

Negotiating Justice: Courts as local civil authority during the conflict in South Sudan

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Negotiating Justice

South Sudan's courts have continued to function despite the extreme pressures of civil war, atrocities, and economic crisis. They constitute a resilient form of civil authority and an instrument to deal with everyday criminality. The courts also hold the potential to prevent violence and improve protection, not least because both men and women turn to the courts to resolve all manner of disputes, from minor arguments within families to violent disputes and abuses, including by local authorities. People also publicly show compliance during court proceedings, despite uncertainty over when and how judgements will be implemented. However, all are not equal under the law in South Sudan. Instead justice reproduces social and economic inequalities, and is subject to local improvisations. Court decisions are sometimes complicit in human rights violations, especially of women and youth. And military, political and economic elites have opportunities to circumvent or manipulate the system.

The justice system is defined by legal and judicial plurality, comprising a patchwork of statutory law and more than 60 varieties of customary law administered either by judges or chiefs. It is not easily legible as an abstract code from the outside, but recording of specific cases reveals how the law is applied. We find some cases that exemplify fairness or good practice, as well as many that reinforce discrimination and inequalities. This paper is based on findings from more than 600 observations of customary and statutory courts by twenty South Sudanese researchers for the Justice and Security Research Programme (JSRP) from July 2015-July 2016¹.

It identifies key issues for further deliberation based on research in the towns of Nimule, Torit, Rumbek, Yambio, Yei, Wau, and surrounding areas, in Juba town and United Nations Mission in South Sudan, Protection of Civilian Sites (UNMISS PoCs) in Juba and Bentiu. It builds on previous analyses that emphasised the importance of chiefs' courts as a locus of civil authority engaged in making order, and an entry point for initiatives to promote and protect the rights of the vulnerable (de Waal and Ibreck, 2016).

Notably, the courts are situated within a fragmented justice and security landscape in the context of war, structural violence and corruption (de Waal, 2014). This paper examines only one facet of justice – court practices and judgements – we do not review how cases come to court, whether and how decisions were implemented, or wider abuses within the justice and security system. We simply focus on the range of cases heard in court, and how judges exercise their legal and normative authority during the proceedings. It should be noted that the courts cannot necessarily compel people to attend nor can they ensure that their decisions are enforced, since some cases are not reported to the police, and security forces and other local authorities sometimes lack the capacity or the will to promote adherence to the law.

The research reveals the makeshift characteristics of courts, and the influence of local contexts and participants on the prospects for justice. We find there are clear distinctions between statutory and customary courts in terms of their procedures and composition, yet they also overlap and blend, with the former drawing upon customary precedents, while the latter sometimes take statutory law into account in their decisions.

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Moreover, all the courts are under-resourced, often relying on commitment and goodwill. Chiefs, lawyers and paralegals are either inadequately paid or voluntary. Even judges are subject to delays in salary and poor working conditions.² The possibilities for good decisions thus depend upon local conditions and interventions, including the conduct of individuals. Given the wider conditions of conflict and fragmentation, it is also apparent that the local characteristics of courts are often the basis of their legitimacy and trust.

The failings of the security forces, and attempts by powerful actors to exploit the courts for personal or political advantage, are everyday concerns for those working to improve the justice system.³ Given political uncertainty and insecurity, compliance with the courts partly depends on the parties concerned and pressure from within the local community. Nevertheless, court hearings are pivotal for the establishment and administration of law, and in promoting norms including human rights.

Customary courts have long been the mainstay of the justice system and remain so today. They are accessible and prolific, dispensing frequent and swift judgements, with cases often reaching the courts in a matter of days and being decided rapidly. They have been uniquely responsive and adaptable during the current conflict. The decisions taken by these courts, especially those relating to marital and sexual relationships, frequently violate international human rights norms – although in some cases, there are efforts to uphold these rights. Yet the open public deliberation characteristic of customary courts ensures that they are more than just a forum for dispensing decisions on breaches of the law and infractions of custom. Rather, customary justice is a mechanism for making social order, constituting public authority and shared identities and norms. Customary chiefs and their courts are closely engaged with protection issues and their activities are closely relevant to the questions of how to prevent and transform conflict.

The significance of customary courts reflects some continuity with the situation prior to the outbreak of civil war in December 2013, and with governance in South Sudan over a longer period, especially since the creation of the Government of Southern Sudan in 2005. Remarkably, in some areas, the war has apparently strengthened chiefs' roles in provision of regulation and order as statutory courts and formal government institutions run out of funds and legitimacy. Chiefs and their courts are found across South Sudan, in government and opposition areas, when other governance institutions appear to be in flux. In periods of conflict and flight to new settlements, South Sudanese have repeatedly remade customary courts in pursuit of social order and public authority. For instance, customary courts have emerged with significant authority in UN PoC sites (Ibreck and Pendle, 2016).

Many statutory courts have ceased to function in conflict zones or during periods of fighting, yet they continued to operate in the towns observed for most of the research period. In general, the courts are convened and presided over by a single judge who ideally 'wears three hats' as judge and advocate for each of the parties.⁴ There are some examples that demonstrate good practice – most judges refer to legal codes in their decisions; some show compassion and moral concern in their decisions; and many cases come to trial rapidly after the alleged offence. Yet, the system is a lottery: it is marred by irregularities and cannot protect the rights of defendants or complainants. Moreover, statutory courts frequently rely on customary norms and practices, for instance with the award of compensation in murder cases.

In what follows, we present evidence from the JSRP archive on the current practices of customary and statutory courts. We identify a series of issues that are crucial for understanding the significance of the courts and the prospects for justice, contributing to a body of existing knowledge about the courts in South Sudan (*inter alia* Jok et al., 2004; Deng, 2010; Deng, 2013;

Leonardi et al., 2010; Mennen, 2010). We include cases that reflect general patterns, expose abuses or indicate the prospects for reform. The aim is to highlight cases that South Sudanese judges, chiefs, legal practitioners and activists might find useful to consider in reviewing and improving the system. Our findings also shed light on the state of the justice system during a period of conflict, political uncertainty, and economic crisis.

Reviewing customary and statutory court cases

To assess how the courts are functioning in practice, we identified a series of concerns relating to justice in South Sudan, based on previous studies (e.g. Leonardi et al., 2010), and interviews or dialogues about the justice system (including JSRP forums in 2014-16). We then posed these as questions to identify patterns and salient cases in the JSRP archive. The records are anonymised for ethical reasons, but the circumstances, charges, judgements and locations are identified. The discussion below synthesises our conclusions regarding the tendencies of statutory and customary courts, and their performance during the conflict. Through specific cases, we also reveal a host of complex issues that confront South Sudanese judicial and legal practitioners.

Do courts promote civil authority?

The courts do generally uphold norms of civility in the process and occasionally they make important rulings against military or political authorities (also see Ibreck and Pendle, 2016: 30-33). Looking across a diverse range of cases, we find that the public authority of customary courts has been resilient in each of the localities studied in 2015-16,⁵ despite the flux of political leadership and the uncertainties of war. It is also apparent that statutory courts have continued to take and settle cases routinely. The court observations highlight the different procedures and composition of customary and statutory courts and some similarities between them in how compliance and legitimacy are generated. Certainly, all judicial authorities are nominally underpinned by the legal authority of

the state. Statutory courts are also symbols of the state and are often supported by other officials, such as court police. But the courts also depend upon local compliance, especially in the context of civil war and contested governmental authority. This makes judicial authorities vulnerable to local pressures and power relations and occasional forms of resistance. Yet the dependence of the courts on local compliance, and their capacity to generate consent, also enables a continuity of public authority even when governmental power is unpredictable and changing.

Pursuing civil processes

The strength of customary systems as civil forms of order-making relies upon the public and participatory nature of the process. The court panels generally include several chiefs – the number varies depending on the locality and timing – and sometimes women's representatives are included. They consistently engage in moralising on questions of right and wrong and involve deliberation and questioning. Customary chiefs rely on weighing up the statements of the two parties, and some contributions from witnesses; occasionally they take account of or demand documentary evidence. Decisions are usually justified by reference to local 'customary' norms, but some chiefs cite statutory legislation as the basis for their decisions. Elements of negotiation and arbitration are central to customary practice, but chiefs may also act in inquisitorial roles akin to those of the judges in statutory courts.

Customary court hearings are generally held in the open, and people contribute to their deliberations. This publicity increases local accountability, but it also makes decisions susceptible to popular sentiment and prevailing local power hierarchies. Chiefs and participants' discussions and decisions can reinforce inequalities and differences that serve the interests of violent entrepreneurs (see below). Yet the courts tend to reach settlements quite rapidly and the crowd present often seems to accept the judgement as fair, only rarely raising complaints.

2. Many of their grievances were expressed in a strike in June 2016 (Radio Tamazuj, 22 June 2016).

3. For instance, such concerns were expressed during JSRP civil society forums in Juba, July 2016.

4. This phrase was used by Justice Raimondo Geri to sum up his task (court observer forum, Juba, July 2016). It is substantiated by the evidence from the cases that legal representation is rare, so judges must 'guide the accused to explain his case properly; help the prosecution and pronounce the verdict'.

5. These included the towns of Torit, Nimule, Rumbek, Juba, Yei and Wau, and surrounding areas at boma, payam or county levels.

There are three levels of customary courts, with A courts at Boma level, B courts at Payam level and C courts at county level, while urban areas may also have town bench courts. On paper, A courts are expected to rule on family matters and minor disputes; B courts to take more serious civil cases that merit fines or prison sentences; and C courts to act on appeals and handle some criminal cases (Mertenskoetter and Luak, 2012). The reality is fuzzier, with diversity in cases handled at different levels (see various examples below). The jurisdictions, composition and procedures of courts vary in different localities, as does the content of 'customary law', as illustrated in the following two cases.

DISPUTE OVER AN 'INFORMAL' CONTRACT IN TORIT

A customary C court hearing in Torit on 24 May 2016, was presided over by a single chief, a secretary and two court police; it was attended by 13 women and 33 men. The case concerned a dispute over an 'unwritten contract'. The presiding chief first noted the name, address, tribe, occupation and relations of both the complainant and accused. He then asked the complainant to explain what brought him to court. The complainant claimed that the accused had not fulfilled the terms of their agreement to pay 1500 SSP, and he brought a witness to support his claim. The accused argued that he was lying about the contract, in which he had only agreed to pay 750 SSP. Neither could produce any documentary evidence. The accused was then given a chance to state his case.

The complainant alleged that the accused had initially refused to appear in court and that when he received the summons from the customary court the accused had thrown it before the sender stating 'what will these chiefs do... do you know who I am?' This second allegation was also taken seriously by the court. The chief questioned the accused on this matter: 'why have you acted like that? You have thrown the court petition and you know this is a criminal offence under South Sudan Penal Code Article 110.' The chief determined that the accused had shown disrespect to the rule of law and must be punished for it. He ruled in favour of the complainant and imposed a fine of 2500 SSP. The accused agreed to pay the amount, but 'seemed confused.'

A LAND DISPUTE IN WAU NORTH

The resolution of a land dispute in a customary A court in Hai Bafra, Wau North, highlights a more reconciliatory approach. This case, held on 18 March 2016, was adjudicated by a chief, an assistant chief and a court secretary was also on the panel taking notes (there were no court police); it was attended by five women and six men. The complainant told of a long running inter-familial dispute relating to a plot of land. He alleged that when he had come to the area from Khartoum he had been invited to stay by the grandmother of the accused and bought a plot from them for 300 SSP in 2007, but there were no official documents. He claimed that he began to fight with the accused after he discovered he had beaten his daughter, and at that point the accused questioned his right to stay on the land. The family of the accused then went to the Ministry of Infrastructure to check the registration of the plot and found that since the land was demarcated the situation had become more complex. The complainant's plot was still registered to the accused while the accused's plot was registered in another name (unrelated to them).

The chief and his panel court members asked many relevant questions. They then asked both parties to speak about what would help them most. The complainant asked the accused's family, who were all present in the court, whether they would allow him to remain on the plot, or whether he should sell it and take off the discount he paid to their grandmother. Another option discussed was whether to go to the authorities to change the names of the two plots to their names. Finally, the accused and his family agreed 'to step down from' the plot where the complainant was staying.

In both these customary cases, the matter raised was resolved within around an hour and at a fee of 30 SSP.⁶ In contrast, statutory trials are less transparent and participatory and cases take longer to resolve, cases are frequently adjourned and further evidence is called for. Most of those present in these courts tend to be involved as parties or witnesses in the case, or awaiting trial later in the day. Very rarely is a lawyer present to represent one of the parties and there is no jury. The courts use different languages depending on the locality, but parties may not be familiar with the language or procedures of the court. Although, parties are typically reminded of their rights to representation, they must generally speak for themselves and tend to present their case in the same manner they would in a customary court. Judges reach their conclusions swiftly and independently, either to settle or defer the matter; they often make references to better-known laws, such as the Penal Code, 2008, to justify their decisions. The system is nominally common law, but proceeds largely without reference to precedent, and without publication of case decisions. In practice, therefore, the courts tend to cultivate legitimacy through direct or implicit reference to customary norms, as the main form of precedent familiar to South Sudanese, as illustrated in the case below.

6. Note that later cases illustrate the variation in the cost of courts, depending on the locality. Court fees may rise to as much as 150 SSP.

A FAMILY DISPUTE IN JUBA

A family dispute brought to the statutory court in Juba Kator Payam on 21 December 2015 highlights similarities with the customary approach. The case was heard by one male judge with 13 people in attendance, and was resolved through mediation. The first wife in a polygamous marriage alleged that her husband's second wife was subjecting her to verbal and physical abuse. The case was brought by the sister of the first wife who explained that she believed that the abuse was directed at her sister because she is from the Dinka ethnic group. The first wife attested to the sister's claims stating: 'They politicise the problem'. The judge chose not to impose punitive measures and instead took a 'counselling approach' to work towards reconciling the two parties.

In justifying his actions, the judge stated that the 'conflict had taken a tribal dimension and imposing fines would worsen the relationship of the two parties.' He stated that as the two parties were related by marriage, tribalism should be avoided particularly as there were already children involved 'sharing the blood of the two ethnic groups.' He asked the complainant to drop the case and reconcile with the accused. He also asked the sympathisers of each party to reconcile. After a long arbitration by the judge, the women compromised and reconciled with one another without any charges.

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Imposing civil authority

Occasionally, the courts deal with cases involving government officials, chiefs, or members of the security forces responsible for violence or criminal actions. The flexibility in the justice system creates openings for powerful actors in breach of the law to manipulate and evade justice. Yet it is notable that people still bring cases in the hope that they will succeed. Furthermore, some cases demonstrate the possibility for accountability.

A COMPLAINT AGAINST AN ARMY OFFICER IN A LAND DISPUTE IN JUBA

A land case held in Gudele High Court in Juba is typical of the problem that judicial authorities face in bringing military actors to account. It illustrates the limits of the authority of the courts and the voluntary compliance needed for a case to take place. On 22 February 2016, a land case was heard by one male judge with fifteen people in attendance. The matter concerned the conduct of an army officer accused of taking a plot of land belonging to a Bari woman who had built a tukul (traditional house) on it and lived there since 2008. The complainant explained that she was initially assured of her rights by the county commissioner and local committee. But the army officer had threatened them, using force to claim the land. He then sought to purchase documents to register the plot in his name. The complainant did not report the matter to the police and instead brought the issue directly to court with the aim of reclaiming her property. She was asked to pay 2000 SSP alongside the court fees for bringing the case to court (the reason for the payment was unclear).

However, the accused officer simply failed to attend on the date of the hearing. The court remained in session for five hours, presumably awaiting the officer's arrival, but his absence left the court powerless to rule on the matter. The complainant spoke of her frustration at the 'the way people with guns threaten those without guns' and the officer's ability to take

the land 'because he is a man with money and a gun.' This case suggests that the courts cannot challenge the power and authority of military actors, although the fact that the complainant raised the case in court indicates her hope that the civil forum might hold sway.

A CASE AGAINST A SOLDIER WHO FAILED TO PAY A DEBT IN RUMBOK

In some cases, it does seem possible to bring military actors to court and to secure a prosecution. In customary proceedings at Rumbek town court, on 20 October 2015, a female seller of local brew raised a case against a Sudan People's Liberation Army (SPLA) soldier who was accused of consuming her alcohol on credit. He ran up a debt of 200 SSP and failed to pay it back. The woman explained that she had gone to his duty station to request the money owed, knowing that he had been paid, yet the soldier still refused to pay her and instead gave his pay directly to his wife. The complainant then decided to follow the matter up at his house. When she confronted him there, the soldier threatened to beat her.

The soldier attended the court case and responded to the demands of the court for an explanation. He conceded that he did owe the woman a debt of 200 SSP but explained that he was still unable to pay. He claimed that his salary was not in fact given to his wife but instead was taken by another individual from whom he had previously taken a loan. The court ruled that the soldier must immediately pay the amount of 200 SSP plus losses incurred amounting to 600 SSP and should be detained until he clears that debt. He was also ordered to pay the losses incurred by the woman. The judgement was welcomed by the complainant and supported by the onlookers.

A PROSECUTION OF A SOLDIER FOR RAPE IN WAU

A particularly significant prosecution of an SPLA soldier for the rape of a child was made by Wau customary A court on 16 July 2015. The soldier was accused of statutory rape of a six-year-old child. The judge found the soldier guilty based on the evidence presented and sentenced the soldier to 14 years' imprisonment and five cows to be paid in compensation to the family of the child. The imprisonment period is in line with the Penal Code 2008 and the Child Act 2008. However, under statutory law, rape cases should only be tried by statutory courts. Yet, at the time, there did not appear to be a statutory court functioning in Wau and so the case might have only been heard in the customary court because of lack of access to an alternative.

Do courts regulate violence and criminality?

Both customary and statutory courts repeatedly demonstrate their capacity to prosecute perpetrators of violence. In this sense, they surely contribute to conflict prevention by limiting demands for self-help justice and revenge. Courts often also engage in pre-emptive efforts to regulate violence and criminality, although it is not always clear whether these are successful. Court sentences typically either involved fines or imprisonment or some form of reparation, whether livestock or monetary compensation.

The chiefs warned both the complainant and the accused that 'the law does not permit the raiding of cattle as a revenge for your stolen cows.'

TWO CASES OF CATTLE RAIDING IN RUMBOK

A customary case held in Rumbek on 24 November 2015 responded to an ongoing local conflict involving cycles of cattle raids, in which cattle were stolen by one clan and counter raids organised. The case was presided over by a panel of four chiefs who ruled that all stolen cattle be returned to the rightful owners and warned both the complainant and the accused that 'the law does not permit the raiding of cattle as a revenge for your stolen cows.' This case is significant firstly as cattle raiding can often turn violent and spark cycles of revenge killing, alongside raiding of cattle, and secondly as the court provides a resolution outside of continuing cycles of raids (which would have likely been the case without this judgement).

Charges of cattle raiding were presented at a statutory court in Rumbek on 6 January 2016. The complainant accused a man of stealing his cattle and requested that the court take steps to recover his cattle from the accused. The accused appealed explaining that since the raid he had been reprimanded by the police who had taken six of the cattle and further he accused the complainant of 'collaborating with the military and selling one of his bulls which is now counted against him.' The complainant denied having taken part in selling the bull but stated that it is 'a tradition of the police and security when they catch a thief to take some of his cows or money as a penalty for the crime' – he argued that this should not be counted against him as he 'didn't give the orders.' The case was adjourned to bring witnesses forward and a statement from the military and police was requested. This shows the challenges involved in resolving such cases, but also establishes the willingness of the courts to investigate a complaint against the police.

THE PUNISHMENT OF A VIOLENT PERPETRATOR IN NIMULE

The possibility for bringing a violent perpetrator to justice was demonstrated in an exemplary ruling in Nimule county court on 16 September 2015. The case took only ten days to be taken to court through the police with a recommendation from the public prosecutor. The complainant accused her husband's cousin of beating her. She explained that he became violent when she did not respond immediately to his instruction to come to his house, and accused her of undermining his authority within his household, so that 'his wife does not respect him as usual.' When she arrived at his house, he dragged her into a room and beat her with a stick. She was injured on her neck, arm and thigh and showed physical and written evidence of these in 'form 8' (a form issued by the police). She also showed evidence of expenses incurred during her treatment.

The facts of the case were not disputed by either the perpetrator or the witness. Yet the accused defended his actions on the basis that he was responsible for looking after the woman because her husband is a driver and is often away. He also admitted that he beat his own wife and took the telephones of both his wife and the complainant explaining: 'The reason why I beat her is that she and my wife do come home very late. They are all business women but they report home normally at 9:00pm... they do not listen to my advice.'

The judge issued a punishment for the assault, citing the South Sudan Penal Code 2008. Article 9, section 233. The accused was fined 600 SSP, he was to pay the treatment bill of 300 SSP, pay for the telephone if any damage was found on it or an equivalent amount of 840 SSP and pay for the goods which got spoiled in the store while the complainant was in treatment. The judgement was welcomed by the complainant. She said 'let the law take its course because women are tired of torture from the men of such nature.'

Do courts license and tolerate violence?

The case records suggest that courts do not generally license violence, but they frequently tolerate it, especially in cases relating to gender-based violence (see below). Some customary courts issued sentences of corporal punishment, including 'lashes' and 'canes'. In such rulings, judges generally allowed people to pay a fine as an alternative, favouring those with access to money. Statutory courts in South Sudan are also prepared to award the death penalty, even when the defendant is not represented by a lawyer.

CORPORAL PUNISHMENT IN JUBA POC

A court in the Juba PoC imposed a sentence of corporal punishment on 14 January 2016. The sentence was imposed upon a woman convicted of arranging to have a child moved out of the PoC without the father's consent. She was sentenced to a 'beating', with the support of the crowd. Similarly, two adultery cases held in Juba customary courts led to the accused parties (one male, one female) being subjected to caning as well as fines.

DEATH PENALTY ISSUED IN RUMBEK

A highly sensitive case concerning a violent feud between clans, was heard in Rumbek statutory court on 25 September 2015. The case appeared to be a straightforward murder case – the motivation for murder was said to be the theft of a large amount of money from the deceased. But although the accused admitted the crime, he claimed that it was in revenge for his cousin's murder by the clan of the deceased. He explained that there were ongoing revenge killings among warring communities in the state and argued that he should be put on trial together with others involved in this feud, including the murderer of his cousin, who he alleged was killed by the family of the complainant in his case.

The judge sentenced the accused to death with 14 days to appeal. The accused declared he would appeal on grounds that a clan war is the responsibility of both communities, not a lone individual. Indeed, the case demands further scrutiny. Firstly, the ruling is in violation of international human rights law due to the death sentence and lack of due process: the accused was not represented by a lawyer. Secondly, previous cases suggest that restrictions on implementation of the death penalty – which can only be issued to persons aged over 18 and must be signed by the President – are not always adhered to. Thirdly, given the context of clan feuds, the ruling has the potential to inflame local tensions and be counted as just another killing in the clans' cycles of revenge.⁷ Additionally, the ruling is in contrast with the sentences of compensation awarded in several other murder cases (see below).

Courts also ignore or tolerate violence in various forms. For instance, there are cases in which grievous bodily harm ('beating') is reported during the trial, but because the harm was not the original subject of the complaint, it is not commented on or punished by the court. This approach does not appear to contradict popular sentiment, based on observations of the audience, but it entrenches the legal and social permissibility of violence, and leaves victims, who are generally the most marginalised, with no means of redress.

ACCUSATION OF VIOLENCE IGNORED IN A CASE IN JUBA POC

A case held in the Juba PoC on 5 May 2016 presided over by 13 chiefs describes the complainant openly beating the accused in public with a weapon. However, the case was brought to resolve an incident of trespassing and the question of violence against the accused was not pursued by the court. No punitive measures were taken against the complainant, despite his admission of having committed the beating. In taking no measures, and failing to condemn the beating, the court contributed to tolerance of societal violence.

WOMAN LEFT VULNERABLE AFTER A DIVORCE CASE IN RUMBEK

Similarly, a divorce case held in Rumbek on 26 November 2015 left a woman vulnerable to further violence. The woman brought the case for divorce because she had been subject to domestic violence. Yet the case was adjourned on the basis that family members needed to be present to authorise the separation under customary law (this is typically the case on the basis that divorce requires the return of the bridewealth). However, no measures were taken to protect the complainant in the interim period.

7. For example, in 2013 there was a series of killings in Rumbek in revenge for two men executed by the SPLA government in the 1990s. Yet it should be noted that communities have also sometimes demanded the death penalty in such circumstances arguing that it is a means to end the violence (personal communication, Non-Violent Peace Force representative in Mingkaman, 2016), which may be a source of pressure on judges in such cases.



Are court judgements restorative?

Customary courts clearly seek to restore relationships within and between families and communities, making efforts to reconcile the parties and to end future grievances, including through criticism and advice to perpetrators, and recognition of victims. Both statutory and customary courts employ compensation as a remedy. But compensation may not meet the spiritual and moral demands of the parties and might not serve reconciliatory aims. Moreover, both customary and statutory courts can apply significant punitive measures including imprisonment and fines. Almost all cases include a monetary fine and these can sometimes be of significant value, regardless of the economic status of the parties in the case. It is generally assumed that the families of the convicted person will assist them with the payment, but in the current context it is questionable whether such fines can be paid and whether unpayable debts might contribute to fuelling tensions rather than restoring relations.

A MARITAL DISPUTE IN YAMBIO

The role of fines and punishments in even the most minor customary cases is apparent from this marital dispute in Yambio town B customary court on 14 June 2016. The case was brought by a 32-year-old Zande man against his wife. He complained that she had spent the night outside without informing him and did not respect him. The wife responded by admitting that she 'escaped from him because he used to fight with me everyday' and she went to Ezo county 'to get rest'. Yet the ruling of the chiefs was strict and punitive. The wife was instructed to return immediately back to her husband's home. Additionally, she was fined with 150 SSP or, if she could not pay, to serve a sentence of three months' imprisonment. This case illustrates gender inequalities examined further below, but also demonstrates that customary courts are not simply 'reconciliatory' and regard punishment as integral to justice, including the restoration of relationships.

Statutory courts do not tend to explicitly engage in public moralising about wrongdoing as part of efforts to mediate or reconcile parties. However, they do rely on customary norms that prioritise compensation as central to the resolution of a case. Compensation, including blood compensation for murder, is often presented as a punishment in statutory courts. While such decisions are closely informed by customary precedents, they may also be distorting some of its principles, due to the different processes involved, which do not involve similar deliberation on the case and which often lead to monetary settlements rather than cattle.

A MURDER CASE IN RUMBOK

A murder case was held in the statutory court in Rumbek on 23 September 2015. The accused admitted to killing a fellow member of his clan with a stick when a fight broke out in a cattle camp. The deceased died of his injuries three days later. The accused claimed that he had not intended to kill the deceased. The complainant (father of the deceased) told the court that he and his family members had 'opted for blood compensation as the accused is from the same clan.' The judge ruled in favour of this, ruling the accused pay 8000 SSP in blood compensation and 2000 SSP in fines. He was not subjected to any prison sentence or other punitive measures.

During the ruling the judge quoted part of the Penal Code in justification: 'if the nearest relatives of the deceased opt for customary blood compensation, the Court may award it.' However, he failed to note the remainder of Penal Code article 206 which stipulates that compensation is acceptable alongside imprisonment; it may be awarded: 'in lieu of death sentence with imprisonment for a term not exceeding ten years.'⁸ This case illustrates the heavy reliance in the statutory system on a single judge's ruling, and that

8. *Penal Code Act 2008, Article 206, page 112.*

judge's interpretation and application of the law. It also demonstrates that even statutory law may be localised to sub-clan level, since the relationship between the complainant and accused was deemed material to the settlement. The social and political implications of killing a stranger have historically been considered to be different to those associated with the killing of a close family relative and the judgement appears to take this into account. This nuance is rarely captured in attempts to codify and harmonize the customary laws. This ruling also demonstrates a manipulation of existing law to fulfil local or family opinion relating to restoring and sustaining intra clan relations. However, in so doing, the law is contravened.

THE PROSECUTION OF AN UNINTENTIONAL KILLING IN RUMBOK

The award of Dia (blood compensation) remains a well-established principle in Dinka communities. But the scope for its reworking and application in diverse cases is apparent from a case in the same court in Rumbek on 10 September 2015. In this instance, blood compensation was awarded as a remedy for unintentional killing by a Ugandan driver responsible for killing a 35-year-old man in a road accident. The driver had been imprisoned for three months awaiting trial and was ordered to pay blood compensation of 31 cows, on the basis that the act was unintentional (in the case of intentional killing the compensation would be 51 cows). The driver requested to pay a monetary settlement of 60,000 SSP instead, but was told that a single cow cost 3000, so he could pay 93,000 SSP, or the cows.

While the price of compensation varies, we also see similar blood compensation settlements in various communities, for instance 24,000 SSP was awarded in one case in which a man was beaten to death in Torit.

Meanwhile, 21,000 SSP was called for in another case in Juba, in which an Ethiopian man had accidentally run over an elderly man while driving – he had already served two years in prison but was detained again until he could pay. Such settlements demonstrate the continued resonance of customary norms – and especially that of compensation – across South Sudan's legal systems.

Do courts violate women's rights?

Court decisions typically reproduce gender inequalities and contribute to securing the power of men over women, regardless of the variations in customary law and the rights accorded to women under South Sudan's statutory law. As one court observer explained: 'customary law continues to give a man power over his wife and children' (BKY, Juba, 2015). In large part, the inequalities and injustices arising in courts relate to the wider social and economic significance of bridewealth, which has increasingly been commercialised and binds women into subordinate relationships to spouses and parents. Gender relations and the meaning and functions of bridewealth have been negatively affected by decades of war (Jok, 2005) and the emergence of hyper-masculinized, militarized identities (Hutchinson, 2000). Disputes related to bridewealth payments are typically addressed in customary courts. But the social norms established in customary law are carried through into cases of adultery, elopement and pregnancy that might be dealt with in either statutory or customary forums. Adultery is punishable by law and, especially when a married woman is involved, both men and women can expect to be harshly punished.⁹

Women bring cases to the courts, often to seek a divorce or to report domestic violence. But even if members of court panels may show sympathy for the woman's situation, their primary consideration in decision-making is the perspective of the relatives that 'own' the woman. Women are rarely questioned or consulted in cases concerning sex and pregnancy. Divorces tend not to be granted without the consent of the family (and repayment of bridewealth). Women are liable to lose custody of children.

9. *It is worth noting that polygamy is legal for men.*

A DIVORCE CASE IN JUBA

On 22 October 2015, a woman brought a case to the Kator customary court in Juba seeking to divorce her husband citing unfair treatment. She explained that she had always intended to get a good education and a job and had succeeded in securing a job in a ministry and had enrolled in school. However, her husband had stopped her from working by going to her boss to terminate her employment and stopped her furthering her studies. A panel of four chiefs publicly supported her entitlement to education but refused to grant a divorce, stating that this was a domestic issue to be resolved at family level with their parents. The court observer notes that: 'in such customary courts, which base their judgment on the customs of the communities, there are mixed reactions. Those who received education (not all of them) believed the woman was right. Especially those aware of women's rights and gender equality... But the majority of people in their communities believe in their traditions.'



A DIVORCE CASE INVOLVING A CHILD IN TORIT

However, Torit town customary C court on 14 September 2015 did grant a divorce to a woman who claimed her husband had failed to provide for his family for six years. The couple had a five-year-old child. The husband denied the charges, explaining that he had been disabled by a sickness. But he agreed to the divorce on the condition that he was given custody of the child. He argued that he had paid 20 cows for bridewealth, and that in Lotuku culture he is allowed to claim his boy 'by giving 12 cows and the balance of eight cows will be returned to him.' A panel of five chiefs listened to both parties and ruled in favour of the wife, granting her a divorce, but also upheld the claim of the husband to the child, who was to be given to him at the age of seven. He was also told to support the boy for the next two years. The wife faced both the problem of repaying the eight cows for the dowry, and the payment of a 20 SSP court fee, 100 SSP for the divorce certificate and a fine of 200 SSP in lieu of four months' imprisonment (the reasons for this imprisonment or fine were not explained). This case highlights the possibilities for divorce and its potential costs, most notably the loss of the custody of the child.

A DOMESTIC VIOLENCE CASE IN TORIT

A case was brought to Torit town C court by the father of a woman who was suffering domestic violence. He explained that his daughter was being beaten by her husband. The accused denied the accusations and brought witnesses who attested to his innocence. No witnesses were presented by the complainant. The paramount chief ruled in favour of the accused based on the 'evidence presented by the witnesses'. This case highlights how customary law often views women's protection from sexual and gender-based violence as a purely domestic matter, and how knowledge of the system can sway a case outcome.



Women frequently bring cases to customary courts seeking a divorce or protection from domestic violence. However, unless they have the consent of their husbands or support from their families, they tend to lose the case. Such cases need urgent review in recognition of women's rights. At the same time, this review needs to be sensitive to the complex dilemmas that chiefs face; chiefs courts are often the main authority that can stop cases of divorce erupting into physical violence. Occasionally, there are careful judgements that show customary courts can both protect women from abuse at home while also keeping peace in communities.

Art by Victor Ndula, for the Cartoon Movement.

AN ACCUSATION OF ADULTERY IN JUBA POC

In a case held in PoC 3 in Juba a young woman was accused of adultery by her husband in an arranged marriage. However, the woman insisted that she did not commit adultery as she had not been consulted during the marriage arrangements and she referenced her 'right to choose my husband.' The court upheld that the girl had committed adultery with a man unknown to the family, a panel of 12 chiefs sentenced the accused to six months' imprisonment, 6500 SSP compensation to the complainant (arranged husband) and 2000 SSP in fines (payable to the court). The court observer reported that the spectators of the case (over 100) were divided over the ruling with young people siding with the woman and her right to choose, while her husband and elders in the crowd applauded the upkeep of custom. This case highlights the heavy punishments imposed for adultery and how the understanding of rights, mostly learnt through rights education programmes of international agencies that solely target women, often cannot be actualised.

Do courts bring perpetrators of sexual violence to account?

We can assume that many rape cases do not reach the court due to social stigma, the high potential for community violence and the potential effect on bridewealth. However, cases that do reach the court are often dealt with by bringing charges such as 'impregnation' or 'elopement', which obscure the rape itself, or are dismissed due to lack of evidence. Technically rape cases should always be handled at a statutory level, however in several states the statutory court does not function, therefore the customary court is the only means to seek justice (also see SPLA case above).

Courts rarely investigate whether sex is consensual, including where unmarried girls are involved. Rape and sexual violence are not only acute personal traumas for the women and girls concerned, but they are also volatile community issues partly because of their implications

for the bridewealth economy. This leads both to failures to investigate in some cases, and categorisation of consensual sex as rape in others. The focus in cases concerning sex, pregnancy and marriage is instead upon restoring relations in order to stem tension and violence within and between families, or in the community. This is usually achieved through restoring bridewealth through (forced or early) marriage or payment of 'damages' to the family of the woman in question. Courts may be engaging in attempts to manage conflict, but rulings implicitly or explicitly conceive of women and girls as property and in so doing they reproduce the socio-cultural norms conducive to violence against women and girls.

PROSECUTIONS FOR 'IMPREGNATION' IN TORIT

A case presented in Torit town market court on 16 September 2015 was categorized under 'impregnation' and the young woman concerned was referred to as a 'child' and did not appear in court. The male youth accused was also described as 'young'. Whether the sex resulting in pregnancy is consensual was not investigated, although it was noted that she was 'taken from school to a house.' The head chief (the only chief presiding over the case) ruled that the accused pay 1500 SSP as school fees and 1600 SSP as dowry for marriage. This case shows how potential assault can go uninvestigated while the focus remains upon the issue of how to maintain the girl's value for bridewealth. The fact that the details of the relationship were not clarified and the 'child' was not present also raise serious concerns.

Similarly, Torit C court on the 28 September 2015 also failed to investigate whether an 'underage pregnancy' case was a result of consensual sex. The accused (an adult male) is simply ordered to pay 'damages' to the father of the 'girl.' This exposes how the societal priority of maintaining relations among families, especially their elders, and the closely-related task of sustaining the bridewealth economy, both militate against investigation of a potential statutory rape case.

A STATUTORY RAPE CASE IN WAU

In contrast with the rulings against impregnation in Torit, a case held in Wau customary court on the 6 December 2015 was categorised as a 'statutory rape case.' Yet in the description of the case the young man and woman concerned were described to have been in an 'ongoing relationship', suggesting consensual relations. The accused was imprisoned for six months and ordered to pay compensation of 6000 SSP to the relatives of the young woman.

FAILURES TO PROSECUTE ALLEGED RAPE CASES IN WAU

A rape case brought to the customary court in Wau in June 2015 concerned a young deaf girl. The mother of the girl claimed the accused was guilty of raping her daughter. The chief dismissed the case because a sign language interpreter was not available. The complainant strongly objected to this conclusion as when she previously brought the case it was sent back to be 'handled at family level'. This case demonstrates how sexual assault cases are often dismissed as domestic or family matters rather than crimes. It also shows the courts are under resourced without provisions to support persons with disabilities to bring cases to court.

On 10 August 2015, a case was brought to the police station in Wau. It concerned the statutory rape of a male minor by a male adult. The case was followed to the station by the court observer but never reached the court, despite the complainant having produced medical evidence. Seemingly, the case was not brought to the court due to public stigma and discrimination against victims of male rape.

THE PROSECUTION OF AN OFFICIAL ACCUSED OF RAPE IN YEI

Given the wider context, it is essential to record and publicise prosecutions of rape. A case in point was held on 17 May 2016 in Yei High Court. The case was brought by a public prosecutor and tried by a single judge. No lawyers were present. However, it is notable that the judge took time to explore the details of the case and weigh up the evidence. The case was brought against a middle-aged man who was a government official. The public prosecutor recounted that the man was accused of rape of a young girl two months previously. He denied the act, but in a previous statement a witness had admitted to bringing the girl from the market place to the home of the accused, and leaving her there on the instructions of the accused. The government official accepted that he had given these instructions to his colleague, and that the girl was in his house, but he denied the rape.

The victim was then asked to speak and she described that the accused 'had sex with her' and gave her money for her school fees. The judge demanded answers to why the accused had sex with such a young girl, and declared that he believed the victim and the witness statements and assured the court that the 'law will take its course'. Finally, the judge ruled that the accused was guilty of rape under section 247 (Penal Code, 2008). He was convicted to six-years in prison with two years eligible for bail at 4000 SSP and four years without bail. He was also asked to pay compensation of 5000 SSP to the complainant and a transport refund of 1500 SSP. All parties accepted the ruling, although the prosecutor expressed his anger at threats he had received from friends of the accused when taking the case to court, and those present in the court 'complained about threats and behaviour of leaders.'

Do courts increase the power of elders over youths?

Chiefs and judges are predominately elders and may be explicit about their concern to regulate the conduct of youth through the courts. Inter-generational tensions that surface in courts include disagreement over forced marriages of young women and, occasionally, young men. Customary courts also often hear cases of elopement where young men have tried to marry, despite being unable to meet the bride price obligations. Many customary laws in South Sudan demand a significant bride price, making marriage unaffordable for many young men. Older and wealthy men are in a much better position to marry, sometimes multiple wives. Indeed, political and military elites have sometimes employed payments of bride price to incentivise recruitment and secure loyalty, and to extend their patronage and kinship networks (Pinaud, 2014).

Urbanisation, the shifting war economy, and the declining availability of cattle and money in some areas is challenging customary norms and the authority of elders over youth. For example, in the PoC sites some courts have allowed men to marry with a promise of future cattle. Elopements have also become a tactic to secure marriage or an expression of rebellion. Young men may elope without necessarily meaning to affront their own family or the family of their bride. If the family has cattle or wealth available for marriage, the bride price can later be enforced by the court. But some courts have imposed heavy sanctions on elopement, including prison sentences, going beyond customary laws that demand compensation for the girl's parents.

Cases related to sex before marriage and relationships between minors are very controversial, partly because of the threat these pose to the marriage prospects and bridewealth of the girl. Customary (and some statutory) courts tend to concentrate on demands for social reparation in such instances, while the questions of whether sexual relationships are taking place, or are consensual, are rarely investigated. Young men accused of such breaches of custom are subject to punitive measures, while their families share in an obligation to provide cattle as compensation, even when there is very little evidence to support allegations.

YOUNG MEN SENTENCED FOR 'IMPREGNATION' IN RUMBEEK AND JUBA POC

A statutory case in Rumbek, involved a male youth accused of 'impregnating' a young woman. The woman in question neither spoke nor was spoken to throughout the case and the ruling and the issue of consent was not raised. The accused male was sentenced to two years' imprisonment and a 1000 SSP fine.

A case held in the Juba PoC on the 22 February 2016 demonstrates the focus on community relations at the expense of prosecution of a crime. A young man was accused of 'impregnating' a young woman. The young woman in question was asked to confirm her pregnancy and was otherwise not consulted during the trial. A panel of 13 chiefs ruled that the accused should pay 4500 SSP plus 500 SSP for the 'ronk' (traditional coming of age skirt). However, the youth protested his innocence and raised the fact that no evidence or witnesses were produced. The courtroom started to become violent when the family of the young woman in question heard his protestations. The young man was urged by the community to accept the charges brought against him and the chief's ruling to avoid community violence. This case also highlights the role the courts play in stemming community level violence.

Do courts resolve land disputes?

Judges and chiefs handle land cases cautiously and decisions are often postponed or prolonged while they call upon external authorities for advice, sources of legitimacy, or documentation. This unusual hesitancy occasionally produces good practice, but typically land disputes prove very difficult to resolve and complainants may bring the same case to court over a period of years, either in pursuit of a final judgement, or because a previous decision was not implemented. Land disputes tend to involve complicated and disputed paperwork, accusations of bribery and the use of force by people in positions of power or owning firearms.

A LONG RUNNING LAND DISPUTE IN JUBA

Land disputes are prominent and politicized in urban centres, especially in Juba. A land case presented to the statutory court in Juba on 21 February 2016 exemplifies the problem. The case was brought by a military officer but it involved a plot of land that had been the subject of various disputes over ownership. The accused claimed the land belonged to his father who was a prominent politician. He argued that his father won the plot in a court ruling against a military officer in 2004, but he could not present any written evidence of this.

In November 2005, the military officer in question came and destroyed the fence and erected a three-bedroom building in the plot. In 2011, the father of the accused opened a case against the officer and the court ruled in his favour: the army officer was evicted by force and his house was destroyed. In 2013, however, a different group entered the same plot illegally. A woman from Mundari ethnic group erected a few tukuls (huts) in the plot. When she was asked to leave, she said she was poor and needed some money to move. The father of the accused gave her 8000 SSP, but she used the money to build more tukuls. In November 2013, military police were sent to evict the woman from the plot, but her husband brought soldiers from his Dinka ethnic group that outnumbered the military police and chased them away.

When the civil war erupted in December 2013, the plot was abandoned. Then the father of the accused died in August 2014. Knowing the man had died, another military officer came to claim the plot; he opened a case in the High Court and won the plot. The accused employed a lawyer and appealed within 30 days. However, the accused reported that both the complainant and judge were absent on every date set for the hearing. He believed this was a trick to allow the complainant to

process documents for the plot, which he duly succeeded in doing on 18 January 2016. The judge confirmed the previous judgement in favour of the complainant. The accused remained convinced that the judges have been bribed or were biased since they failed to turn up and then ruled against him. He called for the 'injustice that is being done by judges in favour of criminals who have money' to be exposed.

THE RESOLUTION OF A LAND DISPUTE IN RUMBEEK

On 4 December 2015, a land dispute case was brought to Rumbek statutory court. The case had been in process since 2009. In the first hearing the court directed the Land Committee in the Community Land Authority and Ministry of Physical Infrastructure to inspect the land and make a fact-finding mission to determine the number of plots and their ownership, with respect to the two parties to the case. The committee found that the two had been living on the land since the 1970s. The land had three plots and the accused had one plot. The judge acted on the land committee's report and divided the three plots as recommended. All parties agreed to the ruling.

The accused called for the 'injustice that is being done by judges in favour of criminals who have money' to be exposed.

THE SETTLEMENT OF A LAND DISPUTE IN NIMULE

A land dispute in Nimule was settled in a customary B court. The complainant was not occupying the plot. In 2013, he had planted his plot with bamboo and left it to be used later. In October 2015, the accused came and claimed the land, then sold it to another person for 15000 SSP. When the complainant returned, he found the land occupied by the person who had bought it. He called for witnesses from the area who knew that the land belonged to him to explain to him what has happened. They then reported the name of the individual responsible for selling the land. The accused claimed that the land had been given to him by someone else before he sold it but he could not provide any proof of this since he said that person had since died. Members of the community then intervened in the case to confirm that the complainant was the owner of the land and no one gave it to the accused. The chiefs ruled in favour of the complainant. They charged the accused with responsibility and demanded he repay the person who had bought the land mistakenly and that he should leave the land within two weeks. The accused was also fined 1000 SSP and court costs of 720 SSP.



Do courts adapt to new circumstances and norms?

Courts are pivotal in that they often reflect social norms but may also contribute to changing them. This is especially relevant to customary courts, due to their flexible and participatory characteristics. There are examples of changes to the substantive content of customary laws as they respond to new circumstances and normative codes. There is also dynamism in the processes of selection and appointments of chiefs, and some chiefs have knowledge of other sources of law. There is latitude for chiefs to interpret law creatively, even when they premise the authority of the law on a notion of tradition and custom.

In some cases, customary courts take progressive or novel decisions, even when they meet with the disapproval of a crowd that expects punitive measures. There are also indications that pressure from the crowd can influence decisions and evolutions in law. In some cases, members of the crowd show their disapproval of decisions that might affect them negatively. For instance, several observers noted divisions between youth and elders over decisions, and in Juba this divide appeared to be between participants who were more educated, and those with less education.

A DIVORCE GRANTED IN JUBA POC

A young woman brought a divorce request to the customary court in Juba PoC3. She requested a divorce on grounds that she was 'eloped' by the accused and forced into marriage. The accused objected to the claims stating he had paid 15 heads of cattle to the parents of the complainant so 'the woman belongs to him.' Witnesses attested to the marriage. The panel of 17 chiefs ruled that the complainant should be granted a divorce and marry the husband she had planned to. She was ordered to pay 4500 SSP in compensation to the accused and 2000 SSP fines to the court. The accused, witnesses and the attendees appealed the divorce decision. This case illustrates the courts' ability to adapt to the woman's right to choose, where she was physically taken and married against her will. However, this decision was reportedly not well received by some members of the crowd.

Forced marriage affects both young men and young women, and may become more common with the collapsing economy and the reliance on bridewealth economy. Research shows that young men and women regard forced and early marriage as a primary form of gender based violence in their communities (Justice Africa, 2015). However, there are cases that show the courts taking a progressive attitude towards forced and early marriage.

A YOUNG MAN RELEASED FROM A COMMITMENT TO MARRIAGE IN JUBA POC

On 6 June 2016, a young man was taken to court in Juba PoC3 by a man who accused him of failing to complete the payments for his sister's dowry. However, the accused appealed that he was forced to marry the complainant's sister against his will. The panel of 17 chiefs ruled in favour of the accused to terminate the marriage and that the accused received three cows in compensation. The complainant was also given one pregnant cow in compensation. However, there were appeals from some members of the crowd that the judgement should be overturned.

A DIVORCE GRANTED TO A WOMAN IN JUBA

On 20 December 2015, a middle-aged woman brought a case for divorce to the Kator customary court in Juba. She cited her husband's alcoholism and neglect as her reasons. The panel of chiefs referred to the constitutional right of a woman to request a divorce. However, they deferred the final decision to her parents. The parents agreed, on the basis that they would receive access to their grandchildren. This case shows adaptive elements, in the sense that chiefs were concerned to uphold the constitutional rights of the woman. Yet it was also in line with a principle that matters of divorce and child custody concern the entire family, and especially the parents of the couple.

A woman requested a divorce on grounds that she was forced into marriage. Her husband objected to the claims stating he had paid 15 heads of cattle to her parents so 'the woman belongs to him.'



Conclusion

South Sudan's courts are striving to impose order at the local level during a time of war, disruption and atrocity. The practices and decisions of the courts, reflected in the JSRP court observation archive, expose the flaws of the justice system – its fragmentation, inequalities and abuses. And yet viewed in comparison to the wider militarization of politics and society, the courts still emerge as a source of legitimate civil public authority. The archive provides considerable evidence of the commitment of judicial practitioners to finding civil solutions to conflicts, crimes and social discord; and to invoking legal principles as the basis for their decisions. The courts draw variously and creatively upon a heritage of norms and practices associated with customary law, and upon legislation forged in the post-2005 era or under the new state of South Sudan. And in some respects the justice system appears to be working – various courts in different localities have brought authorities and violent perpetrators to account.

We find that there are both differences and some overlaps between the practices of customary and statutory courts and the versions of law that they employ, as well as variation within each of these arenas. Statutory court decisions generally depend on the interpretations of a single judge, since lawyers are rarely present, and the specifics of law and precedent are largely unclear or unknown to the parties. In contrast, customary courts processes are more transparent, accessible and locally accountable, partly because they involve several chiefs and public deliberation. Chiefs command legitimacy, and customary courts have been called upon to rule upon even the most serious criminal cases, and they sometimes draw upon statutory law to do so.

The blending and improvisation that is apparent across the justice system produces numerous inconsistencies and serious injustices. However, cross-fertilisation and variation in decisions should not simply be dismissed as dysfunctional or targeted for wholesale reform from above. Instead there is a need for internal reflection and dialogue among chiefs and judges, and between them and local communities, regarding how justice can be advanced for all South Sudanese and how the legitimacy

of the courts and law can be sustained. It is notable that the courts issue punishments, as well as making efforts to repair social relations. The principle of compensation is incorporated into both statutory and customary courts in cases such as murder, rape and adultery. However, the resort to monetary payments as well as cattle and the import of norms of compensation into statutory arenas, without the ethical and deliberative frameworks in which they originated, might erode their meaning and normative power.

Certain norms, laws and judgements are directly implicated in human rights abuses or in fuelling conflict, and demand review. Despite significant initiatives to promote women's rights and human rights before and since the Comprehensive Peace Agreement (2005) and South Sudan's independence (2011), we find that the courts continue to violate these by prioritising considerations of parental or marital rights and concerns about intra-familial or communal conflict. The courts are reproducing societal norms that treat women and girls as property and increase their vulnerability to violence.

Moreover, the costs of justice and the fines and sentences imposed differ substantially. There is a need for judicial practitioners to collectively reflect upon how to set fees and fines, and what might be fair and appropriate for payments, ranging from bridewealth to compensation. Additionally, in this time of desperation, there are some hints in the archive relating to concerns about corruption or bribery and strong tendencies for courts to rule in favour of the complainant in the absence of detailed investigations and evidence. There is therefore reason to be concerned that people bringing complaints might try to employ the courts to extract compensation, while there is scope for some judicial practitioners, especially chiefs, to increase fees and fines as forms of taxation during the crisis.

As committed local advocates for justice, the South Sudanese team of JSRP researchers have demonstrated the merits of recording court cases to identify abuses on one hand, and exemplary or progressive rulings on the other. The cases discussed in this paper supply evidence that can inform future deliberations about how to transform justice from below. The paper also suggests that there are possibilities for such reforms.



The customary system is central to justice in South Sudan, and, to retain legitimacy, chiefs are consistently involved in negotiating political, social and economic changes, social differences and social memories of custom. Meanwhile judges and lawyers are also adept at responding to diverse circumstances.

As this paper shows, customary and statutory courts act locally, and conclusions about law need to be made cautiously with an awareness that its content is not fixed, and can evolve, including by setting precedents that may have influence on future decisions. There have always been plural, dynamic customary laws even within every ethnic group and fragmentation associated with the conflict fuels ambiguity over both the substantive content of laws and who has the authority over making and enforcing customary laws. Reformers need to be attentive to the reality that what is happening is not the formal codification of pre-existing static body of positive law, but an active, political process that will reshape ideas of justice and community.¹⁰

The courts need both support and ongoing scrutiny. Previous wars have seen the increasing militarization of justice: 'military courts have supplanted local courts and military law has replaced customary law' (Jok et al., 2004: 28). This study finds that in the context of the post-December 2013 war, people have continued to bring all manner of disputes from very minor to serious cases to court in several localities, often independently of interventions by the police or security forces. Justice-seeking and demonstrations of public compliance with the law indicate popular demand for civil order, while sustaining the public authority of chiefs and judges. But South Sudan's courts are operating in very difficult circumstances and with limited resources. They are subject to pressures from above and below, and to financial and political incentives. Although the civil authority of courts has survived in some parts of South Sudan, it remains at high risk.

10. Given the divisive public reaction some rulings receive, it is important that not only judicial and legal practitioners but also community members recognise the law as fluid and adaptable. Plus, programming and policy formulation in relation to customary law needs to be aware of its potential intentional or incidental impact on the substantive content of law.

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Notes

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