

Women's Security and the Law in South Sudan

Despite the official end of war in South Sudan, women's well-being and security remain under constant threat. The fledgling country has promised to ensure equality and rights for all, yet its very laws are often a source of insecurity for women.

Years of war had a devastating effect on the country's justice sector. Much of the limited court infrastructure that existed before the war was destroyed as chronic insecurity prevented development, legal education, and the formation of an effective legal system. As a result, South Sudanese have had limited recourse to the formal justice system; instead, people rely almost exclusively on traditional courts, which apply the customary laws of South Sudan's many tribes.

These laws play a critical role in regulating South Sudanese society. During the civil wars customary law provided an important source of cohesion and order in families and communities; it became a means with which responsibilities were enforced and family support was ensured. Yet the reliance on customary practices has also had negative consequences for women. The law is deeply patriarchal, casting men as the undisputed heads of their families, with women playing subservient roles. While South Sudan's 2005 Interim Constitution guarantees human rights and equality for all (GoSS, 2005), numerous rules of customary law continue to violate women's rights. As the new state develops its justice sector, drafts new laws, and establishes a functional legal system, it faces the challenging task of reconciling customary law with the guarantees of human rights that are enshrined in the constitution.

This report discusses the law and its effects on women's security in South Sudan. It describes the parallel court systems and bodies of law, both formal and customary, examining the ways in which they work together in theory—and in practice. It assesses how women are affected by the dominant use of customary courts, highlighting particular components of the law that threaten women's security. Finally, it considers the conflict between customary law and South Sudan's human rights obligations, exploring options for reconciling the two.

While there are significant variations among the customary laws of various tribes, this report places a focus on laws that are common to many or most tribes. Nevertheless, the rules and practices described below should not be understood to apply to all communities.

The parallel legal frameworks

Two bodies of law operate side by side in South Sudan. Statutory law is generated by the state and consists of the constitution, legislation, and precedent created through court judgements. Until a final constitution is drafted, the 2005 Interim Constitution is the highest law of the land and all other laws must be consistent with it. About 40 laws have been drafted for the new state, among them legislation that has a direct bearing on women's security, such as the Penal Code Act (2008), which sets out

various criminal offences, and the Child Act (2008). Operating alongside the statutory system is that of customary law, which consists of numerous unwritten bodies of law that have regulated South Sudan's tribes for centuries.

The laws of both systems are binding. The 2005 Comprehensive Peace Agreement, which marked the end of the war, recognized customary law as valid, stating that:

All personal and family matters including marriage, divorce, inheritance, succession and affiliation may be governed by the personal laws (including Sharia or other religious laws, customs or traditions) of those concerned (GoS and SPLM/A, 2005, ch. 1, para. 6.4).

The Interim Constitution confers legal recognition onto customary law in a number of provisions. The two bodies of law are to operate in parallel, both forming critical parts of South Sudan's burgeoning legal system.

Despite the distinct hierarchy in the system, the courts work together in a confusing and often inconsistent manner. Statutory courts, which form the top tiers of the hierarchy, are supposed to provide an avenue for appeal from customary courts. Presided over by judges with formal legal training, these courts apply predominantly statutory but also some customary law, partly in the context of appeals from customary courts. The customary courts represent the bottom tiers of the hierarchy. Although a subject matter division was envisaged between the different types of courts, attempts at enforcing this have been ineffective.

Referrals from customary to statutory courts are made inconsistently and without clear regulatory guidelines, with individual chiefs adjudicating in the manner they feel is appropriate. Given the poor state of the statutory courts, customary courts hear the vast majority—up to 90 per cent—of cases. While it is theoretically possible to appeal from the customary to the statutory courts, the widespread absence of local courts prevents many South Sudanese from accessing the formal legal system. In a 2009 workshop held in Bahr el Ghazal, one woman described the challenges women face in accessing courts:

If you complain to the civil court, the judge will mostly refer you back to the customary male chiefs in your tribe. You complain to the male customary chiefs and they will ask you to obey your husband and follow our community culture [...]. Actually we don't know where to find justice (Aldehaib, 2010).

Chiefs who preside over customary courts are generally older men with deeply ingrained patriarchal views, which are reflected in their decisions. Research shows that chiefs are more easily swayed by men's interests and points of view and that their judgements are often biased in favour of men (UNFPA and DPK, 2008). Customary courts are often held out in the open, for example under a large tree, and community members are free to observe the proceedings. Normally many more men than women

attend the courts, which can make them intimidating for a woman. Chiefs also take crowd support and opinion into consideration. A largely male crowd can thus influence matters in favour of male litigants.

A key problem with the customary courts is inconsistency. As customary law is unwritten, chiefs seldom refer to written sources for guidance on punishment, although some do have copies of the penal code, to which they refer. A recent study compares customary court cases in four regions of South Sudan, revealing significant variation in decisions and sentences. Court decisions varied between rural and urban areas, between different tribes and populations, and depending on the attitude and education level of the individual chiefs (UNFPA and DPK, 2008). Such variations preclude any sense of confidence in the law, meaning that women cannot look to the courts for guaranteed or consistent protection.

Across the country, law enforcement services are weak and police are undertrained and under-resourced. In particular, police are given little training on how to handle cases of gender-based violence and for the most part, they have little knowledge of the concept of women's rights. Women in focus groups explained that police often refuse to deal with women who report domestic abuse, claiming that this area falls outside of their jurisdiction and sending them home to address the issue within their families. Women complain that police meet reports of sexual violence with indifference or counter-accusations (D'Awol, 2011). In some cases, police have reportedly arrested rape victims for adultery or incarcerated them for their own 'protection' until a perpetrator was caught.

Police insensitivity can be a significant barrier for women who are seeking protection. The newly developed Special Protection Units seek to address this shortfall. Situated at police stations, these specialized units are staffed by police who are specially trained to assist women and children offering legal aid, protection, medical care, and psychosocial support. The development of these units has been slowed by a lack of trained personnel, however, and they remain largely unavailable outside of major urban centres.

Customary law and women

Customary law is said to be the legal expression of the practices, customs, and beliefs of the people. Chief Justice Ambrose Thiik explained that customary law 'embodies much of what we have fought for these past 20 years. It is self-evident that customary law will underpin our society, its legal institutions, and laws in the future.' Customary law took on great importance during the war, as family units and formal structures were disrupted, with people relying more heavily on customary practices to regulate their lives.

South Sudan is home to more than 50 tribes, each of which has its own customary laws and traditions. While these bodies of law are characterized by significant variations, they also have many commonalities, particularly with respect to family

issues—such as marriage, divorce, custody, and inheritance—which have a strong impact on women’s security. All of the systems of customary law are inherently patriarchal, relegating women to a lower status in the family and community and perpetuating and enforcing a number of customs and traditions that are harmful to women. Proponents of the law maintain that the role and status of women must be seen in the context of a culture whose upmost value is family cohesion; from this standpoint, women and men’s positions are equally critical to the family unit’s survival, with the woman’s subservient position fulfilling an important social role.

The following sections discuss the impact of South Sudan’s legal system on women’s security, especially with respect to domestic violence, divorce, adultery, ownership of property and inheritance laws, and sexual violence. Many concerns relate to marriage, an institution of critical importance, which—perhaps more than any other aspect of life—shapes a woman’s experience, status, and security. In marital disputes customary courts place the emphasis on preserving marriages, even if doing so is to the detriment of a woman’s safety and well-being. Under all of South Sudan’s customary law codes, marriage involves the payment of a bride price by a man and his family to a woman’s family. Chiefs often overstress its importance and a husband’s resulting rights over his wife. Marriage is thus the backdrop against which the topics discussed below need to be understood.

Domestic violence

Levels of domestic violence are extremely high in South Sudan (Stern, 2011). Customary law allows a certain level of violence in the home and permits a man to ‘discipline’ his wife. Yet while customary courts condone some physical abuse, women may appeal to the courts if the violence exceeds a reasonable level. That level varies greatly depending on the location, the court, and the individual chief. Domestic violence is often condoned by a court if a wife is found to be ‘behaving badly’ or not fulfilling her duties, such as by failing to cook for her husband, insulting him, or drinking. Many of the women who take their husbands to court for excessive abuse are themselves sentenced by the courts; wives are sometimes punished more harshly than their offending husbands, for example by receiving a larger number of lashings.

As noted above, customary courts aim to preserve marriages. Rather than granting a divorce in a domestic violence case, a court may order a man to compensate his wife for harm inflicted, such as by paying her hospital bills. Alternatively, he may have to pay a fine of a certain number of cows or—in extreme cases—serve several months in prison. In deciding whether to grant a divorce, courts place an emphasis on whether the man wishes to remain in the marriage. A court is likely to order a woman to remain with her husband if he does not wish to be divorced and apologizes to his wife, promising to desist from further excessive beating. Among the Bari and other tribes, such promises take the form of a symbolic licking of a traditional spear in court. A guiding belief holds that if the promise is not made truthfully, the spear will harm the person.

Courts only grant divorces to couples if the domestic violence reaches a certain level of gravity or regularity, or if the violence can be seen as evidence that a man has disowned his wife. This position has occasionally provided an incentive for men to beat their wives repeatedly in order to force a divorce. If a divorce is not granted, a woman is almost always compelled to return to her abusive husband, with little done to protect her from further harm. As a result, women are often afraid to report domestic violence, fearing that their husbands will only become more irate. Notably, a man only has the right to use violence against his wife or his daughter. Courts take violence that targets non-family members more seriously.

Divorce

Divorce procedures vary among tribes. The Dinka, for example, have to appear before court to be granted a divorce, while the Shilluk can divorce each other based on an agreement between a husband and wife. Despite these variations in procedure, in most of the customary law systems it is the return of bride price to a husband's family that renders a couple divorced. The need to return the bride price can create a number of difficulties. At the start of a marriage, the bride price is distributed among a bride's family and her various relatives. Repayment can cause logistical problems and friction within families, prompting them to push for reconciliation at any cost.

Whenever divorce does occur, most versions of customary law place children with their fathers as they are considered part of the male lineage. However, young children are permitted to remain with their mothers until they turn between three and seven years old. The prospect of losing custody acts as a strong disincentive to mothers who are considering a divorce.

Given the difficulties in attaining a formal divorce, many couples opt to separate informally, which can also create problems for women. While polygamy is legal for men, for women it is not; if a separated woman enters into a new relationship or marries another man this is considered to be adultery (see below). Any children she might have with her new partner will 'belong' to her former husband. Other men may thus avoid becoming involved with separated women, as children born to these unions will not be considered to be of their lineage.

Adultery

Adultery is a criminal offence in South Sudan and is taken very seriously. The Penal Code Act makes it a crime in statutory law, punishable by a prison term of up to two years and/or a fine. It is also forbidden in customary law. Among the Dinka and some other tribes a man who has slept with or impregnated a woman who is not his wife may have to pay a fine to her husband or, if she is unmarried, her parents.

Adultery by women is treated more harshly. An accused woman may be held in prison for 24 hours while an investigation is carried out and may be sentenced to several months of incarceration if she is found to be guilty. Like men, women are often given the option of paying a fine instead of serving time in prison. Yet given

that most women do not have incomes of their own and because their money and possessions belong to their ‘aggrieved’ husbands, they are more likely to spend time in prison.

Ownership of property and inheritance laws

Women’s capacity to own property is among the main factors affecting their security. In a severely underdeveloped country such as South Sudan, which has little in the way of social security and assistance, an abandoned woman who is left without a home or property may become completely destitute. The Interim Constitution expressly states that women have the right to own property and to share in the estates of their deceased husbands. Customary law differs on this point, however, focusing instead on ensuring that property remains within families. Although property is owned by a family, it is held by the man, as the head of the household—an arrangement that is often confused with that of ‘ownership’. According to the customary laws of many tribes, women cannot own property in their own capacity, nor may they keep their own income.

On leaving a family through divorce, a woman forfeits all of her belongings, which continue to be owned by the husband’s family. The threat of being left with nothing can thus serve as an enormous disincentive to divorce. Property also becomes an issue after the death of a spouse. According to most versions of customary law, death does not terminate a marriage. A widow is therefore still considered married to her deceased husband. The deceased’s property remains within his family, dispersed among his male relatives. Widows thus find themselves dependant on their deceased husbands’ families for support. It is not uncommon for them to be evicted from their homes and left with nothing. This became a serious problem during the war, when a large number of men were killed, leaving widows behind them. One of the ways in which South Sudanese society dealt with this problem was with the practice of ‘wife inheritance’, in which a wife was ‘inherited’ or remarried to the deceased’s closest male relative. This practice, which dates from well before the outbreak of civil war, had its origins as a means to guarantee support for widows.

Sexual violence

While the law in South Sudan prohibits sexual violence, most sexual violence cases do not make it to the courts. Women are often made to marry their rapists, an option preferred by some as it prevents men from going to jail and avoids the stigma attached to women who are known to have been raped.

If a sexual violence case is taken to court, the chances of conviction are low, largely due to factors including the poor investigative capacity of the police, the evidentiary challenges associated with sexual violence, and court biases. Officially, customary courts are not supposed to hear serious criminal matters such as rape; they are expected to refer these cases on to the statutory court system. In practice, however, customary courts frequently do try rape cases. If perpetrators are convicted, punishments are often mild. A rapist might be sentenced to a short prison term—

sometimes around three months—or might be forced to pay compensation to a woman’s family if she is unmarried or to her husband if she is married. To a great extent, those who rape get away with the crime, perpetuating a perception that men can rape with impunity.

Notably, section 247 of the Penal Code Act specifically excludes coerced marital sex from the definition of rape, regardless of the level of violence that accompanies it. However while coerced marital sex is thus not against the law, the violence accompanying the act may constitute a different crime.

Tensions between customary law and human rights

The Interim Constitution states: ‘All persons are equal before the law and are entitled to the equal protection of the law’ (GoSS, 2005, s. 18). It adds that ‘[w]omen shall be accorded full and equal dignity of the person with men’ (s. 20(1)). Yet the Interim Constitution also grants legal recognition to customary law. The potential conflict between these provisions is addressed in the constitution, which clearly states that authorities may apply customary law ‘subject to this Constitution and the law’ (s. 174(3)). Legally, this means that customary law is binding and applicable *to the extent* that it does not conflict with the rights in the constitution. Rules of customary law that violate constitutional rights are therefore unconstitutional and—at least in theory—may no longer be applied.

In determining how this problem should be addressed and what role customary law should play in the future, it is important to consider how the people of South Sudan perceive the law and its corresponding court system. At a political level, customary law has been continuously bolstered. Politicians have repeatedly emphasized that it will form an important basis for the nation’s legal system. The Sudan People’s Liberation Army’s statutory reforms of 2003, in which the legal basis for the state was established, also accords it great legitimacy. The statutory courts, too, have affirmed customary law, with South Sudanese jurisprudence continuously incorporating customary practices in its rulings. Moreover, the vast majority of residents of South Sudan support it.

A 2008 study, conducted in four regions of what is today South Sudan, concludes that people largely trust the customary courts, preferring them to statutory alternatives (UNFPA and DPK, 2008). Interviewees explained that it was significant to them that these courts applied their own laws and upheld the customs and traditions that they felt were important. They described customary courts as able to negotiate more acceptable and appropriate outcomes. They also said that they valued their familiarity with customary laws and procedures and appreciated the speed and simplicity with which matters were heard and settled. Interviewees emphasized the many barriers to using the statutory court system, including complicated procedures, the significant expenses involved, and the need to hire lawyers.

In the same study 51 of 59 interviewed women who had had cases of gender-based violence heard by customary courts reported that the punishments given in their cases were fair, while 61 of 64 expressed faith in the customary courts to provide justice. These results may be surprising since rulings in many of their cases were strongly biased against them (UNFPA and DPK, 2008). Clearly, many South Sudanese men and women strongly believe in the principles that customary law promotes—including the respective roles of men and women in families and communities.

Ongoing efforts by the government and the aid community to eliminate discriminatory facets of customary law are supported by human rights advocates, but many South Sudanese are opposed to this development. They caution that such a process will lead to an impure version of customary law and bring about unintended consequences. They emphasize the social value of old traditions, warning that legal changes should occur in a way that ‘does not threaten to destabilize a society already under pressure from a myriad of external and internal sources’ (Akechak Jok, Leitch, and Vandewint, 2004). Although most people accept that some change to customary law is inevitable, many caution that this change must come from within South Sudanese society and occur at a pace to which the society can adjust.

In order for the statutory courts, customary courts, and parliament to undertake the process of excising and amending the unconstitutional parts of customary law, the justice sector will require people who are knowledgeable about both bodies of law. That capacity is currently lacking at all levels. A key challenge will involve persuading chiefs to develop customary law in conformity with the constitution. During the past few years, a small number of chiefs have received training and have thus become somewhat knowledgeable about the Bill of Rights. Studies conducted after the training sessions concluded that some were open to discussions about women’s rights and that their judgements had become more respectful of those rights, for example by increasing punishments for gender-based violence and more frequently granting divorces in response to domestic abuse (UNFPA and DPK, 2008). Where chiefs are not willing to adapt their views in the context of conflicts between the bodies of law, appeals will inevitably be made to the higher courts. As the judiciary grows in size and capacity, the influence of statutory law will probably begin to increase and the trickle-down effects will become apparent.

Attempts to codify customary law are also under way. A Customary Law Development Centre, which is currently being formed by South Sudan’s government, will research and codify the laws. At the same time, the centre will analyse customary law for violations of the constitution and refer areas identified as requiring legal reform to the appropriate bodies. These codification efforts are not without controversy. Opponents caution that customary law is supposed to reflect contemporary practices and beliefs, which change over time. They fear that codification may remove the law’s flexibility to respond to change.

Additional initiatives have begun to address this problem, driven by both the government and international donors, despite warnings that such a process must be run and driven internally. Initiatives have included training for chiefs and judges, the creation of ‘chiefs forums’, the facilitation of linkages between chiefs and judges, and capacity building of the statutory courts. There is a pressing need for further work in these areas. More regular, more formalized, and more in-depth training is needed to teach chiefs about human rights and how to handle gender-based violence cases. Village headmen, often the first port of call in people’s cases, also need to be trained. The ‘chiefs forums’ should be expanded and linked to law reform processes; in that way, chiefs will be informed if legislation or a court outlaws specific traditional practices. It is also crucial that a case review and appeals process be created to prevent violations.

Finally, after significant delay, a National Constitutional Review Commission has been formed and is about to embark on the process of drafting a final constitution for South Sudan. This provides an opportunity to create a constitution that stands firmly for women’s rights and clearly demarcates the ways in which practices that violate these rights should be addressed.

Conclusion

The creation of the new state and its budding legal system provides South Sudan with a unique opportunity to reform social practices and to align them with the fundamental guarantees of human rights and equality. To date, this goal remains a distant hope as patriarchal laws continue to be applied, harming women, threatening their security, and relegating them to inferior positions in their homes and communities. Critical change is needed in this area. In developing its legal system, South Sudan will reveal whether its struggle for equality truly entails the pursuit of equality for all.

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