

CSRF Meta-Analysis: Justice in South Sudan

This Research Repository has been compiled by the Conflict Sensitivity Resource Facility (CSRF) to assist donors and aid workers in South Sudan to better understand the context in which they work. The repository is searchable by key words, and it is categorized by “theory focus” and “practice focus” to enable easier exploration of specific topics. The CSRF has conducted a meta-analysis for eight theoretical categories, analysing a selection of relevant, key literature and extracting some of the most salient questions for donor-funded programming. This meta-analysis provides an overview of literature available on the role of justice in South Sudan.

The CSRF is implemented by a consortium of Saferworld and swisspeace and supports conflict-sensitive aid programming in South Sudan. The United Kingdom, Switzerland, Canada, the Netherlands and the European Union have joined forces to develop shared resources through the Conflict Sensitivity Resource Facility in South Sudan.

Introduction

The literature on justice in South Sudan prior to the outbreak of armed conflict in December 2013 tends to focus on the justice system that evolved in South Sudan before and since the signing of the Comprehensive Peace Agreement. Literature covers both statutory law and customary law mechanisms and practices, and the way those are perceived. Similarities but also tensions between the intertwined spheres of the pluralistic legal system are discussed. The role of justice in relation to conflict prevention, peace, and reconciliation has also been considered in several studies. Other publications were written with an eye to policy recommendations, exploring the relation between justice, human rights and gender-based violence in South Sudan. Publications from the post-2013 era put an emphasis on human rights violations linked to the civil war and transitional justice, an issue covered in the peace agreements signed in 2015 and in 2018. Besides this, judicial practices emerging in conflict affected communities such as among internally displaced persons (IDPs) are studied.

The following questions were developed with the aim of providing insights into the existing literature on judicial practices and mechanisms and their links to peace and reconciliation in contemporary South Sudan.

1. **What are the limitations of the formal justice system in South Sudan?**
2. **How do statutory courts and chief courts relate in South Sudan?**
3. **What are the tensions between customary law and international norms?**
4. **What is the link between customary law and sexual and gender-based violence?**
5. **What role does transitional justice play in the current context of South Sudan?**

1. What are the limitations of the formal justice system in South Sudan?

In the first years after the CPA was signed, there were few English trained court administrators, judges and lawyers working in South Sudan. Judges were mostly trained in Sudanese (sometimes Islamic) law and in Arabic but were expected to work in English and apply the new emerging laws of Southern Sudan. These language barriers and new laws to some extent undermine the ability of judges to deliver effective justice up to the present day. For many South Sudanese, statutory law courts and their procedures are

difficult to access, hard to comprehend, slow and expensive, compared to chief courts, which are present even in remote areas. Chiefs have settled the majority of disputes in the past decades and continue to do so.

The judiciary has been affected by interference from the executive branch, and enforcement of court rulings is limited, particularly during civil war and widespread insecurity. Thus, perpetrators of violations and abuses of international humanitarian and human rights law are often not held accountable. The police have inadequate human and financial resources, limited knowledge of law, a lack of transport and communication capabilities, and a practical inability to enforce decisions against members of the armed forces.

Given the negative impact of the most recent civil war and widespread sub-national and localized violence on the formal justice system, chief courts and informal dispute resolution mechanisms of elders, family and community leaders will remain pivotal. Chief courts and more informal customary law arenas of justice headed by elders have emerged in Protection of Civilian sites (PoCs) and in refugee settlements abroad, providing mechanisms for the resolution of disputes ranging from minor arguments within families to violent

disputes and abuses by local authorities. These embody an attempt to constitute public authority, regulate social life and very importantly, prevent or set limits upon violence, but may complicate consolidation of the formal justice system. Since 2018, innovative areas of justice have started to emerge. These include, for example, mobile courts to adjudicate criminal case in areas where no statutory courts exist, such as in PoCs, remote rural and conflict affected areas.

2. How do statutory courts and chief courts relate in South Sudan?

In South Sudan, higher courts and chief courts are part of the same judicial system. Chief courts are answerable to higher courts, with cases originating at chief court level referred to county and high courts that are hierarchically above chief courts.

While chief courts only apply customary law, statutory courts apply both statutory and customary law. They use the latter often in cases related to family issues and compensation. In South Sudan, different ethnic groups feature different types of customary law. These different types of customary law, however, often share commonalities. Nor should customary law be understood as static and discrete and solely based on traditions - it is dynamic and has been influenced by colonial and post-colonial legal policies and practices, including sharia law.

After 2005, statutory courts gradually emerged in rural areas and took over some cases that chief courts had previously settled. Competition over judicial competencies, court cases and court fees has emerged, and the legislative guidance for determining the responsibility of different courts, including which type of cases chief courts or county courts should solve, has not always been followed in practice. For example, while according to legislation criminal cases fall – with some exceptions – in the jurisdiction of statutory courts, in practice, chiefs at times settle criminal cases. There are also contradictions between the Local

Go to the source

Abatneh, A. S. and Lubang, S. M. (2011).

[Police reform and state formation in Southern Sudan.](#)

Deng, D. K. and The Transitional Justice Working Group (TJWG) (2021). [South Sudan: Justice Landscape Assessment.](#)

Ibreck, R., Logan, H. and Pendle, N. (2017). [Negotiating Justice: Courts as local authority during the conflict in South Sudan.](#)

Refugee Law Project (2022). [Gender and access to justice in Uganda's refugee settlements: The experiences of South Sudanese refugees.](#)

Sudd Institute (2017). [The Importance of Judicial Independence to the Administration of Justice: The Case of South Sudan.](#)

Willems, R. and Deng, D. K. (2016). [Perceptions of Transitional Justice in South Sudan.](#)

Government Act and the Judiciary Act concerning local justice, which are yet to be reconciled.

Go to the source

Deng, D. K. and The Transitional Justice Working Group (TJWG) (2021). [South Sudan: Justice Landscape Assessment](#).
 Leonardi, C. et al. (2010). [Local Justice in Southern Sudan](#).

3. What are the tensions between customary law and international norms?

Some customary law principles and chief court practices contradict international human rights standards and are criticised for supporting discrimination against women, children and youth. Customary law is perceived as reproducing gender inequality and male dominance over women, thereby contradicting South Sudanese legislation enshrining gender equality.

In customary law, women are disadvantaged in matters of property and divorce. Land is expected to remain in the family of the father and is, therefore, often not inherited by married daughters. In agro-pastoralist communities, both chief and higher courts regularly try to discourage divorce as the families of women frequently have no desire to return the bride wealth received for their daughters. As a result, it is often difficult for women to divorce, even if they suffer from domestic violence. Customary law is also criticised for tolerating forced marriage, the marriage of minors and violence against children.

Customary law prioritises communal interests and restoring local relationships over the rights and interests of individuals. Accordingly, customary law rulings often favour parental or marital rights and concerns about intra-familial or communal conflict over individual rights. Given that mostly senior men from influential families dominate political positions, the civil administration and chief courts, chief courts' practices and interpretations of customary law are likely to reflect the interests of these senior men and

reproduce not only gender but also generational, socio-economic and socio-political inequalities.

Go to the source

Human Rights Watch (2013). [“This Old Man Can Feed Us, You Will Marry Him”: Child and Forced Marriage in South Sudan](#).
 Jok, A. A. et al. (2004). [A Study of Customary Law in Contemporary Southern Sudan](#).
 Kolok, D. J. et al. (2020). [Land and reparative justice in South Sudan](#).
 Van Cutsem, C. and Galand, R. (2007). [Equal Access to Justice in Southern Sudan: Assessment Report](#).

4. What is the link between customary law and sexual and gender-based violence?

In patriarchal societies in South Sudan, domestic violence and violence against women in marital relations are widespread. Customary law is perceived by human rights and protection advocates as legitimising or at least tolerating sexual and gender-based violence (SGBV). Victims of SGBV often face difficulties in accessing justice, and some victims are reluctant to report cases due to stigma and a lack of confidence in law enforcement and judicial institutions. When customary law is applied to domestic violence and marriage matters, its application often favours men. Cases of SGBV are not necessarily

Go to the source

Jok, M. J. (1999). [Militaryization and Gender Violence in South Sudan](#).
 Leonardi, C. et al. (2010). [Local Justice in Southern Sudan](#).
 Luedke, A. E. (2015). [Violence Begets Violence: Justice and accountability for sexual and gender-based violence offences in South Sudan](#).
 Refugee Law Project (2022). [Gender and access to justice in Uganda’s refugee settlements: The experiences of South Sudanese refugees](#).
 Tiernan, M et al. (2011). [Combating Gender-Based Violence in the Customary Courts of South Sudan](#).

investigated on the grounds of consent but as to whether the case involves adultery, defilement or impregnation and therefore requires compensation to the victim's husband or family for "both humiliation and the value of lost bride wealth" (Leonardi et al. 2011).

5. What role does transitional justice play in the current context of South Sudan?

Transitional justice mechanisms are provided for in the Agreement for the Resolution of the Conflict in South Sudan (ARCSS) and the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), which stipulated the formation of a Commission for Truth, Reconciliation and Healing (CTRH), a Hybrid Court for South Sudan (HCSS) and a Compensation and Reparations Authority. Staffed by judges and lawyers from South Sudan and other African countries, the HCSS is intended to have primacy over the national judiciary.

By early 2023, the HCSS does not yet exist. Thus, the timelines for passing the legislation and establishing the HCSS and the CTRH have not been respected, and the African Union has failed to meet its obligations to establish the HCSS as provided for in the peace agreements. Even with successful implementation, due to the sheer number of crimes and victims, future transitional justice mechanisms will need to go far beyond ARCSS' scope. To maximize impact, its mechanisms would best aim for the inclusion of civil society, traditional courts and national dialogue on issues such as truth, reconciliation and alternative sentencing.

Suggestions made by David Deng and Rens Williams include:

- initiating a national dialogue that allows people to express their preference for truth, justice and reconciliation and consider a possible role for various forms of partial amnesties and alternative sentencing;
- examining how existing practices relating to mitigating and alternative sentencing in customary courts could be incorporated into

efforts to prosecute crimes committed during the conflict;

- engaging with traditional authorities in conflict areas to identify and appropriate modalities for involving customary institutions to promote justice and accountability;
- examining how customary and statutory courts typically treat confessions and apologies for possible incorporation into the transitional justice program.

Go to the source

Amnesty International (2022). [African Union's abandoned Commitment to Justice in Africa: The Case of the Hybrid Court for South Sudan](#).

Deng, D. K. & Williams, R. (2016). [Expanding the Reach of Justice and Accountability in South Sudan](#).

Deng, D. K. and The Transitional Justice Working Group (TJWG) (2021). [South Sudan: Justice Landscape Assessment](#).

Magara, I. S. (2021). [Timing of transitional justice mechanisms and the implications for the South Sudan peace process](#).

[The Transitional Justice Working Group \(TJWG\)](#) (2021). [Building a Foundation for Justice in South Sudan: An Agenda for the Revitalized Transitional Government of National Unity \(R-TGONU\)](#).

[Further publications on justice in South Sudan are available in the CSRF repository.](#)