, and claimed that there had been \$200,000 USD in the car, which was now missing. It has been speculated that the robbery was most likely carried out by 'street boys'.

The customers called upon a friend who was a policeman but not at that time on duty, who came to the supermarket and arrested the two security guards, even though they had been inside the supermarket during the robbery. The two security guards were taken to a nearby police station in Juba, and incarcerated. They remained locked in the overcrowded prison cell for 20 days without being given the opportunity to give a formal statement, see a judge or even hear the charges that had been brought against them.

The supermarket that they worked at had CCTV, but the shop owner refused to assist with the case or visit the two men.

Similarly, the security company for whom the two men worked for also refused to cooperate or assist with their defence. This is striking because according to the law, the case should have been brought against the security company, not the two men, because they were working on behalf of the company, not as private individuals.

When the two men's lawyer, who was approached by

a relative of the two men, approached the police investigator to find out details of the investigation, and to see the charges being brought against the two men, the investigator refused to cooperate and would avoid the lawyer when he arrived. This is a denial of the defendant's constitutional right to know the charges being brought against them.

Eventually, in order to secure the release of the two men, their families had to raise 1000 SSP (roughly \$300 USD) to the police investigator. This was misconduct by the police investigator, as money for bail should be paid to the police department, not an individual officer. Furthermore, it is arguably illegal because in the eyes of the constitution, the two men were free and therefore, in the words of their lawyer: 'You cannot take money from men who are constitutionally free'.

CASE 2: MEDICS ARRESTED

In October 2014, following the death of an asthmatic patient at a private clinic in Juba, three medical staff at the clinic were arrested and detained. Their case, as told by their defence lawyer, exposes gaps in existing law, which does not adequately protect private medical practitioners, as well as arbitrary detention and delays in the administration of justice.

According to the owner of the medical clinic, his staff were detained on the basis of an accusation that they administered the wrong drugs to the deceased patient, resulting in her death. However the complainants, the relatives of the deceased, have so far made no official statement, failing to turn up to give their statements to the police officer in charge.

A post mortem carried out at Juba Teaching Hospital showed that the deceased died of a severe asthma attack. But the woman's relatives continue to insist she had been given the wrong drugs, though they were unable to show any evidence of this. The police officer in charge of the case informed the owner of the clinic that the arrested medics will not be released until the relatives of the deceased come to give their statements.

At the time writing this report, the arrested medical staff had been in custody for over two weeks without

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charges having been brought. Yet South Sudanese law says nobody should be detained for a duration of over 24 hours without being taken to court.

The owner of the clinic, who has no lawyer, lamented that his business had been closed for over two weeks now and has affected his livelihood. He has been going every morning to the police station, in the hope that his staff would be released on bail, but without success. Such cases are not unusual in South Sudan. For instance, in a comparable case from June 2014, in Tonj South Aweil County, Warrap State, some doctors from a private clinic were arrested and detained following the death of a police commissioner, who was a regular patient of the clinic and who was prescribed treatment for high blood pressure. The police commissioner was diagnosed as suffering from typhoid. However, before he received the necessary treatment, he had heart attack and died. The relatives blamed his death on the clinic staff, who were then arrested and detained for a prolonged period pending a formal investigation.

The cases against these medical practitioners reveal a number of problematic issues regarding the South Sudanese justice system and the provision of public health services. It is commonly accepted that the extent and standard of government-funded public health care in South Sudan is extremely weak, and struggles to meet the needs of the population. Many people are therefore forced to use private medical care and, as a result, the demands upon private health services are extremely high. Despite this reliance on private medical practitioners, it is striking that South Sudanese law – outlined in the Medical Practitioners Act of 2012 – provides no legal protection for them. The situation is different in public government hospitals as their government affiliation provides them with some automatic protection. However, we may even question whether there is adequate scrutiny

of incidents in government hospitals, where patients are suspected to have died due to clear negligence of the practitioners, and where these cases may not be fully investigated or brought to court.

CASE 3: LAND CONFISCATION

The following court appeal is underway within the statutory court system, and concerns an ongoing dispute over land that began in 2013. The case is told from the perspective of the appellant's lawyer who observed that laws in South Sudan are often misinterpreted and erroneously applied and that errors are not simply due to a lack of knowledge, they are also sometimes deliberate, intended to favour powerful people who can reward judges after their verdicts. The lawyer depicts a form of judicial clientelism which denies justice to ordinary citizens who are unwilling or unable to offer such rewards.

In May 2013, a court case was filed following a dispute of ownership over a piece of land in Konyo-konyo, Kator Payam, Central Equatoria State. In the court, the trial judge ruled against the occupation of a piece of land by a group of 67 families, although they have been living on it since the 1960s. He instead gave it to a businessman, who claims ownership of the piece of land since 2006. In doing so, the lawyer representing the 67 families argues that the judge ignored the provisions of Section 48 of the Land Act 2009, and Section 7 (1) (2) (3) and Section 88 (1) (b) (2) (3) of the Local Government Act 2009. Two representatives of the 67 families, referred to here as the appellants, have since launched an appeal against this judgment.

The judge failed to understand the jurisdictional position of government bodies that are responsible for issuing land to the citizens and the classification



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of land under the law. The land in question is 'fourth class land', which in South Sudanese law falls under the jurisdiction of the Kator Payam administration. Accordingly, the appellants possess the permit for occupying this land, issued to them by the Kator Payam administration. Meanwhile, the land ownership documents held by the businessman, such as the croquis (rough sketch), pertain to land that should fall under the jurisdiction of the State Ministry of Housing and Physical Infrastructure. By this logic, the respondent must have acquired the land through fraudulent means, because the Ministry of Housing and Physical Infrastructure is not responsible for allocating fourth class land plots.

A witness, a surveyor from the Central Equatoria State Survey Directorate, told the court that he had obtained information about the plot in question in the name of a seller in Khartoum in late 2011. The witness told the court that he inspected the area in question in October 2013. The 5000m² square area had a concrete building upon it, used for shops. The witness confirmed that the area is indeed of fourth class status and referred the court to the Kator Payam administration because the plot's status dictates this. He told the court that the appellants had all of the correct documents from the Kator Payam administration, whilst the respondent, the businessman, did not have any such documents.

The businessman claims to have acquired the land on behalf of a company at a time when the company itself did not exist as a corporate body with the capacity to enter into legal relations (such as contracts). He told the court that he had purchased the plot from the seller in 1996 in Khartoum and had it transferred to his name in 2006. The record of legal existence (certificate of registration) of the businessman's company however contradicts this, since the company was registered in 2007.

The trial judge, when passing his judgment, neglected to evaluate the evidence as a whole, and therefore failed to prevent institutional corruption and fraud by legitimising the activities of the respondent. The respondent's fraudulent transaction was carried out in collusion with a surveyor who works under the State Ministry of Housing and Physical Infrastructure, and not the Kator Payam administration, although the

ministry is aware that the land in question does not fall under its jurisdiction. It is on the court record that in 2012 the respondent brought a surveyor, accompanied by armed soldiers, to draw up the croquis of the land and put pegs in the ground, all without notifying the Kator Payam administration. This is evidence of fraud, as every payam and state has their own surveyors to demarcate land under their jurisdiction. As a result, the court failed to stop the irregular allotment of the land to the respondent company, under Section 90 of the Land Act, 2009.

CASE 4: SPLA OFFICERS SENTENCED

The following case took place in January 2015 in Juba county court, concerning the abuse of power by two SPLA officers during the outbreak of conflict in South Sudan in December 2013. The case is extremely noteworthy given that it took place in a civil rather than martial court, and resulted in a rare sentencing of the accused, in a context where impunity among security personnel is the norm. The case is told from the perspective of a lawyer who observed the case.

In Juba, Central Equatoria State, in January 2015, the Juba county court under a judge with powers of the High Court sentenced two army officers to two years in prison.

The complainant, a resident of Tong Ping district, lodged a complaint in March 2014, claiming that the two officers ordered their subordinate to break into his house and loot its contents during the outbreak of violence in December 2013, at the start of what is now a year-long nationwide crisis. Describing the accused officers as being in military uniform, well-armed, and driving an SPLA vehicle, the complainant told the court that the two officers, accompanied by other soldiers, broke into his house.

During the proceedings, the police prosecutor told the court that the two accused were caught breaking into and removing belongings from the complainant's house. They were subsequently arrested by the SPLA patrol. The police prosecutor said that after he finished the investigation into the case, he then transferred it to county criminal court division

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for trial. The prosecutor said the fair trial was conducted in accordance with Article 19 of the Transitional Constitution 2011.

Following the investigation the two army officers were charged under Section 48, 294 of the Penal Code 2008. The judge said that the accused had confessed before the court, an act which under Section 27 of the Evidence Act 2006, qualifies as confirmation of criminal guilt.

The judge sentenced the two SPLA officer to two years in prison and fined each officer 50000 SSP, to be paid to the complainant. The two officers were immediately placed in prison custody by the court police.

It is questionable whether the outcome would have been similar if this case had been handled within the military court not a civil court. Within such martial courts, it is common for the interests of the military as a whole to override the interests of ordinary citizens, and therefore imprisonment of soldiers for wrongdoing is rare. We should also consider whether the two officers should have been handed a more severe punishment for their actions in view of the fact that they are entrusted to be upholders of the law and the protectors of South Sudan's people, not their abusers.

CASE 5: CHILD ARRESTED

The following case took place in a county-level statutory court in Juba, and involves the arrest and detention of a young boy accused of dealing in illegal drugs. However, the prosecution lacked proof to substantiate these claims, and during the process of his arrest and trial, the boy experienced a range of serious abuses outlawed under the Child Act 2008 of South Sudan. The case is told from the perspective of a journalist observing the trial.

In December 2014 in Juba, Central Equatoria State, a high court judge of the county court dismissed the criminal charges that had been placed against a fifteen year old boy by the state prosecution attorney. The boy, who is considered a juvenile under the law, was accused by the prosecutor under Section 384 of the South Sudan Penal Code 2008, citing the unlawful possession or use of dangerous drugs. During the court hearing the police prosecutor said that the accused was caught selling illegal drugs and was arrested thereafter.

During the court proceedings the boy denied the charges, but was not represented by any legal advocate. During the examination in court, the judge asked the boy where he was at the time of his arrest and what he was doing. In his statement to the court describing the scene, the boy told the court: 'The police arrested me at the river bank when I was washing my clothes and they beat me up and brought me to the police custody in Juba'.

The boy went on to say that he did not even know the reason for his arrest by the police. He asked the judge to ask the prosecutor to present the drugs they claimed to have found on him. The prosecution was not able to present any evidence against the boy and the judge dismissed the case against him and set him free. Had the judge found the boy to be guilty, upon conviction, he would likely have been sentenced to imprisonment for a period not exceeding five years or a fine, or both.

Having being freed from a prison that is widely thought to be one of the country's worst in terms of living conditions, the boy remained unhappy with his treatment, particularly because he had missed his school exams whilst under the police custody. The boy claimed that he need to be compensated for the damage he incurred under false accusation by the



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police, whom he suggested were trying to use him as a scapegoat for their own business. The boy told the prosecution before leaving court: 'You are responsible for me missing my exams and ruining my future'.

Section 36 (3) of the Child Act 2008 provides that 'No child accused of infringing the law shall be removed member said that they were disturbed by the accusation placed on their son. They said that 'he left the house for the river bank to wash his clothes and he did not return home. We looked for him for two days, no one could tell us where he was' only discovering only later that he was being held in a Juba prison.' The police failed to inform the parents of the child of his arrest, in contravention of the Child Act 2008, which stipulates that the parents of the juvenile should be informed at the time of the arrest.

Furthermore, the Child Act 2008 also decrees that juveniles should not be detained in adult prisons, and yet this 15 year old boy was held in an adult prison. During his time in custody, the boy said that he was forced to undertake demeaning tasks including carrying the urine of other prisoners. Arguably, this treatment is in violation of Section 39 of the Child Act 2008, Sub-Section 4, which says that any arrest shall be made with due regard to the dignity, wellbeing and special status of the child.

CASE 6: LAND DISPUTE

This case details the attempt of an individual to claim back land which he legally purchased but was later confiscated from him by a relative of its former owner. The complainant opened the case in 2007 and won, but in the years since there have been 6 appeals against the judgement and pressure upon the authorities not to execute it. The case reveals the use of nepotism and manipulation of tribal affiliations during court proceedings. It also suggests the reluctance of some individuals within the police and judiciary to confront state security officials due to concerns about personal safety. The case is told from the perspective of the complainant's lawyer.

The complainant is an Equatorian man, who bought the land from a Dinka man through legal means and

possesses the correct legal documentation to prove this. However some time later, the Dinka man died, and his brother then claimed that the piece of land still belonged to his family, even though the original sale was legal and finalised.

The court case that ensued ruled in favour of the complainant. The judge ruled that the court police – who are linked to the military police, and distinct from civil police – should go to the piece of land and demolish the building on it which had been built by the defendant. At this point the defendant involved a relative of his, who is a high-ranking official in the National Security Service (NSS), who ordered the court police not to carry out the demolition.

The defendant then launched an appeal against the court ruling. The court ruled again in favour of the complainant and ordered the demolition, and again the defendant and his relative from the NSS ordered the police not to execute the ruling, although they had no authority to do so. The defendant then continued to use a range of tactics to block the execution of the court ruling, for instance by asking the NSS official to say that the land belonged to him, apparently in the hopes of scaring the court police and the judge. The judge became too scared to intervene, apparently for fear that the NSS would have him killed, and unsuccessfully requested that the case be handed to a higher level court judge. In every subsequent appeal against the court ruling the defendant would create a new claim against the ruling, for instance by saying that the complainant had forged the legal documents of the land sale. After each failed appeal the defendant and NSS official would threaten the complainant. At the same time they would play on the court policemen's loyalty and obligations as part of the state security services in order to block the execution of the ruling. Indeed, there exists a photocopy of a letter that appears to be written by the NSS official, addressed to the court police, saying that 'troubles [would] arise' if they proceed with the demolition.

After 6 appeals and 7 years in and out of court the complainant has now abandoned hope of finally securing the land for himself and has instead said he will settle for being refunded by the defendant. The defendant refused this request.

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The judge, in spite of his fear, acted in the correct and respectable manner. In South Sudan the powers of judges vary according to the level of court they are in; lower level court judges often refer risky cases to higher level court judges because they think they will have greater powers and are better protected.

Incidentally, like the defendant and his family, the chief of the court police is a Dinka, and therefore it has been suggested that his compliance with the NSS official and defendant's demands is the combined product of tribal loyalty, obligations towards to the state security services, and fear of the NSS. The interference of different arms of the security services, particularly by the NSS, is very common in South Sudan.

The complainant's lawyer concluded: 'Here in South Sudan the ordinary person cannot get justice. Only the powerful can access justice, while the ordinary man is the victim of justice.'

CASE 7: MISUSE OF APPEAL COURT

This case concerns the misapplication of correct legal process between the county court and court of appeal in Juba, Central Equatoria state. Commentators have suggested that this was the result of tribal favouritism on the part of the court judges.

In 2013 in Juba county criminal court, a woman brought a case against a man who had caused her injury. The court pronounced a judgment in the woman's favour, with the judge ordering the man – the accused – to pay the woman 6300SSP (£720). The woman tried to institute a civil case to recover her money, but had only received around half of the total amount by January 2015.

The judge of the county court set the session for the first week of February 2015, calling for the debtor to pay the balance of the money, an amount of 3300 SSP. However, according to the woman who had lodged the complaint: "When I went to the judge she told me that my file was not brought by the town clerk, and when I went to follow it they told me that my file has been taken to court of appeal".

The woman's lawyer applied for the court to produce the file for the execution of the original judgment to continue, but was told by the judge again that the file had been called by the court of appeal, though without clear grounds for doing so. The lawyer queried the judge on this decision, which the judge responded to by dismissing him.

According to the process laid down by South Sudanese law, the action of the judge belonging to a court of appeal to call a file that is being handled by a county court is a definite violation of legal procedure.

Moreover the law stipulates 15 days as being the fixed time period during which somebody who is dissatisfied with a court ruling can launch an appeal. However in this case, more than one year and eight months had elapsed before the judge called the file for appeal.

On this basis, the woman's lawyer has argued that this act by the judge of the court of appeal is a clear violation of the procedural law and demonstrates a miscarriage of justice.

Furthermore, it has been speculated by several observers of these proceedings that the judge acted in such a way because defendant is his relative and belongs to the same tribe, the Bari, whereas the woman complainant belongs to the Mundari tribe; therefore the judge's actions against the woman have been said to be driven by tribal favouritism and nepotism.

CASE 8: POLICE STATEMENT IN QUESTION

The following case from Juba county court suggests concerns about the susceptibility of members of the security services to manipulation and the potential for miscarriages of justice.

A Kenyan and a Ugandan citizen appeared before the County Court in Juba, Central Equatoria State, accused of robbery. The case was presided over by a second class magistrate. The complainant, a South Sudanese minor, worked in the same hotel as the defendants. He claimed that the two had stolen his money, but could not present any evidence of this act to the court.

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A statement was read to the court by the police investigator. However the two accused persons denied the statement, claiming it had been distorted from the original version that they gave.

The defendants' lawyer claimed that there was strong evidence to suggest that the police prosecutor had interfered with the defendants' statement. The lawyer stated that he has grounds to believe that the family of the complainant had paid the prosecutor to erase elements of the defendants' formal statement which would have demonstrated their innocence.

CASE 9: COURT DENIES REQUEST FOR LEGAL AID

This case points to a legal grey area regarding the provision of legal aid in South Sudanese courts and the miscarriages of justice that can arise when poor people are unable to afford legal representation.

Muduria County Court in Juba refused to provide a lawyer for a woman who requested legal aid for her defence. The woman was arrested on the claim of illegal trespassing by the complainant, who claims to be the owner of the property where she was living.

The defendant had lived on the piece of land in question for over twenty years, which according to the prescriptive rights of South Sudanese law renders the piece of land as her property. Moreover the complainant does not possess the original documentation that would be able to prove his prior purchase of the land.

The defendant said before the court that for the sake of justice she need the court to provide her with a lawyer: 'Your Honor I cannot afford to hire a lawyer and I need the court to help me, I need a lawyer to defend me'.

The judge instead offered her two weeks to find a lawyer to defend her, stating that this was in line with accepted criminal procedures in South Sudan.

However the woman was unable to raise the funds to hire a lawyer during the prescribed period, and was therefore arrested and incarcerated in a local prison.

The request of the accused was in line with the right to fair trial, provided for under Article 19 of the Transitional Constitution of the Republic of South Sudan 2011, which stipulates that "any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence."

The decision of the judge highlights the grey area that exists in the provision of legal aid in South Sudan; the provision of legal aid is necessary to permit the universal right to fair trial, and yet only serious offences warrant legal aid. This leaves defendants charged with moderate and minor offences without legal aid, and therefore by extension could be said to be denied their right to fair trial. There is no specific legal aid act in South Sudan, leaving legal practitioners to derive legal aid policies from the Constitution, which lacks specificity.



CUSTOMARY COURT REPORTS

REPORT 1: SHARIA CLASHES WITH BARI CUSTOM

This case highlights the legal grey areas and points of conflict between different jurisdictions of customary, formal and Sharia law in South Sudan, as well as the commodification of young women under the dowry system.

In Moli, Nimule, Eastern Equatoria State in December 2014, a customary court of the Madi Moli area, charged a businessman from Darfur, Sudan, with impregnating a school girl. The father of the girl in question opened a criminal case against the Darfuri businessman – the defendant – for impregnating his under-age daughter.

During the proceedings, presided over by a panel of three chiefs, the head chief argued that the man should be charged under the Madi customary law whilst the defendant claimed that his actions were legal under the laws of Darfur and Islamic Sharia. The defendant contended that he should pay a ‘mahar’ dowry, in accordance with the custom of his own culture and Islamic religious practices.

The chief asked him the value of the ‘mahar’, in order to assess whether it is equivalent to that of the Madi. Finding instead that it is not relevant to or commensurate with the Madi customs, the chiefs ruled against the defendant’s demand, and insisted that Madi customary law will apply in that case, not Sharia or Darfuri law.

There was also confusion over the meaning of the two different words used by Madi people and the Darfuri defendant. For the Darfuri man, paying ‘Mahar’ guarantees marriage, whereas for the Madi chiefs, paying ‘Mahar’ means ‘kasubet’, which is a sort of fine, and thereafter any desired marriage proceedings will be separate.

‘Since you have entered your foot in Madi land, it is the customary law of the girl to be used against you’, said one of the chiefs.

The chief compelled the defendant to pay goats and dowry to the family of the young girl. The chief then concluded: ‘After paying what is demanded of you, the choice is yours. If you want the girl as your wife

then you can come for marriage separately’.

However the defendant was not satisfied with the ruling of the Madi payam court against him and said that he had been over charged: “‘It is unfair for me to pay such a huge sum of money, almost 15000 SSP!’. He complained that 5000 SSP should be enough money to marry a girl.

Under South Sudanese law, criminal cases are designated as falling under the provisions of statutory law, whilst civil cases are dealt with using customary law. As a further demonstration of the legal ‘grey areas’ that this case highlights, the Madi chief did not follow these provisions, which would normally treat such a case as a criminal offence and therefore subject to the formal statutory law of South Sudan. Instead, the chief dealt with the case as a civil matter, and as such the man was not sent to prison as might have been the case in a formal statutory court. Therefore, the chief did not take the degree of the offence as seriously as is provided under the Penal Code 2008 of South Sudan. The chief’s actions in this case can be partly explained by the fact that the Madi Moli area is remote and rural, located about 20 km outside of Nimule town, with no formal court or police post. The chief-led customary court is therefore the only body able to administer justice and enforce the customary law. For matters that are beyond their jurisdiction, one has to travel the distance to Nimule town, where the formal statutory court and the prosecution attorney preside.

REPORT 2: DOMESTIC VIOLENCE

This case took place in a county customary court in Tonj, Warrap state, wherein a man petitioned for divorce from his wife citing domestic violence as the reason. The case is noteworthy because the alleged victim was male, and the ruling may be compared with similar domestic violence cases in which the victim is female. Here, as in many other cases, it appears that the court emphasised the importance of repairing the relationship.

In January 2015, a man opened a case against his wife, requesting a divorce from the county customary court, citing domestic violence and alcoholism on her part. The complainant told the court that he wished

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the court to grant him a divorce, after his wife beat him and his family for no apparent reason. He added that his wife has a drinking problem and refuses to stop: “she has a baby in his family for no apparent reason. He added that his wife has a drinking problem and refuses to stop: “she has a baby in her hand and she is drinking too much and fighting me every day at home’.

He told the court that before he decides to take ‘the law into his own hands’, he has brought the case to the court for a solution. The wife, the defendant, responded that her mother-in-law and brother-in-law’s family were the ones who started the fight and said that she had acted in self-defence. She also said that upon hearing unsubstantiated rumours about her during a visit to the nearby town, her husband had returned home and started beating her and she again acted in self-defence. She said however that the fighting is ‘not a problem’.

Almost 70 people attended the court hearing, which was presided over by four chiefs, all of them male. After some deliberation, the chiefs forced the defendant to apologise to her husband and reprimanded her for the claims put against her. However, the chiefs also turned down the request for the divorce, instead instructing the two parties to return home together and reconsider, and if subsequently they still insisted on a divorce, then they could petition the court again.

The outcome of this case might be deemed unsatisfactory from a legal perspective, given that two conflicting stories were put forward, without substantial evidence, and neither could be proven. Thus the chiefs’ condemnation of the female defendant could perhaps be interpreted as discriminatory. However, the court did not up-hold the complainant’s request for divorce and as such it suggests that customary court judges primarily seek to act as mediators in dealing with domestic disputes and envisage justice as a restorative process, including when the alleged victim is male. The judgement labelled the behaviour of the wife as immoral, they called upon her to offer reparation in the form of an apology, but above all they sought to encourage the repair of the relationship. It is notable that the complainants initially accepted the ruling.

REPORT 3: FEMALE LAND RIGHTS

In Kator Payam, Juba County, Central Equatoria State in November 2014, a customary court of the Bari tribe, known as a ‘B’ Court, presided over by a panel of four chiefs, passed a verdict preventing a woman from collecting house rent from her late father’s houses. The court ruling highlights a range of problematic issues, suggesting gender discrimination in customary courts. At the same time it highlights the ways in which customary courts can respond to broader social and cultural issues beyond those immediately relevant to the case in hand.

The complainant was a women who wished to collect rent from the tenants occupying houses owned by her late father. The defendant, wife to the complainant’s brother, argued that her sister in-law had deprived their family by stopping the tenants of the late father’s houses from paying rent to the defendant, on the basis that she (the complainant) had not been given her share from the rent for two years.

‘I want this court to tell me: who should be responsible for collecting the rent?’ the defendant asked the court. The complainant responded by arguing that she had stopped the tenants from paying rent to her brother because he was a drunkard and would waste the money.

The court, which attended by some 150 people from the local area, ruled in favour of the defendant, thus denying the complainant the right to benefit from the property inherited from her father. This verdict was in accordance with the Bari tribe tradition, which denies women the right to share in the property of their fathers. This tradition is based on the assumption that Bari women will be married into other families, at which point they lose the right to make claims upon their birth family, with these being transferred to their in-laws. The court declared that since the complainant was already married into another family, she had no right to ask for a share in the rent of the houses. The court ruled that the complainant’s brother (the defendant’s husband) was the rightful person to inherit his father’s property, regardless of his behaviour or conduct. However, the court did reprimand the complainant’s brother for his drinking and instructed him to stop drinking alcohol.

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Here we see that the customary court of the Bari tribe, like those of many other tribes, discriminates against women in their right to inherit and own property. Referring to the Transitional Constitution of the republic of South Sudan 2011, there is not specific article women regarding inheritance of their father's property. However, the Constitution does state in Article 16.1 that 'Women shall be accorded full and equal dignity of the person with men'. Article 16.5 provides that 'Women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased'. Therefore, on this basis, one could argue that in the spirit of the Transitional Constitution, women should have the right to inherit property from their father. Here we see the misalignment between customary practice and South Sudan's Transitional Constitution of 2011, as well as transgressions from international human rights norms. However, the court also issued a condemnation of the conduct of the complainant's brother, looking beyond the immediate legal issue to pronounce upon the moral conduct of the parties involved.

REPORT 4: FAMILY NEGLECT

This case regards a marital dispute within a family in southern Tonj County, Warrap State in January 2015. A woman raised a case against her husband in a customary 'C' court for neglect. The process and the ruling demonstrate the way in which customary chiefs can act as mediators as well as arbitrators and suggests the significance of the public nature of the court hearings within a community.

A mother of two children opened a case against her husband in Tonj South County court and they were referred by the authorities to the 'C' court. The mother, the complainant, said that her husband was not taking care of her, their children or their home, refusing to provide clothes and other daily subsistence requirements. The complainant told the court that her husband just visits the local town and goes drinking, only returning home late at night, whilst she struggles to take care of their home and look after their children, of whom one is sick. She went on to say that when she complains to her husband, he refuses to help.

The complainant explained that she would be able to better cope with looking after her children and home if she and her husband were separated, because she is currently the only breadwinner, running a small business making alcohol, whilst her husband is unemployed. She told the court that her mother gave her a goat to sell in order to pay to open the case in the court, because she could not afford to. In court the complainant's mother supported her daughter's case, adding that her daughter's husband does not show her respect and did not pay an adequate dowry – he paid just one bull. The mother explained that she would have considered this to be an adequate dowry had the husband then looked after her daughter properly, but in this case he has fallen short of her expectations.

The defendant responded that he considers his wife's case against him to be unjustified, arguing that he was helping her in with some issues at home, complaining that he did in fact buy clothing and food for the household.

There were five chiefs on the panel as well as a court secretary presiding over the trial. After deliberating the case, the chiefs fined the defendant, instructing him to give one pregnant cow to the mother of his wife, and to take better care of his wife at home and to show respect to his wife's family.

As with other cases in customary courts dealing with family and domestic issues, it is questionable whether the chiefs' ruling would be unsatisfactory to the woman who raised the case, as they did not grant the separation she requested nor provide her with any clear material gains or concrete ruling. Instead, greater importance appears to be attached to the need to respect one's inlaws. Here the chiefs adopted the role of family mediator as opposed to legal adjudicator. The case highlights the way in which customary court proceedings handle and make public even the most personal and domestic aspects of people's lives, and invites the question of whether the public airing of such grievances, resulting in naming and shaming in front of the community – in this case over 100 people – might in fact be a central goal of those accessing justice through customary courts.

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REPORT 5: LAND INHERITANCE

This case concerns the property inheritance rights of the offspring of one man. The court proceedings highlight the predisposition towards gender discrimination in such cases, but also the opportunities for such norms to be overturned, and the potential space in customary legal proceedings for flexibility and progressive change.

The case was heard in the ‘A’ court in Hai Game, Central Equatoria State in December 2014, under the chief of Hai Game presided over by a panel of eight, including four men and four women. It concerned a dispute between two wives, each of whom had several children, over their rights to a plot of land following the death of their husband. The verdict resolved this dispute by allowing several siblings to collectively share in the property of their late father.

The complainant in this case was the first wife of the late father, who wished to register the family plot into her son’s name, the eldest of the siblings, thus denying the second wife’s children from enjoying the same rights to the property. The deceased father also had a daughter who, as a female, would automatically be denied the right to inherit her late father’s property, according to customary law. The defendant, who was the second wife to the deceased man and her son, argued that the plot should remain in their late father’s name so that all of the siblings can benefit from it.

During the proceedings the male members of the ‘A’ court panel decided that the plot should be registered in the name of the elder son of the first wife and that he should be the one to manage the land on behalf of the family, as is customary in such cases. However, before the chief could read the court ruling, one of the female members of the panel raised an objection to this decision, proposing instead that the plot remained registered in the name of the late father, with the eldest son holding the status of manager of the plot when necessary. The female panel member argued that once the plot is registered in the name of the elder son, the rest of the family are exposed to the danger that the plot could be sold off without their notice or consent, whereas if the plot remains registered in the name

of the late father, nobody can sell it without the consent of the other family members.

The court decided to go into recession briefly and, upon their return, the panel abandoned the first ruling and instead adopted the second ruling, as proposed by the female panel member. The chief passed the ruling, saying that the plot will be registered in the name of the late father but will be managed by the elder son of the family.

The family of the late father welcomed the idea proposed by the female member of the court and accepted the ruling. This outcome of this particular case is unusual; in similar customary court cases elsewhere, rulings seen as discriminatory against women are often an accepted norm, even where they demonstrate contraventions of South Sudan’s Transitional Constitution of 2011 and transgressions from international human rights norms. Furthermore, this verdict was not in accordance with traditions of the Otuho tribe, local to the region, which denies women the ability to enjoy rights to the property of their late husband, but rather to transfers those rights to the first born son. This tradition is based on the assumption that the widows will be married into new families, at which point they lose the right to make claims upon the property of their late husband, with these rights being transferred to their new husband.

Referring to the Transitional Constitution 2011, there is no specific article outlining the rights of women and children regarding the inheritance of their father’s property. However, the Constitution does state in Article 16.1 that ‘Women shall be accorded full and



Traditional Court in Warrap State, South Sudan
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equal dignity of the person with men'. Article 16.5 provides that 'Women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased.' The ruling might therefore be seen to be successfully interpreted in the spirit of the Transitional Constitution of 2011, in which women and offspring should have the right to inherit property as legal heirs of their late father or husband.

REPORT 6: WOMAN ACCUSES COURT OF BIAS

This case illustrates contestation and concerns about prejudice within the customary court.

In a Dinka customary 'B' court in Rumbek, Lakes state, a 'criminal' case was launched by a man against the mother of a woman he had once sought to marry. He claimed that the mother and her daughter owed him for some gifts he had given them. According to the woman – the defendant in this case – the complainant had 'tried to marry my daughter by force and my daughter refused him and so he brought me to court claiming that he has been bringing things to us and he wants to be repaid'.

The defendant went on to deny any knowledge of any gifts stating: 'I have not seen anything and I call on him to produce any witness at the time he was handing over the gifts'.

During the court session, one of the chiefs of the all-male panel insulted the woman and accused her of receiving gifts from the complainant in a promise to marry her daughter, a claim that observers of the case say lacked any supporting evidence.

The chief ruled against the woman and ordered her to pay the complainant 1800 SSP plus five cows. The ruling of the chief was contradictory to the Dinka customary law that has traditionally prevailed in the area. According to the Dinka customary law if any person pays a dowry to marry a girl, and subsequently that marriage fails and the girl gets remarried, the first husband will only be recompensed for the initial dowry by the second husband, rather than the girl's parents. But in the case at hand the chiefs ignored the existing principles.

The woman said she would not attempt to appeal the ruling because it would be handled by the same people who handled the original case, and therefore the outcome would inevitably be the same.

The case attracted wide attention from the local community, due to its contested nature. The audience who attended the session appeared unhappy with the outcome, arguing that it contravened the principles of Dinka customary law. Some observers questioned whether the complainant had issued verbal threats towards the court chiefs, forcing them to rule in his favour. They noted that the defendant and one of the chiefs were from the local area, whilst the complainant and the other chief were from a different state – Warrap. They suggested this might have led to bias on the part of the chief from Lakes state against the complainant.

REPORT 7: BOY DENIES RESPONSIBILITY FOR UNDER AGE PREGNANCY

The following customary court case proceedings in Lakes state challenge the principle of justice wherein innocence is presumed until guilt can be proven.

A customary 'B' court in Rumbek Center, Lakes state, has sentenced a boy to 15 days imprisonment for refusing to admit responsibility for the pregnancy of an eighteen year old girl.

The complainant, who is the girl's father, told the court that the boy was responsible for the pregnancy of his under-age daughter.

During the proceedings, the defendant refused to plead guilty, arguing that he was not responsible for the pregnancy. He insisted that he did not even know the girl. However, the girl persisted in telling the court that the boy was responsible for her pregnancy.

The customary court, consisting of three male chiefs, having failed to persuade the defendant to admit responsibility by pleading guilty, sentenced him to 15 days imprisonment in a bid to force him to do so. After 15 days the case was brought back to court for retrial, during which the boy again refused to plead

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guilty and was therefore once again incarcerated for a 15 day period. Apparently the case will remain pending until the boy proclaims himself guilty.

According to the Rumbek Center customary court clerk, there is a customary order that an accused must plead guilty in court; if not, he or she will be sentenced to a period of imprisonment and be brought again to the chiefs to be questioned. Whether or not such an order exists, the handling of this case violates the fundamental right.

REPORT 8: COURT PREVENTS FORCED MARRIAGE

This case from a 'C' court in Warrap ruled in favour of the woman during a dispute over divorce proceedings.

In Tonj South County of Warrap state, a 'C' customary court prevented a woman from being forced to into remarriage by her ex-husband, from whom she had been granted a divorce three months previously.

A man lodged the complaint in court against his ex-wife, the defendant in this case. The complainant allegedly attempted to marry the defendant for a second time by force, but the woman refused, contending that they had already been granted divorce by the courts. Indeed, the 'C' court panel of five chiefs during the proceedings affirmed the divorce and refused the attempts of forced remarriage by the complainant. The chief presiding over the court said that the divorce certificate given to the defendant by the complainant three years ago rules out any future marriage between the two. The court freed the woman because she was in possession of the correct document of separation.

The defendant told the court during the proceedings that the reason for her divorcing the complainant had been the regular mistreatment, domestic violence and the destruction of her family's property committed by her husband.

She told the court: 'I would be dead by now if I did not divorced him'. The woman added that during their three years of marriage they had consulted the court five times to resolve their disputes, before even-

tually separating. After her divorce the woman moved to Wau to run a business selling tea, but the complainant then went there and had her arrested. He claimed that she was still his wife because he had paid cows for her, and upon separation he expected to be repaid by the woman's family.

The man contended that he did not possess the separation document from the court. The woman responded that at the time of the document's issuing, her ex-husband had refused to take his document and left it in the court, whilst she took her document with her. She argued that she was free to look for another husband because she was divorced.

The 'C' court freed the woman and rejected the protestations of the complainant, stating that he has no right to make claims against her. However the court did ask the woman's relatives to pay back the cows from their daughter's dowry, before allowing their daughter to marry another man.

More than eighty members of the community attended the case. Some offered their thoughts on the proceedings, voicing their agreement that the woman has right to seek another husband because she is officially divorced in the eyes of the court.

REPORT 9: ACCUSATION OF ADULTERY UPHELD ON THE BASIS OF MIDWIFE'S TESTIMONY

This customary court case demonstrates how traditional beliefs may be treated as evidence in rulings on divorce and adultery.

A 'B' customary court in Rumbek, Lakes state rejected a man's request for a divorce although it upheld his complaint that his wife had committed adultery. The wife and her alleged boyfriend were both defendants in this case. During the court proceedings the complainant told the court: 'I do not want this woman and if you force her to my house I will kill her'.

The complainant did not have concrete evidence to back up his claim of adultery, except for the statement of one woman, a midwife, who claimed that the defendant had confessed her affair during the recent birth of her child. According to Dinka tradition, if a

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woman experiences difficulty during childbirth, it is indisputable evidence that the child is the product of an affair. Apparently, the defendant began experiencing difficulties whilst in labour, and was said to have confidentially confessed her affair to the midwife, after which the birth proceeded without complications.

The chief said that the statement obtained from the midwife served as conclusive evidence of the child's paternity and therefore the defendants' affair. As such, the two defendants were not given an opportunity to defend themselves but were forced to plead guilty. On this basis, the chief turned down the complainant's application for divorce, but ruled that the second man should pay seven cows as a fine for adultery and that the child be registered in the name of the complainant, regardless of the child's biological paternity.

The case took about one month to be completed, because the male defendant had to find the seven cows ordered by the court as a fine. The ruling by the chiefs was generally well received by observers of the case, who commended what they saw as the proper upholding of Dinka custom, despite the limitations of the evidence, the delays in the case and the decision to uphold the charge of adultery while refusing to grant the complainant a divorce.

REPORT 10: MAN FINED FOR GOSSIP

This case highlights the cultural primacy placed upon the public perception of an individual's reputation and the role that this can play in court proceedings.

In Kator 'B' court, Central Equatoria State, a man brought a case against a married woman who he believed to be having an affair with another man, on the basis that he had found the woman and the man in question drinking together. The pair in question in this case argued that they were only drinking together and denied the affair.

The man who launched the case had no relation to any of the parties in question, other than being their neighbour. The married woman's husband, upon hearing the allegation, demanded that the man with whom she had been drinking must find a ram and carry out a traditional purification ritual. However the woman subsequently remained bitter with the man who had made the allegations, for tarnishing her reputation.

The court ruled that there was no evidence of the allegations and therefore fined the man who had launched the case a sum of 500 SSP for 'gossip',



Mundari tribesmen move a bull at a South Sudan cattle camp. © Lt. Col. Alisa Wilma, U.S. Army Africa. www.flickr.com/photos/usarmyafrica/9965867966

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warning that the matter could have led the husband of the woman to kill the accused man without cause. Due to the lack of evidence, the court proceedings were extremely quick, with the hearing lasting just one hour.

REPORT 11: DISPUTE OVER BRIDE PRICE IN COUNTY COURT

The following case began in a county court, was then referred to a customary court, and finally back to the county court. It illustrates the difficulties which can arise in a dispute over marriage between members of two tribes.

A mother brought the case to Wau County court in order to demand payment of dowry according to Dinka custom from a boy she accused of impregnating her under-age daughter. The girl in question is a member of the Dinka tribe while the boy, the accused in the case, is a member of the Balanda tribe.

During the original proceedings the boy had agreed to marry the girl, but the father of the girl refused to accept the marriage proposal, on the basis that the Balanda tribe does not possess enough cows.

The court gave the two parties two weeks to go away and settle the matter in a traditional court. However, due to the differing marriage traditions of the two tribes, the parties failed to resolve the matter and the case was brought back to the same county court.

The court sentenced the boy to three months imprisonment, a fine of 1,000 SSP and five cows to be given to the parents of the girl. But the father and mother of the girl protested the ruling claiming that the sentence was not in accordance with the Dinka customary law and demanding more cows and further punishment of the boy.

Dinka customary law requires seven cows as a fine for eloping with a girl without the consent of her parents; in addition the dowry demand may be up to 100 heads of cattle.

REPORT 12: MAN CHARGED FOR MANSLAUGHTER OF HIS SON

This court case from Warrap demonstrates the ways in which a customary court can choose to adopt and enforce the legal rulings of statutory law, even where they run counter to local traditional practices.

The customary 'B' court in Tonj, Warrap state, sentenced a man for the death of his own child. The case was brought to court by the family of the deceased child's mother, claiming that the defendant used outlawed traditional means of circumcision on the child, resulting in his death. The family also told the court that the defendant did not pay a dowry when he married their daughter and asked that he should be forced by the court to pay for the death of the child.

The defendant during the court proceedings described to the court that after he had performed the circumcision using the traditional tools of the Dinka, the child died subsequently in hospital, probably of blood loss or infection. The defendant emphasised that he did not have any ill intentions towards his child, arguing that he only acted upon the common traditional practice that many parents carry out in the region.

The panel of five chiefs presiding over the court ruled to hold the defendant liable for the death of his own child on the basis that he had violated the order that prohibits parents from circumcising their children by traditional means. This statutory legal order was first established by the Ministry of Health, but the Tonj customary court had decided to adopt it within their own laws due the dangers of traditional circumcision. Moreover the chiefs decided that the defendant's failure to pay a dowry at the time of his marriage reinforced his guilt. However the chiefs ruled that the death of the child was not intentional and sentenced the defendant accordingly.

The defendant was charged with paying five cows in compensation to the complainants, his late child's maternal relatives, and ordered to pay the outstanding dowry, with the complainants being told to pursue this payment through civil court procedures. The defendant was not imprisoned.

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This case demonstrates that customary courts may adopt statutory law, but also reveals the blurred boundaries between customary and statutory courts. This was a criminal case and therefore theoretically under the jurisdiction of the High Court, and yet here we see it being decided in a customary court. It is estimated that in a statutory court the man could have been fined the monetary equivalent of double the amount demanded by the customary court.

REPORT 13: TWO MEN FINED FOR DRUNKENNESS

The following case from a customary court shows the value that some communities place upon traditional rituals over punitive rulings.

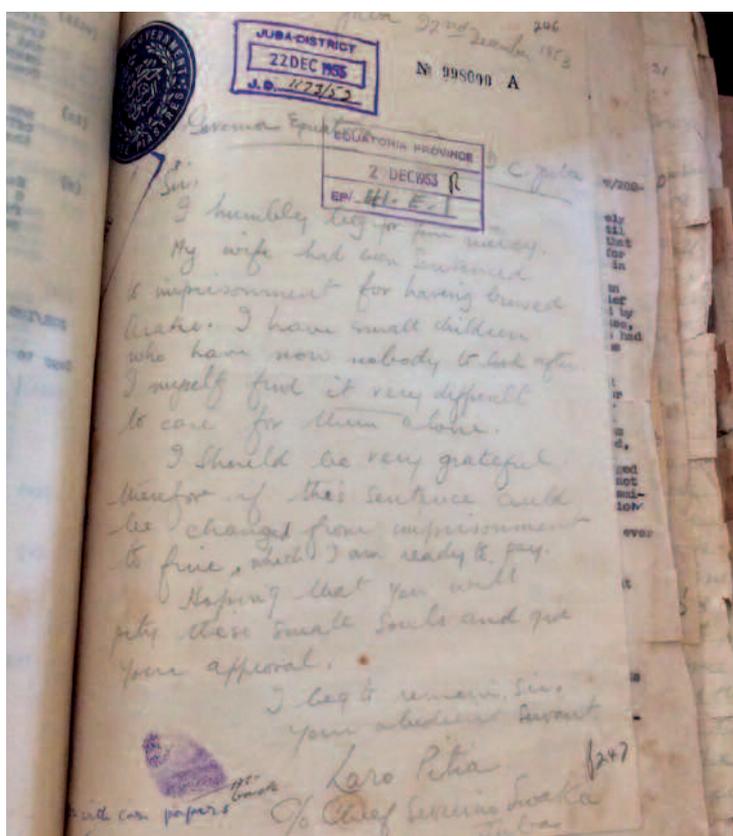
Two men were fined and took an oath of abstinence before the Kator 'B' court in Central Equatoria state, for drunkenness and domestic violence.

The two men – the defendants – are neighbours in the same residential compound and often drank together, hence their being tried in court simultaneously. There were two complainants in this case – the mother of

the first man, who claimed that her son's alcoholism had led him to beat her frequently, and the wife of the second man, who alleged that her husband neglected to provide for his family's needs due to his excessive drinking.

The panel of four chiefs of the Bari tribe, presided over by a paramount chief, passed a ruling sentencing the two defendants to a fine of 150 SSP each, paid to the court, and ordered them to take an oath never to drink again.

The two took an oath using a spear. In accordance with local customary traditions, communities use a spear as the means for swearing, rather than a bible or Koran. For the oath the men proclaimed: 'I so swear that I will never take alcoholic drinks again throughout my life, and if I do, may this spear pierce me', and licked the spear three times. The gravity of such an oath is felt greatly in the community and it is believed that one who has taken the oath will die if he or she violates it. As such, the complainants in this case, despite receiving no material gains, were largely satisfied with the ruling. They believe the oath will have a positive bearing on the two defendants' behaviour.



CONCLUSION

Court reporting: past, present and future

Justice in Practice surveyed a random sample of court proceedings, including customary courts at ‘B’ and ‘C’ levels, High Courts and County Courts in urban and rural settings from five of South Sudan’s ten states. These observations found that cases in customary courts frequently related to domestic disputes, such as divorce or the payment of bride price, and often the settlements appeared to have been acceptable to the the community, but to contravene human rights norms. Cases heard in statutory courts were plagued by contraventions of either the Transitional Constitution of 2011, of national law, or raised questions about grey areas in existing law.

These initial observations cannot be the basis for firm generalisations about the delivery of justice in South Sudan, but they do confirm many of the concerns identified in the review of existing studies (see page 3). They constitute an initial exploratory study of justice in practice which will help to provide a foundation for future academic research. They also aim to contribute to a wider series of ongoing initiatives to promote access to justice in South Sudan. Many of these other initiatives focus on improving practice in customary courts. In particular, the United Nations Development Programme Support to Access to Justice and the Rule of Law is supporting the Ministry of Justice in a vital commitment to promote ‘the harmonization of the customary and statutory law systems, as well as the ascertainment of customary law through continuous research’ (UNDP, 2015).

Significantly, *Justice in Practice* indicates the need to redouble efforts to improve the statutory system and to provide open access to consistent reports of proceedings in these courts. Lawyers lack a legal gazette and need better provision of records of court cases, for instance as a means to establish legal precedent. Researchers and lawyers can also gain insights from lawyer’s accounts of their own handling of cases and experiences in court. The ‘caseload reports’ expose an array of practical and legal challenges that South Sudanese lawyers encounter on a daily basis. Recording these behind-the-scenes challenges as well as the proceedings in courts is essential, both for combatting abuse and corruption within the justice system and for the development of the common law system.

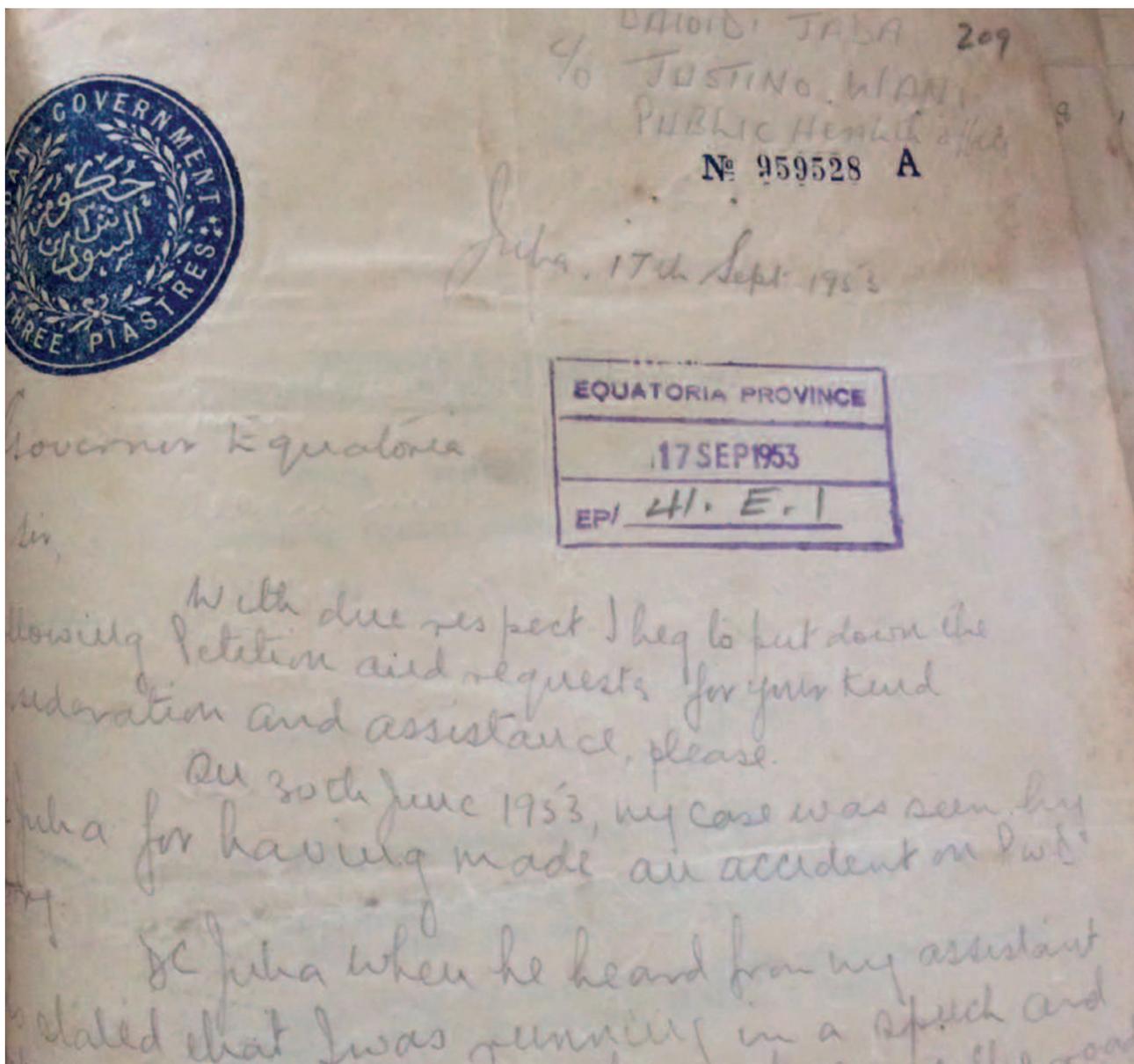
Consulting past records

In the quest to document and understand the administration of justice, researchers, legal practitioners and customary court members can draw lessons and comparisons from history. Housed in the South Sudan National Archive, there are volumes of detailed written reports on justice proceedings in statutory and customary courts ranging from minor domestic disputes, to the mutiny of 1955 which instigated the Anyanya movement and the First Sudanese Civil War. The archive, established through collaboration between the Rift Valley Institute and the Department of the Ministry of Culture, Youth and Sport in 2004, represents an invaluable resource to researchers and underscores the importance of open access to records of court proceedings.

Identifying new practices

Beyond the everyday problems of the administration of justice in customary and statutory courts, it is important to identify the specific challenges have emerged since December 2013. Seemingly, legal pluralism is becoming even more complex in the context of the ongoing conflict. Alongside crimes associated directly with the civil war, there are rising reports of the justice and security system being used to silence or intimidate, as noted by the United Nations OHCHR (2013) report, and exemplified in recent reported arrests of suspected ‘rebels’ without charge. While there are persistent attempts to improve and to ‘ascertain’ court practices in communities outside of conflict zones, those who have been affected by the civil war have faced new threats, new authorities and even new systems, including as refugees or Internally Displaced People (IDPs).

In the current circumstances, we have seen improvisations in efforts to deliver justice, including from local governments, civil society groups, humanitarian agencies and, most unusually, the United Nations Mission in South Sudan (UNMISS). The UNMISS Protection of Civilian Sites (PoCs) constitute a unique legal space, in which there are attempts to uphold international law while also experimenting with local mechanisms. The UN police force (UNPOL) has struggled to respond to rising incidents of crime in the PoCs, while conforming to the requirements of



protection and international law. It initially handed over some criminals to the government, with a 'declaration of assurance' from the government that they would respect the suspects' human rights. But serious crimes such as murder could be subject to the death penalty and, following a dispute over the crime assessment criteria, the Prosecutor General refused to prosecute IDP crimes. On occasion, UNPOL has resorted to expulsion, or has held serious criminals without trial indefinitely. But its main response has been to contribute to the development of an informal dispute resolution process carried out by community leaders in the PoCs and supported by the UN. The Informal Mitigation Dispute Resolution Mechanisms (IMDRMs) are designated for petty crimes such as

theft, but have also been used for more serious crimes, including rape and homicide. These practices are setting precedents and they need to be examined and documented.

Concerns for the future

Justice in Practice is a call for systematic court reporting across the spectrum of South Sudan's courts, and for intensified efforts to harmonize and improve the justice system. Such reports are essential to understand how legal practitioners, local chiefly authorities and a range of partners continue to strive to administer justice in the face of adversity and uncertainty.

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Justice in Practice does not represent the views of the partners or of any particular group or individual. It simply records experiences of justice through a series of customary and statutory court cases at different locations and times between November 2014 and February 2015. Any errors or omissions are the sole responsibility of Justice Africa.