

Legal Pluralism in Southern Sudan: Can the Rest of Africa Show the Way?

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Southern Sudan is in the midst of a massive transformation from a society ravaged by fifty years of war to a democracy governed by the rule of law and a modern judiciary. But is the south at risk of destroying important and effective traditional systems of dispute resolution and restorative justice in its quest for modernity? While legal pluralism does not have a perfect track record in Africa there might be important lessons that can be applied to the Southern Sudan context. This article combines analysis of previous African experiences with a current assessment of Southern Sudan judicial systems to propose a system of legal pluralism to shape the Southern Sudan legal framework.

Southern Sudan is slowly emerging from twenty-one years of almost continuous conflict.¹ The Comprehensive Peace Agreement (CPA) between the Khartoum government and the Sudan People's Liberation Army (SPLA), signed on 9 January 2005, recently celebrated its second anniversary amidst accusations from both sides of non- or delayed compliance. Yet, as the two sides point fingers at each other, the process of forming a southern government that represents and is accountable to the people of Southern Sudan continues. Wealth sharing might be the most politically contentious issue under the CPA,² but forming a legal and judicial framework that incorporates the strongly distinct cultural identities of the south might very well be the most difficult.

African states have struggled with concepts of legal pluralism³ since independence. Legal pluralism theories abound. The Government of Southern Sudan (GoSS), however, is starting from scratch — a newly semiautonomous region with countless tribal divisions and

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investment, growth, and development. The questions presented to the international community are: What has been learned from years of study and experience in legal pluralism, and what is the next step for Southern Sudan?

Parallel Judiciaries

The Southern Sudan context is similar to that of other African countries that have developed systems of legal pluralism. Southern Sudan is home to more than fifty tribes with countless subtribes and clans within each (see Figure 1). Latent tribal conflicts, enflamed by a half century of civil war and by associated internal fighting, are still prominent in the social fabric. The Dinka tribe — who formed the core leadership of the SPLA, the signatory of the CPA — dominates the nascent GoSS. Other tribes form majorities in the states of Southern Sudan, and still others are minorities in all administrative areas above the village level.

A deeper look into the current state of the legal system in Southern Sudan reveals rings of complications. The Interim Constitution of Southern Sudan (ICSS), Interim National Constitution (INC), and CPA form the foundation for the legal framework of Southern Sudan during the interim period leading up to elections and the referendum for self-determination in 2011. Provisions of the ICSS provide a vague guide to the role of customary law. Under Article 130, the Supreme Court is given final jurisdiction with respect to all litigation under statutory and customary law (Southern Sudan 2005, Article 130). Jurisdiction of customary law courts, however, is ultimately left for determination by each state (Southern Sudan 2005, Article 171(3)). The role of traditional authorities and customary courts is even vaguer under the local government provisions of the ICSS: “The object of local government shall be to: ... (i) acknowledge and incorporate the role of traditional authorities and customary law” (Southern Sudan 2005, Article 173(6)(i)). Further provisions draw similar divisions of duties; the ICSS provides vague guidance that customary law and the role of traditional leaders should be accounted for while leaving ultimate responsibility to state governments.

The current reality is that state government and judiciaries are nascent in Southern Sudan, while customary law continues to exist in an unadulterated form in the rural, mono-ethnic regions of the south. In the former garrison towns, such as Juba, the capital of Southern Sudan, customary law has been altered, primarily by the imposition of Sha'ria law by the northern government during the war, but remains the primary body of law. In Juba and other areas of large populations of internally displaced persons (IDPs), customary courts regularly collaborate to adjudicate intertribal disputes even while each displaced tribe retains its own intra-tribal dispute mechanisms. Since the signing of the CPA, most urban areas have developed semi-parallel systems of statutory and customary law. Attempts are made at

panels of up to seven. Lawyers are prohibited. The chiefs act as both advocate and arbiter; the community acts as public opinion. Chiefs are typically revered as the custodians of the complex oral legal history of tribes and clans. Yet chiefs who continually advocate for unfair decisions lose credibility among their community and the constituents that pay their allowances. Chiefs without credibility lose prominence on the court panel.

Customary courts in Southern Sudan have also shown an amazing degree of cross-jurisdictional flexibility. The sheer number of southern Sudanese IDPs (Sudan has the largest number of IDPs in the world) has necessitated it. Chiefs from different tribes regularly convene in the same customary court to adjudicate cases between members of different tribes. When a defendant appears from a tribe that does not have representation on the panel, the case is suspended, and a chief from the appropriate tribe is summoned to help adjudicate at a later date.

Subject matter jurisdiction has also developed considerable flexibility in the customary courts of Southern Sudan. As a trusted institution, customary courts receive disputes in all areas of law. While most customary law cases center on family law in its many forms (including adultery, divorce, inheritance, and child custody), customary courts also adjudicate criminal, contract, land and property, and traditional disputes such as hexes. Even if a case is not directly covered under the tribe's customary law, the chiefs will often adapt customary norms of fairness to the dispute at hand. As they presently exist, customary courts are the entry point to justice for a majority of Sudanese citizens.

A brief example from a customary court in Juba reveals how these flexibilities manifest in the framework of the post-conflict south. In a recent case, a man from the Kakwa tribe was taken to the Kator "B" customary court in Juba by a man from the Lokoya

developing electronic case databases, and training judges in English in schools in Nairobi. Aid and government policy strive to create a statutory legal system that will usurp most of the traditional jurisdiction of the customary law system. For all these efforts the fact remains that Southern Sudan is horribly understaffed for its ambitions. Judges for the states and counties are few and often inexperienced. The legal profession, let alone qualified prosecutors, is virtually nonexistent outside of Juba. Yet judicial and legal policy continues to undermine and ignore the preexisting, organic judiciaries while neglecting to consider the role customary law and courts are already playing. Instead, policies need to be developed that strengthen the capacity and legitimacy of these courts while establishing systems of appellate review that reinforce principles of human rights and technically sound judgments.

The importance of customary law to societal norms and accepted behavior remains strong in Southern Sudan. At the same time, customary courts are the primary mechanism for dispute resolution. The challenge of moving Southern Sudan from conflict to lasting peace lies squarely in establishing a legal system that can peacefully resolve disputes and provide order to its economy. To reach these ends a legal framework needs to be established that disentangles jurisdictional issues between the fledgling statutory system and customary law, while maintaining the authority and support to customary courts that further its important position on the front line of judicial access. In short, a modern, legal pluralist state needs to be created. Southern Sudan can look to Africa's long and sometimes troubled history in legal pluralism for advice and lessons learned.

Africa abounds with experiments in legal pluralism. The academic discipline of legal pluralism contains a rich catalog of research and academic literature. Within these experiences lie a number of lessons for Southern Sudan on the virtues and pitfalls of legal

jurisdiction to international investment.⁵ The challenge for Southern Sudan is to develop a legal pluralist framework and well-respected court system that encourages investment while embracing the cultural values of customary law.

Another prominent critique is that legal pluralism legitimizes harmful traditional practices. The experience of South Africa, however, as detailed below, and the approach of this article is toward harmonization of those customary laws that violate notions of human rights, not wholesale adoption. Even with standardized human-rights norms there remains a valuable role for customary law and legal pluralism as a primary mechanism for access to justice (United Nations 2004).

African legal pluralism has much of its origins in the colonial experience, where two coexisting systems of law were encouraged: one for colonial rule and access to land and natural resources and one for the colonized. Early approaches to legal pluralism favored this dual system where each system runs parallel to one another with only limited, prescribed interaction (Griffiths 1998, 133).

More modern legal pluralist approaches, such as the one advocated by John Griffiths (1986, 4), treat legal pluralism as “an empirical state of affairs in society.” Thus, any socially pluralist society inevitably contains elements of legal pluralisms that result from development and enforcement of locally accepted social norms. In other words, legal pluralism is a synonym for cultural pluralism. In multicultural societies such as the United States, the law, even in its strictest sense, is dynamic: “improvising, selecting, appropriating, denying, and contesting normative ideas from a host of sources” (Greenhouse 1998, 67). The persistence of common law jurisprudence in the United States reflects this. Decentralized adjudication in the common law history represents the need for a constant legal dynamic that adapts to

Since the civil war ended, the Mozambican government has attempted to better integrate the traditional authorities into the administrative and legal systems of the state. The 2000 Law of Community Authorities recognized greater participation of traditional authorities in public administration. At present there exists only a patchwork structure for the role of traditional authorities and customary law. Traditional authority differs from region to region and depends more on individual influence rather than established systems or legal orders. In rural areas in particular there is a societal appeal to “return to the traditional.” This coupled with a growing activism on the part of traditional authorities to intervene more broadly in conflict resolution points to an ongoing resurrection of customary systems in Mozambique and to the historical, social, and cultural importance of customary law.

South Africa

South Africa provides another case study on legal pluralism supported by a multicultural constitutional process. South Africa is one of the most prominent examples of social pluralism providing recognition to traditional leadership and customary law (Oomen 1999, 86). The South African Constitution creates a comprehensive system of rights to cultural, linguistic, religious, and traditional communities. Specifically recognized within this is the role of customary law and traditional leadership. Section 221 of the constitution states:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

overturning provisions of the Black Administration Act (Oomen 1999, 92).

South Africa's commitment to legal pluralism and traditional structures is an important development because it reflects not only a constitutional dedication to multiculturalism but also the political and functional need for incorporating traditional legal systems.

Ghana

Ulrike Schmid's work on legal pluralism as a source of conflict between tribes in Ghana provides important insight on the pitfalls of certain pluralist approaches (2001). In the northern region of Ghana, a history of conflicts between the Gonja and Nawuri tribes escalated to a civil war in 1994 in part due to the power relationships established by a legal pluralist system. Traditional authorities that had been delineated in terms of tribal membership were altered and assigned to a specific territory. Traditional definitions of jurisdiction by tribal allegiance were mixed with an artificial jurisdiction measurement based on territory. The restructuring created a new legal hierarchy that gave "majority tribes" legal dominance over "minority tribes." Historical conflicts over land were now placed in a legal framework that subordinated minority tribes' customary law to that of the majority tribes (Schmid 2001, 7). The Gonja tribe imposed its newfound legal power over the Nawuri in adjudicating land conflicts, leading to Nawuri backlash and ultimately civil war.

Schmid's account of the tribal conflict in Ghana is an important lesson to be considered by the GoSS when constructing jurisdictional definitions in the new judicial framework. The experience also highlights the need for creativity in legal pluralism by not imposing foreign structures, like territorial jurisdiction, that compromise underlying, customary relationships.

framework I propose also relies heavily on analysis of current, organic approaches to legal pluralism in the customary courts of Southern Sudan.

The current legal pluralist approach of customary courts in multi-ethnic areas of Southern Sudan provides important lessons on the vetting and collaboration required for legal pluralism. For legal pluralism to function in multi-ethnic Southern Sudan there has to be a built-in flexibility that allows discussion and compromise between customary law traditions. There also has to be significant space for oral jurisprudence and less emphasis on rigid statutory procedures.

The first step in developing a legal pluralist system in Southern Sudan is to begin documentation of all customary law and to create a legal clearinghouse for judicial decisions by tribe. Documentation would build up the jurisprudence within each tribe and create a structure for continued recording of judgments. The process would also assist in creating a “professional” customary law system with increased consistency and predictability of rulings. The system would allow tribes to better track compliance and evolving changes to jurisprudence. In the south there are infinite complexities within each tribe, along subtribe and clan lines. Documentation would be limited to the tribal level and, at this stage, would focus solely on appellate-level proceedings within each tribe. Clan and family-level judgments could be documented in the future.

Consideration must be given to constitutional reform that emulates South Africa’s pluralist approach and provides more guidance to the place of customary law throughout Southern Sudan. The current wording in the Interim Constitution of Southern Sudan leaves too much interpretation to each individual state constitution. A national approach is required for customary law as tribal boundaries and relations cannot fit neatly into the

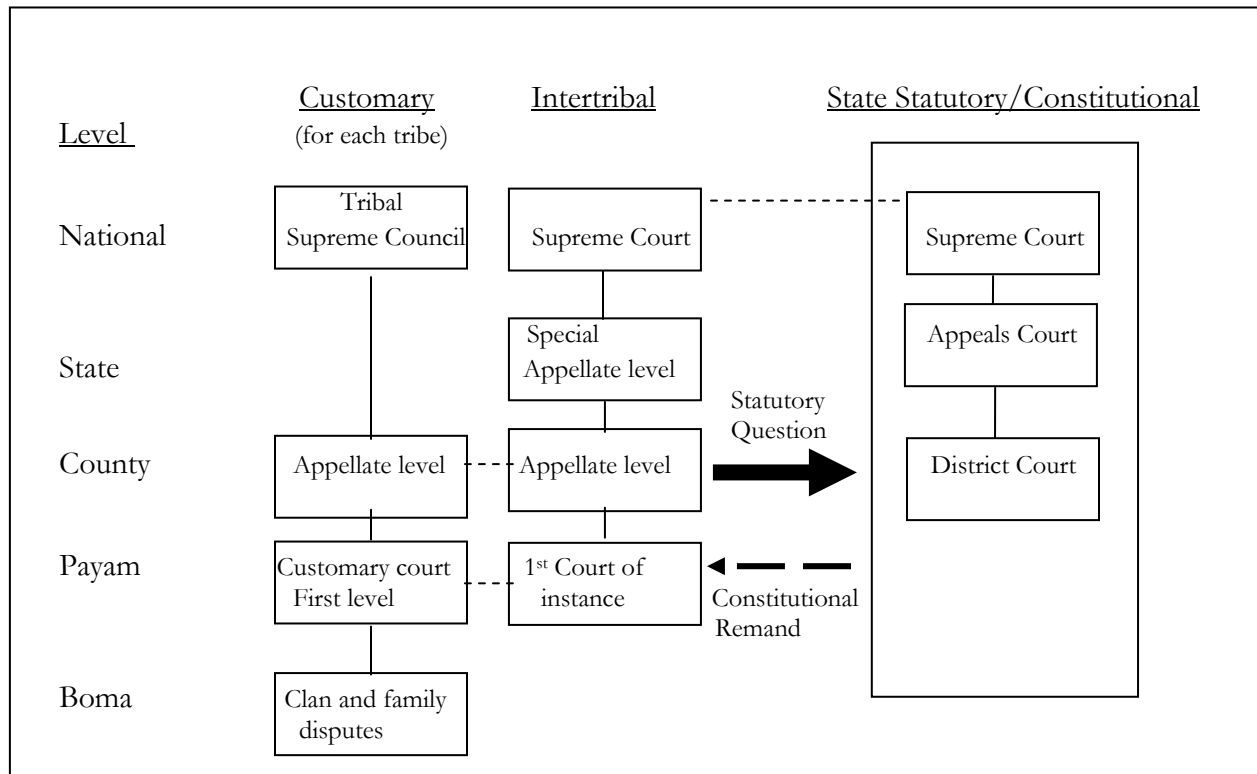


Figure 2.

*Personal Jurisdiction*⁸

Personal jurisdiction would first be determined by tribal membership. Customary courts for each tribe would be organized as they currently exist, along the family and clan level, with higher courts at the *payam* level.⁹ *Payam*-level courts would then appeal to a tribal appeals court. A supreme court would take cases *certiorari* from the appeals level. Other procedures and structures within each tribal court system would be determined individually. Personal jurisdiction in the customary court system — perhaps the most simplified out of the pluralist system — would only be granted for members of the tribe. Any cross-tribal dispute would be referred to a separate system.

A separate court system would exist for intertribal cases, utilizing dispute resolution mechanisms currently in place in multi-ethnic areas such as Juba. Cross-jurisdictional courts

