

# THE POLITICS OF CUSTOMARY LAW ASCERTAINMENT IN SOUTH SUDAN<sup>1</sup>

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## Introduction

Justice reform practitioners in both conflict-affected and developing countries are increasingly seeking ways to engage customary justice systems in their efforts.<sup>2</sup> This stems from the realization that formal justice systems are often inaccessible, unfamiliar and illegitimate for much of the population, and that the vast majority of dispute resolution occurs in customary forums. The approach taken by justice reform practitioners tends to entail recognition of the ‘positive’ aspects of customary justice, while seeking to minimize the ‘negative’ aspects. As these efforts generally occur under mandates that adhere to internationally-defined ideals of rule of law and human rights, this often translates programmatically into

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<sup>2</sup> In recent years guidance notes on how to engage customary justice systems have been issued and commissioned by the United Kingdom Department for International Development, the United Nations Development Program, the Organization for Economic Cooperation and Development and the International Development Law Organization. A wide range of NGOs and donors have invested in programming involving customary justice. (See Isser 2011, n.d.; Harper 2011).

attempts to preserve the accessibility and effectiveness of customary justice, while ‘improving’ its ability to meet rule of law notions of certainty, predictability, equality and due process. Moreover, justice reform practitioners – both international and national – tend to have as their goal the strengthening of a unified justice system under the regulation of the state. Thus, approaches to customary law often favour efforts to harmonize it with state law and to establish clear limits and hierarchical relations between the systems. This statist and legalistic emphasis, however, tends to focus on forms over functions and on ideal end states over practical strategies grounded in local realities and experiences. Consequently, efforts to ‘fix’ customary justice in line with Western notions of rule of law can serve to decrease, rather than increase, litigants’ access to justice (Isser n.d.).

These international approaches to justice reform have been articulating with government policies and strategies in South Sudan, particularly since 2005. The 2005 Comprehensive Peace Agreement (CPA) brought to an end over two decades of civil war between the Khartoum-based Government of Sudan (GoS) and the Sudan People’s Liberation Movement/Army (SPLM/A). The CPA created the semi-autonomous Government of Southern Sudan (GoSS), and established the right of the South Sudanese people to a popular referendum on self-determination, which would result in a vote for secession and the creation of the Republic of South Sudan in July 2011. Among the priorities of the GoSS during the interim period (2005-10) was the establishment of a justice system independent of the sharia-based system of the North, which would reflect the values and identity of the people of South Sudan. This in turn reflected the longstanding role and development of the SPLM/A’s own judicial institutions from an early stage of the war in the 1980s, as well as its equally long – if frequently fraught – working relationship with chiefs, and increasing recognition of the latter’s judicial and governmental role from the 1990s (Monyluak Alor Kuol 1997, 2000; Johnson 2003; Rolandsen 2005; Leonardi 2007; Mampilly 2011).

Customary law and chiefs’ courts thus formed a key part of GoSS strategy in the interim period for both political and ideological reasons – customary law was asserted as key to the identity of South Sudan – as well as for practical reasons: given the very limited formal system, chiefs’ courts in fact were resolving the vast majority of disputes. Policy discussions and interventions increasingly focused on the idea of customary law ascertainment, culminating in a GoSS-UNDP strategy proposal (Hinz 2009) whereby the customary laws of communities (usually defined as ethnic groups) would be identified and recorded in written form by the communities themselves, a process termed ‘self-statement’. These statements

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would then become the basis for the direct application, harmonization, and modification of customary law, toward a unified system meant to comply with modern standards of equality and human rights.

This article analyzes the GoSS-UNDP strategy of customary law ascertainment and argues that it was driven by multiple political agendas more than by the needs of litigants at a local level. It is based on a more extensive report analyzing original field research conducted from November 2009 to January 2010 by a team of consultants for a joint project of the Rift Valley Institute and the United States Institute of Peace, in three locations in Southern Sudan: Aweil East, Wau and Kajokeji (Leonardi et al. 2010). Our point of departure was not ideal end-states, but rather empirical research aimed at understanding and contextualizing current practices and perceptions of justice.

The report describes a local justice system characterised by the amalgamation of multiple forms of law and judicial procedure, not distinct parallel customary and state systems. There was no clear line between formal and informal, state and non-state judicial institutions. Instead, our informants perceived these as part of a single hierarchical system, ranging from the occasional courts of headmen and elders, to the sub-chiefs' and chiefs' courts, and finally to the paralegal judges of sub-county *payam* courts, and the magistrates and judges of the county, state and regional courts. The composite nature of the law and justice provided in the local courts blurred the line between state and non-state. Rather there was a spectrum, from the settlement of minor disputes at the lowest level, largely through mediation and advice, to the handling of major crimes by magistrates and judges. But at all levels it was common for cases to be settled with a mixture of compensation and penalty, for reference to be made to the statutory codes of procedure and penalties, and for little if any distinction to be drawn between civil and criminal cases. As another report by Scheye and Baker (2007) makes clear, the so-called 'customary' courts in South Sudan were by no means 'non-state'.

This article argues that the multiple political agendas driving the goal of ascertainment produced inherent contradictions in the strategy itself. As Moore has long argued, law and justice are after all essentially political (e.g. Moore 1970). But the universalising discourse of international rule of law programming can mask the politics of interventions. And in the case of South Sudan, the politics of justice have intersected with broader debate over decentralisation of government and over ethnic and cultural rights. The article begins then by exploring the multiple motives for ascertainment and their political context, before examining

the detailed proposals of the GoSS-UNDP strategy. It goes on to explore objections to these proposals that emerged in the course of the RVI-USIP research, and argues that here again discourse around law and justice at a more local level was also inherently political. Informants assessed the local courts in their wider political context, for example by comparing chiefs' courts favourably with higher judicial and government institutions that they characterised as alien or corrupt. And informants' views reflected their own place in local community politics and social hierarchies; it was often more difficult for the researchers to talk to those without a strong voice in the structures of local society. But this in itself produced another of our objections to the ascertainment strategy, namely that the process of self-statement would privilege certain elite discourses.

The article then explores the question of whether more certain or fixed laws – one of the goals of ascertainment – would strengthen or hinder access to justice for the weak or poor. While a more binding and impartial law might be considered a weapon for the marginalised (F. von Benda-Beckmann et al. 2009), we argue that it is important to start from the current context in South Sudan, where the justice system lacks the capacity to implement or enforce a binding law over powerful interests, even at its highest levels. In this context, our research suggests that the interests of poorer and weaker litigants were served more by the accessibility and flexibility of the law and justice currently provided by chiefs and by some county-level magistrates. The article explores the nature of this 'living law' as it was manifest in actual court cases, and argues that it differs from the normative assertions of customary law, which previous attempts at recording or ascertainment elsewhere have produced. Finally the article uses an example of recent tensions over customary law and justice in Rumbek to illustrate some of the potential pitfalls of trying to introduce greater certainty of judicial outcomes, and to reinforce our arguments for the politicised nature of law.

### The Ascertainment Agenda: Motives for Recording Customary Law

The discourses of both the GoSS and its judiciary, and the international agencies working to support justice and legal sector reforms, have contained a number of tensions and contradictions in their focus on ascertaining customary law, which in turn reflect deeper political issues. These consist of tensions between visions of modernity and tradition that have endured in government discourse since the colonial era; tensions between centralising government tendencies and policies of decentralisation; and tensions between nation-building goals and the politics of

ethnicity and cultural rights. All of these dichotomies relate to an underlying tension between the centralised state and local autonomy; it was revealing that when the RVI-USIP report was launched in Juba, the debate among the South Sudanese ministers, officials, judges and lawyers focused most intensely on the issue of judicial and legal decentralisation.<sup>3</sup> This section examines how such debates and tensions underlay the motives for the more specific project of ascertainment, producing fundamental contradictions for the strategy itself.

In the course of our research, positive expressions in favour of recording customary law were of two kinds: the desire of government judges to reference a written customary law to speed and strengthen their decisions, and a popular belief in some areas that each ethnic group should record its own set of laws to counterbalance the customary law of bigger or dominant groups. But the real drive to ascertain customary law was coming from the new government's desire to exercise greater control over the provision of local justice. It drew upon a Western state-building model that assumes that the state should be the main provider of justice (Baker and Scheye 2009). A further stated goal of some in GoSS and the judiciary was to 'harmonize' various customary law systems and statutory law, thus promoting 'national unity' (Madol 2009). During the report launch in Juba, a series of high-level GoSS officials recited a number of arguments in favour of recording and ultimately codifying customary law. These included ideological declarations that customary law was at the heart of national identity. Indeed the Interim Constitution of Southern Sudan had established customary law as a source of legislation (GoSS 2005).

The Chief Justice in 2010, John Wuol Makec, was leading arguments for customary law to form the basis of a common law system (Manyang Mayom 2010a), with obvious throwbacks to ideas of the late colonial period discussed by Moore (1992). She analyses a colonial memorandum circulated in Tanganyika in 1957 which contained remarkably similar discourse to that of the GoSS fifty years later. The memorandum praised African justice and likened customary law to the English common law. But it argued that this law needed to be recorded in order to establish 'certainty', and that it needed to be gradually reformed in line with British standards and legal norms: "Like fat rendered in cooking, the product was to be altered even as it was being extracted" (Moore 1992: 22). And as Moore

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<sup>3</sup> First author's notes taken during the RVI-USIP launch of *Local Justice in Southern Sudan* in the Home and Away Hotel, Juba, 22.10.10. See also Mabior Philip (2010).

(ibid) argues, “[t]he pivotal notion is that there should be a rule-governed judiciary that dispenses justice uniformly”.

In twenty-first century South Sudan, the goals have been almost identical. And these goals have also been produced and supported by international agencies, replacing the colonial ‘repugnancy’ proviso with universalising human rights criteria. In the process of recording customary law, ‘harmful cultural practices’ would be written out of it, reflecting a remarkable faith in the capacity of law to effect change.<sup>4</sup>

However, the launch of the RVI-USIP report produced debates which also demonstrated significant changes since the colonial policies of 1957 Tanganyika, and indeed since a more nationalist era of African legal policy. The 1957 memorandum made only passing mention of “local ‘tribal’ differences in customary law systems” (Moore 1992: 17). In the subsequent decades of African nationalism, tribes were supposed to give way to nations and tradition to modernity. But fifty years later, ethnic difference has been at the heart of political tension and debate in interim-period South Sudan, and has shaped the discussion of customary law ascertainment. It has also provided the main language in which to promote ascertainment at the local level, where some local and provincial political leaders were advocating recording laws in order to promote and protect tribal difference.

The prominence of the politics of ethnicity in debates over law reflects the wider international shift since the 1990s towards ideas of cultural rights and legal pluralism, in which cultural communities have the right to their own laws and legal systems (see Oomen 2005; Comaroff and Comaroff 2009). In South Sudan, defining cultural and legal difference could thus paradoxically be promoted as a means of guaranteeing rights and building the nation. Yet this could have the opposite effect on the ground, contributing to ethnic tensions and even conflicts.

At the core of the emphasis on ethnicity is really a deeper question about local autonomy and the central state. The RVI-USIP report launch event in Juba saw a heated debate between the GoSS vice-president, Dr Riak Machar, and members of the judiciary and ministry of legal affairs. Dr Riak challenged the latter to fulfil the

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<sup>4</sup> For an example of the advocacy of a similar approach to customary law in Somalia, see Gundel (2006: 46-62).

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GoSS commitment to decentralization, and complained that even Southern officials and politicians had been imbued with the long-standing centralizing tendencies and cultures of the Sudanese state (author notes; Mabior Philip 2010). At the heart of the often contradictory discourses around customary law and local justice we thus see fundamental disagreements over models of the state itself, between ethnic or regional federalism and unified, centralized government. Such debates fractured the old Sudanese state since the time of its independence, a legacy that is perhaps being inherited by the new state of South Sudan in its efforts to promote 'unity in diversity'.<sup>5</sup>

The challenge for the ascertainment strategy then was to somehow embrace all of these tensions. Like the various colonial and postcolonial attempts to state customary law in written form, the strategy resorts to a kind of doublespeak or 'double-think' (Moore 1992: 17). On the one hand it justifies ascertainment on the grounds of the need for greater consistency, certainty and predictability of judicial outcomes and the requirement for reform of local justice in line with national and international human rights law (Hinz 2009; Kuyang Logo 2009). Yet at the same time it aims at protecting cultural rights and legal diversity, by recording each 'community's' laws, and it promises to ensure flexibility and change rather than legal ossification. The proponents of ascertainment see no inherent contradiction in these goals, and employ euphemisms such as 'harmonisation' to express what would in effect be a hegemonic project of state legal and judicial control (e.g. SPLM 2004; Aleu Akechak Jok et al. 2004; Jones-Pauly 2006; Human Rights Watch 2009: 37).

On the ground the contradictions and tensions of similar state projects since the colonial era have tended to produce a disparity between policy and practice and sometimes between law and justice. In 2009-10, chiefs and other justice providers were interpreting and selectively employing statutory laws and state legal norms, primarily to authorise their penalties, but most of their procedures and decisions bore little resemblance to the official laws. In this way they were claiming to follow 'the law' but allowing considerable variation in practice. Yet in a sense this is a product of the long history of government legal discourse, which has simultaneously promoted local culture and universal norms (e.g. Johnson 1986;

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<sup>5</sup> E.g. Jok Madut Jok (2011). The SPLM adopted 'unity in diversity' as part of its 'Vision, Programme and Constitution' in 1998 (Herzog 1998). The claim that diversity could be an asset rather than obstacle to a united Sudan has a long history; see e.g. Beshir (1979); Voll and Voll (1985).

Leonardi 2005). As we shall see, however, this has been a creative tension for litigants as well as for justice providers; disputants (even if inadvertently) have exploited the fractures of this composite legal and judicial system by employing its multiple, sometimes contradictory, logics and laws to argue their own cases and to engage in judicial forum-shopping (cf. K. von Benda-Beckmann 1981).

### The 2009 GoSS-UNDP Strategy

The GoSS-UNDP strategy was drafted by Professor Manfred Hinz, who develops and modifies the demand among some GoSS officials and judges to codify customary law into a more subtle process of ‘self-statement’. Hinz (2009) describes three main types of ascertainment: legally binding codification of customary law by statute; restatement (systematic written recording) of customary law,<sup>6</sup> and; ‘self-statement’ of customary law by ‘traditional communities’. He proposes the last strategy for Southern Sudan. The key element in his account, applicable to all types of ascertainment, is the conversion of oral customary law into written form, a process that “contribute[s] to certainty in the application of customary law” (Hinz 2009: 40). “Self-statements come close to codification”, he asserts, “codification not by the organs of state, but by organs of the traditional communities themselves ... [who] are also the ones to change their law when necessity arises” (ibid.: 40). It is this capacity to change and amend the law from below that is given as the key reason to favour self-statement over statutory codification. While this is an important acknowledgment of the flexibility and fluidity of customary law, we nevertheless argue that *any* attempt to define and record such laws misunderstands the nature of local justice, and is likely to encounter significant difficulties of implementation. In this section we examine the latter, before turning later in the paper to the more fundamental issue of the nature of law and justice at a local level.

The strategy’s emphasis on community-based definitions and potential updating of laws, rather than state definitions or rigid codification, seeks to guarantee the ownership of customary law by those who have developed and practice it, as well as recognising its changing nature. The actual process proposed for self-statement

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<sup>6</sup> The term ‘restatement’ was adopted in 1959 for the long-term project to record African customary law at the School of Oriental and African Studies at the University of London led by Antony Allott.

also considers the aim of preserving nuance, flexibility, and negotiability. However, the subtle but vital distinctions from other kinds of ascertainment lead us to raise some concerns about its implementation, in light of the findings of our research project. The strategy proposes a possible ten-step model, including defining and researching the ‘target communities,’ designing the ascertainment process with the agreement of these communities, training ascertainment assistants, conducting complementary research alongside the ascertainment exercise, and preparing the resulting publications in the vernacular and English (Hinz 2009: 72). This model would be adapted to the South Sudanese context, but nevertheless would clearly be a huge logistical exercise, raising questions of capacity and time. A particular concern would be whether the large number of ascertainment assistants would be capable of the level of sensitivity and understanding required to assist the recording of laws without influencing the process.

Once the process of self-statement was completed, there are also issues as to how the resulting documents would be used in practice. Observation of the courts suggests that chiefs and court members use any available written documents and legal codes selectively to add authority to their sentences. If written versions of customary law were available, it is highly probable that chiefs and perhaps judges would treat these as codes of law, even if that were not the intention. Written documents have an authority in themselves in South Sudan, making the distinction between code and statement largely irrelevant in practice. The desire of some leading figures in GoSS and the judiciary to formally codify customary law might also contribute to this tendency.<sup>7</sup>

Having said that, most chiefs and many judges currently refer to the penal code only selectively, and usually only to confirm a specific penalty awarded after a more complex discussion and resolution. Whatever written or unwritten rules or laws the chiefs refer to, they do so in flexible, contingent, and inconsistent ways. A recorded or codified customary law system would unlikely be applied rigidly, particularly in the unsupervised rural courts. It would be absorbed back into local practice, leaving a question as to whether it had advanced the desired government goals of certainty and consistency. In either scenario then, the self-statements are

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<sup>7</sup> This has been the case in Kenya. Although the colonial government in Kenya specifically rejected the project of codification, they undertook a form of restatement. While not intended to be used as a code in a court of law, there is evidence that the written restatements are sometimes used as such even today (Harrington 2010).

unlikely to be used in ways that would advance the subtle goals of Hinz's strategy, to provide greater consistency without rigidity.

More significantly, Hinz's proposal leaves open the definition of the communities within which ascertainment would be conducted. Both government and international agencies have tended to associate customary law with specific ethnic groups, often assuming ethnicity to be a more rigid and bounded category than scholars have long argued.<sup>8</sup> There have been previous proposals to group tribes together for the purposes of ascertainment along the lines of outdated ethnolinguistic categories, such as that of Nilo-Hamites, a category that neither anthropologists nor linguists—much less the peoples themselves—employ any longer (Aleu Akechak Jok et al. 2004). Even the 'tribe' is a problematic unit to define; according to anthropologists, the Dinka, for instance, are not a single tribe but comprised of several tribal groups with multiple layers of sub-sections (e.g. Mawson 1989). In such segmentary societies it can be particularly difficult to distinguish between ethnic groups and sub-groups of an ethnic group; consequently ascertainment could trigger contestations over categories and contribute to the already heightened politicisation of ethnic units of administration and territory (Rolandsen 2009; Schomerus and Allen 2010). Most importantly, our research indicated considerable commonalities and shared values, norms and laws across the different research areas; the differences in 'customary law' most often cited were differences in the form or amount of compensation (and particularly between cattle and monetary payments) rather than in the definitions of the offence.

Perhaps the most dangerous potential result of ascertainment would therefore be its exacerbation of perceptions of ethnic difference. The GoSS-UNDP strategy does not stipulate that the ascertainment communities should be defined in ethnic terms, but the language and process of defining customary law have already contributed to ethnically divisive concepts. Moreover, the proposed organization of customary law ascertainment seems likely to encourage the idea further that each ethnic group or category should have its own legal system and defend it against others. This

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<sup>8</sup> Aleu Akechak Jok et al. (2004:13): 'Each different tribal group in southern Sudan has its own discrete body of customary law... In effect there are fifty separate bodies of customary laws'. See also Jones-Pauly, cited in Santschi (2007: 6). Anthropologists and other scholars have of course long argued that ethnicity is a fluid, permeable and constructed form of identification (since, e.g., Barth 1969) but this scholarly view is frequently at odds with the notions of ethnicity instrumentalised by politicians in South Sudan and elsewhere.

notion was already trickling down to the local level: some people among the Fertit around Wau, for example, believed—and were being told by their judges and politicians—that they needed to protect their own customs in the face of laws said to be derived from Dinka traditions. The ethnicised discussion of law was only exacerbating the sense of division and political manipulation of tribalism in South Sudan. As this suggests, debates around ascertainment were thus shaped by local and regional as well as national politics.

### The Local Political Context For Justice And Customary Law

There is a danger in the approaches of international rule of law programming that discussion of law is isolated from its political context, or that law is assumed to have the capacity in itself to alter or ameliorate structures of power. We found that our local informants were often much more aware of or explicit about both the limitations and the politics of law than some of the more ambitious policy-makers in the GoSS or the international organisations. This section examines how our informants contextualised the local justice system in both political and pragmatic realities.

Often people complained about corruption (bribery and deliberate delays), particularly in the courts of government magistrates and judges. They associated this with a general problem of government. A frequent target of criticism was the state police, whose ranks had been filled with former SPLA or militia soldiers; other reports too have identified the police as a major source of human rights abuses (Human Rights Watch 2009; Sebit Lokuji et al. 2009). And at every level from high court judges to elders, justice providers and a range of ordinary people emphasised the limited capacity of the courts to bring soldiers and powerful military or political leaders to justice; the courts frequently faced problems of intimidation and interference. It is important to understand the perspective of people living in this political and security context; criticisms of the courts were moderated by their perceived relative insignificance in comparison to the bigger problems people were experiencing in their post-conflict state. For many of our informants, it was not the details or recording of customary law that mattered, but the lack of judicial capacity to enforce laws of any kind against powerful political and military elites.

As well as this broader context, the courts were also of course situated in local political and social contexts. One of the problems with recent rule of law

interventions in South Sudan has been the assumption that law can ‘fix’ social inequalities and end ‘harmful’ cultural practices. But when people leave the court they have to survive within surrounding societies, in which good relations with kin, patrons and neighbours have been a vital survival strategy during times of insecurity, displacement, hardship and war. Efforts to end the practice of Levirate marriage (inheritance of a widow by a male relative of her deceased husband), for example, would be welcomed by some women but might remove a vital source of support for others. Legal reform therefore needs to take into account the social and economic context in which litigants are pursuing their cases. Context is vital to court decisions, as one former SPLM lawyer, Dr. Peter Nyot Kok, explained in an interview with Francis Mading Deng about the pre-2005 SPLM judiciary:

I have a feeling that what will have seemed to have been a shortcoming in research was not necessarily a shortcoming in the practice of the legal profession. I mean, documentation in terms of books, your [Mading Deng’s] book and John Wuol Makec’s book, were immensely helpful, but there was a lot of room for going out and finding what people were feeling and were living (Mading Deng 2010: 157).

The next section examines in more detail the capacity of the local courts to take into account what people were ‘feeling’ and ‘living’ – and indeed the capacity of law in itself to be ‘living’. But firstly in the rest of this section, we argue that local justice in South Sudan both reflects social and political hierarchies, and yet also to some extent provides arenas in which to debate and contest such power structures.

There are important questions concerning the reinforcement of inequalities and discrimination in the local courts. Among our informants, there were some complaints at bribery and favouritism in the chiefs’ courts, and many more at the general monetary costs of pursuing court cases. As perhaps in any judicial system, these costs might deter the poor from seeking justice. As one man, recently returned to Wau from Khartoum, complained of the town chiefs’ court: “When you come to open a case they ask who you are and what you do, and if you have no job or look like a poor person, then you will find long delays, unless you can pay this bribe.” His relative, a university lecturer, agreed that “for a poor man, there is no justice nowadays” (Leonardi et al. 2010: 42-3, 39). Poverty and low social status were more often cited as an obstacle to justice than the gender-based discrimination with which many international agencies are most concerned.

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The local courts we witnessed clearly took into account the litigants' social standing, their reputation and the witnesses they could muster. It was often apparent that the outcome of a case was predictable in advance to those involved. The importance of social relations and social capital to the outcome of court cases meant that the local justice system was bound to primarily reinforce existing social structures and inequalities. Leading, respected families and clans were more likely to win court cases, while the chiefs were sometimes sneeringly and mockingly dismissive of those they perceived as 'troublemakers' or 'immoral', or who lacked strong ties to the local community.

But this did not preclude the sense of contest in court cases, which were often extremely adversarial in their style, in contrast to the sentimentalised descriptions outsiders sometimes give of customary justice. If young people or women were asked about customary law in other contexts, they often displayed reticence or shyness, claiming not to know the laws, and referring the enquirer to the chiefs and elders, who were seen to know the authoritative versions of customary law. Yet the same youth or women would appear in the court and argue vociferously for their versions of the laws governing property, marriage, or relations with co-wives, relatives, and neighbours. Court cases were a kind of stage on which people performed and orated in ways that many of them would never have done in any other context. Some chiefs' courts had women members, who gained and retained their position by demonstrating skills of logic and speech; female judges were also respected in this role.

The result was that the courts were arenas of intense debate and contestation, and their decisions tended to reflect wider social, economic and political change. There were particularly intense debates, for example, over how to deal with cases of impregnation of schoolgirls, as increasing numbers of girls were entering school; or how to manage relations and duties of cohabiting couples in the towns who had not legalised their marriage with the bridewealth payment, and often lacked any familial support; or whether the wives of long-absent soldiers had the right to remarry, and so on. Law was thus in continual process, and litigants were playing a part in arguing for change or constancy, albeit from varying positions of power and influence. Chiefs and court members of course had a privileged position in these debates, but in practice they were receptive to the individual context and performance of litigants, and to wider audience opinion – and they were subject to vocal criticism and boycotting of their court if they contravened public opinion too much.

Our research in itself reflected some of the inequalities of local societies underlying the justice system – we found it more difficult to access the views of women, or of the teenage thieves or drunk old man who were lashed in the court, or of those dissatisfied with the court decisions. Our positive assessments of local justice inevitably reflected the views of the more vocal justice providers, litigants and wider society. Yet this should also provide a further warning against ascertainment. The GoSS-UNDP strategy emphasizes that the ascertainment process should be representative: it should include ‘normal’ people, women, and youth in consultations and community meetings. But as Hinz (2009: 79-80) mentions, his own experience in such meetings is that women barely contribute (see also Koech et al. 1999: 41-2). Processes of recording customary law in other times and places invariably have privileged certain informants and elites within local society, whose version of law is then enshrined and perpetuated (Merry 1991; Oomen 2005). The danger then is that the written laws could become a resource for both litigants and court members who wish to assert authoritative definitions of customary law.

At present, the largely oral nature of local law ensures that it remains contestable. If male elders and chiefs dominate the process of recording it—which seems highly probable—the resulting recorded law is likely to represent a conservative version of contested, changing norms, and its application could have an unwelcome or retrogressive effect. Certain elders and chiefs already have a privileged position in the judicial system, but to record their version of law would strengthen their hand against internal challenges from younger people, returnees, or urban or educated people.<sup>9</sup> In theory, according to the GoSS-UNDP strategy, intra-community debates over customary law would be channelled into the process of ascertainment and into regular updating of the recorded laws. But evidence from similar attempts to record and update customary law in other countries suggests that these processes remain likely to be dominated by elders and chiefs; regular updating requires considerable long-term commitment and resources from government or other sources.<sup>10</sup> Our argument is that individual court cases generate greater debate and

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<sup>9</sup> This has been the case in both Tanzania and South Africa (Natal and Kwazulu), where codified versions of customary law trumped more progressive practices in court (Harrington 2010).

<sup>10</sup> For example, Tanzania’s policy on codification envisioned the need for regular updates, but this was never carried out. Similarly, the Natal codes in South Africa failed to reflect updates in practice (Harrington 2010).

more vocal participation than the kind of community meeting advocated in the ascertainment strategy.

The extent to which social inequalities can be mitigated by legal reform is a debated one. A recent discussion by F. von Benda-Beckmann et al. (2009) suggests that legal pluralism can reinforce inequality by decreasing the binding power of the law over the more powerful or wealthy; greater flexibility can work against the weaker parties because the strong tend to determine the choice of forum or rules. Previous research in South Sudan revealed some arguments for recording customary law on such grounds – people believed that if the chiefs were bound by written law, their decisions would be fairer, particularly to youth (Leonardi 2009; Leonardi et al. 2005). But on the other hand, F. von Benda-Beckmann et al. (2009: 12) also suggest that weaker parties may be able to manipulate and exploit the contradictions in the rules to pursue ‘creative strategies’. Our research for the RVI-USIP report certainly suggested that the flexibilities and multiple norms and rules of the composite local court system provided opportunities for litigants to exploit the gaps and contradictions, and thus sometimes to get around the obstacles of social hierarchy and poverty.

### Living Law?

While Hinz’s ascertainment strategy aims to change and reform aspects of customary law to better protect individual rights, we argue that – if its vision were fully achieved – it would conversely restrict the extent of change already occurring in and through local judicial arenas. In this section we argue that the notion of recording customary law fundamentally misunderstands the meaning and function of law in local contexts, particularly in terms of its plurality and its capacity to adapt and change, and to transcend ethnic categories.

An expanding body of scholarship has increasingly argued that customary law is not simply a set of rules and sanctions, but a contextually defined process, involving flexibility, negotiation and reinterpretation of a dynamic body of knowledge to reflect what is considered reasonable under the circumstances (e.g. Comaroff and Roberts 1981; Oomen 2005). The research for the RVI-USIP report supported this view. There were common, normative rules evident in and usually across the research areas, primarily concerning rights in property and persons: for example it was everywhere considered an offense for a man to have intercourse with a married woman, or to impregnate an unmarried woman without paying

bridewealth for her. But while rules or normative principles in these areas were inscribed into social practice, most of the same rules were also being regularly transgressed in everyday life, as (particularly young) people defied them or as changing contexts required modifications. These rules were not simply applied in the courts as rigid laws. As one study of local law in South Africa puts it, “Rules might be the language in which disputes are argued, but they do not determine their outcome” (Oomen 2005: 210). Indeed language might be taken further as a metaphor for local law: language-speakers habitually follow linguistic rules without necessarily being able to explain or articulate these rules; at the same time they contravene other rules of grammar or pronunciation, and borrow from other languages, so that the vernacular is always changing and never entirely rule-bound.

In South Sudan, local justice providers were accounting for a complex range of factors in deciding the outcomes to cases, which might include the characters and oratorical performance of the litigants and their witnesses, their family’s status and reputation, and the wider, changing socioeconomic context, including the effects of war. The rules of marriage and widow inheritance were being questioned in the context of the prolonged absence or death of soldier husbands. Each case was negotiated, argued, and bargained out to come to a conclusion that was by no means predictable on the basis of the bare bones of the case, as a high court judge in Juba explained: “Customary law means procedures as well as laws, like the way that the audience participates in the judgment. It is all about logic and what is reasonable” (Ladu 2007).

The contested nature of customary law is exemplified by the following summary of an SPLM Court of Appeal Case at Rumbek on May 11 2004:

The appellant in this case had cohabited with a lady for seventeen years, and had five children with her. The lady, however, had previously been married and had one child. Her husband had been killed fighting for the SPLA, but in the Dinka custom of widow inheritance, she was still considered to be married to his family, and so her relationship with the appellant constituted adultery. Her first husband’s brother had therefore successfully sued for the return of the widow and all her children, in a series of local courts, and eventually the high court in Rumbek. The appeal court judges decided to reverse these judgments in favour of the appellant by formally divorcing the widow from her first

husband and granting paternity rights to her second husband for all but the eldest of their children (their first child was still considered to be born out of adultery and hence to belong to the first husband's family). Their recorded justifications were somewhat varied, however. One judge declared that in Dinka custom, if a wife had been left without care for two years or more, her legal husband's family could no longer claim rights over a child she produced with someone else; also, the length of an adulterous relationship validated it in terms of paternity rights. The other judge argued that in Dinka law the first marriage would never be invalidated unless formally divorced (by returning bridewealth), but that in this case the customary law should be set aside in order to consider the best interests of the woman and children. As recorded in the court verdicts, "In any case, Dinka customary law could not have taken into account the impact of the national duty on the family of a soldier who goes to the war-front to fight the enemy." (South Sudan Law Society 2004)

Although these Dinka judges reached the same conclusions, their deliberations—and overturning of a previous decision by another Dinka judge—reveal the differing interpretations of customary law even among judges within what might be considered a single ethnic group. The second judge also assumed that customary law was a fixed body of law that could not accommodate the effects of modern wars. Yet the court system has been a key arena for debating and negotiating the socioeconomic effects of war in recent decades, and customary law has been changing as a result. Cases such as this reached the highest courts specifically because the laws were ambiguous and contingent, requiring the individual circumstances and timing of events to be considered.

That plaintiffs rather than government or police prosecutors nearly always opened cases also meant that the litigants contributed to defining which rules were to be considered relevant to the case (cf. Comaroff and Roberts 1981: 130). For example, if a man opened a case against another man for impregnating his daughter, the rules regarding parental rights over daughters would be invoked—though there would still be considerable room for negotiation as to whether marriage or compensation should be the outcome, and, if the former, what the bridewealth should be. But if a young unmarried woman working in a town independently opened a case against a man for failing to provide for her after

impregnating her, she would argue a different set of obligations and responsibilities, though she might also point out the man's failure to marry her legally (i.e. by paying bridewealth).

Our informants expressed a strong belief in the *idea* of 'the law' – 'the law is one' as some put it – as a resource or power to which they might appeal in defence of their rights in property and persons. The law in this sense is both abstract and singular. When people were asked to define laws in the plural, they invariably described penalties. Once a court had ruled on the fault or guilt of a party in a case and determined the desired solution, the chief or judge would probably refer more explicitly to 'laws' to assign a penalty and restitution. The scales of fines or punishments were commonly understood to be set by the government; indeed, the Arabic word widely used for any court penalty is *hukm*, which is closely related to the word for government, *hakuma*.<sup>11</sup> When any of our informants were asked what the laws were, they usually referred to the amounts of these penalties, rather than to the underlying principles and definitions of wrongs. And when local people advocated recording customary law, they tended to mean specifying the amount and form of compensation. To varying degrees, governments have set court penalties and compensation amounts, albeit in consultation with chiefs. For offenses that appear in the penal code, the statutory penalties formed a guide, though they were not always adhered to in practice. Fixed compensation scales tended to have been worked out more on a local or individual basis; one town quarter chief in Wau, for example, produced his own annual 'codes' listing compensation and fines for various types of cases.

The major exception to this – and an important precedent for the current ascertainment strategy – was the set of pan-Dinka laws for the whole Bahr el Ghazal region agreed by chiefs' conferences at Wanh Alel and codified in 1975 and 1984 (the latter led by the current Chief Justice in 2011, John Wuol Makec). Most Dinka would say that the government 'made' the Wanh Alel laws, though their enduring use reflects an apparent consensus over the amounts of the penalties and compensation for the most universal offenses: murder (compensation of thirty cows, plus one as a court fine), adultery (seven cows) and impregnation or elopement of an unmarried girl or woman (one pregnant heifer plus a minimum bridewealth of thirty-six cows). But these fixed penalties acted as a minimum

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<sup>11</sup> For a historical discussion of the meaning of *hukm* in northern Sudan as 'the ability to punish through a government-recognized court', see Willis (2005).

bottom line, above which there was often still considerable room for negotiated settlements, particularly of elopement and marriage. A court decision to impose Wanh Alel penalties was often only the beginning of the complex part of the case, in which the court might have to allocate the individual contributions of cattle from specific members of the family, frequently sparking off further internal disputes over debts and obligations. And in practice, Wanh Alel was irrelevant for the great number of complex disputes over cattle and family obligation that came to the courts in its area of application. Only the penalties for murder, adultery, and premarital impregnation and elopement remained in common use, and in the case of the latter, plaintiffs usually preferred the court to push for a marriage rather than enforce the rather small Wanh Alel compensation. The endurance of the Wanh Alel penalties suggests that there was value in having established bottom-line scales of compensation, but this did not remove the need to negotiate the decisions and wider implications in the courts. In the recent economic context, even the basic compensation amounts of Wanh Alel were being criticized as outdated.<sup>12</sup>

Most cases were much more complex disputes, within as well as between families, over debts, obligations, and offenses that might go back generations. To give just one example observed by Leonardi in a Rumbek town chiefs' court in 2006, a case of the elopement of a girl by the defendant evolved into a complex internal dispute among his relatives over their willingness to contribute to his (cattle) bridewealth in order that he might marry the girl concerned and satisfy the plaintiff, her male relative. The defendant's paternal uncles claimed that it was not yet his turn to marry in the proper sibling order and that they did not have enough cattle to pay the bridewealth, particularly as he was also trying to marry another girl from a wealthy family who were demanding high bridewealth. The defendant's sister then spoke up for him, accusing their uncles of mistreatment because their father had died:

What our uncle said is wrong, because their sons had expensive marriages and when it comes to my brother they want to have a lesser marriage. Now is it because of the death of our father? If not, let them marry these two girls for my brother. I and my sisters have been married by rich families whereby each of us

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<sup>12</sup> The former governor of Lakes State raised the compensation and fine for homicide from thirty-one to fifty-one cows. Many other people have called for similar amendments as bride wealth has inflated from the 1970s and 1980s.

brought one hundred cows as bridewealth, and they have consumed it all on their different businesses. So if possible, Court, let these two girls be married for my brother to be equivalent to their sons' marriages.<sup>13</sup>

The court ordered the family to go away and arrange the marriage of at least one of the girls for the defendant. Young men who were in a junior position in their families often used elopement and resulting court cases to assert their right to marry and compel relatives to pay for their marriage outside the normal order. And the vocal participation by female relatives in this case underlines the point that individual court cases provide greater room for contesting gerontocracy and hierarchy than perhaps any other local arena.

As this kind of case reveals, families and communities were continually negotiating and contesting their 'rules', to maintain social relations, and to adjust to personal circumstance and changing contexts. The law against elopement was accepted as an underlying norm, but this law alone could not have satisfied the parties to the case.

While – as noted early in this paper – there was no sharp differentiation drawn by our informants between the courts of chiefs and of government magistrates, it was notable that the latter were more often criticised for relying too heavily on their 'books', rather than looking into the detailed circumstances of the case. It is not clear then that recorded customary laws would necessarily improve litigants' experience of justice, and indeed they might be seen to prevent satisfactory outcomes if applied rigidly; the defendant in the case above would presumably not have been enabled to marry if the court had stuck rigidly to the customary principles of the order of marriage within extended families. One former chief in Central Equatoria in 2005 claimed that the customary laws recorded there in the 1990s by Justice Deng Biong Mijak had proved unpopular when he tried to apply them:

I worked as subchief and acting chief and was not bad. But some regulations were formulated for customary law, exactly defining the penalties. When I carried these out, people said I was a bad

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<sup>13</sup> Notes on court cases in Rumbek Regional Town Court, 21.11.06.

judge. So when I became unpopular I had to step down.<sup>14</sup>

The ongoing negotiation and contestation of rules and norms was also apparent in a common reticence in our research areas to take the lead in actually deciding and recording customary law, even among the chiefs themselves:

We want to sit and make our laws, what is the fine and so on, so that we are one, together. The Dinka have laws but the Fertit do not. But people have been afraid to write them in case people say they made a mistake or something (Town quarter chief, 13.11.09, Wau, in English: Leonardi et al. 2010: 80).

A county judge inadvertently revealed the same reticence to fix compensation or bridewealth in her advocacy of recording customary law:

It is good to record customary law. For example with the Fertit, in the case of compensation, say for spoiling a girl, you ask them what the amount should be. Amounts like 3,000 Sudanese Pounds have been agreed in the community, but then others say, 'no, it depends on the family sitting'. So the figures vary. But the Dinkas are uniform: seven cows for a married woman; or one pregnant cow for a girl. So it is very easy to settle. We need the Fertit to agree the same; then even a judge sitting alone will be able to apply it. Now we have to call the family members to say what the amount should be. In fact they usually make an agreement among themselves, so the law of contract comes in then (County judge, 25.11.09, Wau, in English: Leonardi et al. 2010: 76-7).

A number of chiefs and elders also claimed that their courts employed flexibility in sentencing in order to take into account the poverty of their people. This might have been self-propaganda, but there were pragmatic reasons for only demanding amounts that people were actually likely to be able to pay in the immediate future, given the limited capacity of the courts to follow up and enforce their decisions in the longer term. Even one young man praised the flexibility of the chiefs' courts in this regard:

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<sup>14</sup> Interview with elders and chiefs, Lasu Payam, Yei County, 2005 conducted by Leonardi as part of the SPLM-UNDP study of traditional authorities (Leonardi et al. 2005).

There are no written laws for the chiefs, only for the judge. It means for example that if there is a case of spoiling a girl, the chief will question the one who did it and ask if he wants to marry the girl. If he wants to marry, the fine will be smaller, to allow him to manage to pay for the marriage. But if he refuses to marry, the fine will be higher. So it is flexible; it is better than if the fine was just written (Young man, returnee, 2009: Leonardi et al. 2010: 76).

In Kajokeji, our research found considerable ongoing disputes over how to handle cases of impregnation of underage schoolgirls; in some of these cases the girls themselves vehemently protested at the punishment of their boyfriends or prohibition of their marriage by magistrates who imposed the statutory law on rape and the age of consent (Leonardi et al. 2010: 60-63).

The extent of contestation, negotiation and adjustment of the laws applied in the courts cannot be captured by legislation or by the written ascertainment of customary law. If the latter is recorded, it will represent idealised normative rules, which will no doubt be added to statutory law books as a means by which to add authority to decisions. But those decisions will continue to be made by chiefs and court members on the basis of individual cases and social context, just as in other local-level justice systems around the world, including lay magistrate courts (see Gordon and Meggitt 1985).

The extent of change going on in the courts was particularly apparent in urban areas of South Sudan. The findings of our research - and that of others - suggest that one of the strengths of the local justice system was its capacity to handle urban and interethnic cases, and thus to mediate among different groups and economic systems (see also Mennen 2007, 2008; Scheye and Baker 2007). Such capacity might be supported by continuing and extending the common existing practice of making court panels representative of their multiethnic jurisdictions, and by encouraging courts to consult chiefs and other expert witnesses in handling cases from ethnic groups with which the court members were less familiar.

Differences among local legal systems in Southern Sudan come down less to the offenses and laws themselves than to the specific amount and form of the compensation required. A 2004 World Vision report listed the basic customary laws and remedies for eight different ethnic groups from across Southern Sudan:

The only significant differences were laws on incest, wife inheritance, and forced marriage (Aleu Akechak Jok et al. 2004). Rather than promoting the recording of customary laws by ethnic groups, the RVI-USIP report therefore recommended more opportunities and arenas for discussing legal norms and judicial practices among people of different ethnic groups. Chiefs and several older informants also claimed that regular cross-border meetings and courts in the colonial period had been an important means of building good relations between chiefs of neighbouring areas and of preventing and resolving conflicts across their borders. Forums that enable debate and improve interethnic communication and understanding would seem a more positive focus of support than interventions that encourage the formulation of discrete ethnic customary laws. But the emphasis on ethnicity in the GoSS-UNDP strategy and in much of the wider national discourse around customary law reveals the intensely political nature of law and the situation of the justice system in the wider context of political tribalism. This political context would also be apparent in disputes over customary law in Lakes State in 2010-11.

### The Politics of Local Justice: An Example from Rumbek

In 2010, an ongoing debate about customary law erupted in the town of Rumbek, in Lakes State, which reveals some of the potential pitfalls and confusions of producing written laws, as well as the intensely politicised contexts in which legal and judicial reform is playing out. In 2010, the Lakes State Legislative Assembly produced the *Lakes State Customary Law Act*, with the stated purpose of ‘Keeping security and peace’ (in light of escalating local armed conflicts in the state during the interim period), and ‘to provide the penalties which govern criminal acts’ and prevent people ‘from committing criminal offences’. The Act claimed to have been drafted in accordance with the interim constitutions of both Lakes State and Southern Sudan, and with the CPA, “as part of the effort to establish minimum Lakes state standards and uniform norms in relation to the existing penal laws currently in use in all judicial institutions in southern Sudan” (Government of Lakes State 2010).

The Act immediately demonstrates the composite nature of ‘customary law’ in South Sudan and the common amalgamation of civil and criminal law. Although it was not produced through anything like the kind of ‘self-statement’ process proposed by the GoSS-UNDP strategy, it does represent an attempt to make customary law accord with national constitutional law. Its provisions principally cover the perceived causes of conflict that were the primary concern of the Lakes legislators, detailing penalties for community leaders and cattle-keepers who

committed actions that had been identified as provocative of conflict, such as moving into other community's grazing territories, allowing domestic animals to stray, performing rituals related to war or singing abusive songs. It also includes sections on adultery, rape and impregnation without marriage. The rape section (31) defines rape as "sexual or carnal intercourse with another person against his or her will or without his/her consent" and prescribes compensation of ten cows (or 10,000 Sudanese Pounds [SDG]) and imprisonment of up to ten years. The impregnation section (33) orders that a man who "rejects or jilts impregnated lady/girl commits an offence of destruction" and should pay three cows and a fine of 1000 SDG (plus seven cows to obtain paternity rights over the child).

In early March 2011, this Act came to wider attention when a series of convictions were reported in the South Sudanese media. The Lakes State High Court President sentenced over fifty young men to ten-year prison terms for 'defilement' of underage girls. The judge himself claimed to simply be enforcing the penal code which defines the age of consent as 18; he explained that the penalty for statutory rape was actually fourteen years and so he was showing leniency by reducing it to ten years (Manyang Mayom 2011). His verdicts led to protests in Rumbek, particularly by organised youth groups in the town, and to reports that the sentences were the result of the *Customary Law Act*. Media reports initially depicted the issue as one of generational conflict between youth and elders, with the latter held responsible for the Act. In December 2010, the chairman of the Rumbek Youth Union had already been cited in a news article as blaming the Act for bringing prostitution and death to society by prescribing ten-year prison sentences for impregnation. He attributed this to Article 33.1, which actually includes nothing about imprisonment. The same article cited a female youth leader who depicted the issue as a generational conflict, claiming that the law "was added by chiefs to try to stop girls falling in love with and marrying young men rather than older men" (Manyang Mayom 2010b).

Another explanation began to emerge, however, when one of the convicts told a reporter that the judge had "misinterpreted the law on Children's Act, Penal Code and Lakes State Customary Law" and had "defied Dinka cultures" by not recognizing that "[i]n our culture, if a girl is on her menstruation we consider her a mature woman" (Manyang Mayom 2011). This argument for a failure to understand Dinka culture became increasingly prominent, leading to the resignation of the judge and his transfer. Discussion by Leonardi with young men in Rumbek in June 2011 also revealed the continuing interpretation of the issue as ethnic rather than generational: the judge was from Kajokeji in Equatoria, and thus

was accused of not understanding or respecting Dinka culture. Ironically, our previous research had recorded similar tensions in Kajokeji over the application of the statutory rape law for underage pregnancies by the county judge, who, in a direct inversion of the Rumbek cases, was blamed by the people of Kajokeji for not understanding Kuku culture because he was Dinka (Leonardi et al. 2010: 60-63).

Untangling the actual production of the Act and its perceived relation to the sentencing of young men for statutory rape requires further research. But its reporting indicates the intensely politicized nature and multiple interpretations of customary law that would be the context for any attempt to agree and record it, let alone to harmonise it with statutory law and the bill of rights. It reveals the potential for bitter contestation between generations or between people with different interests at stake in relation to any law. Perhaps most importantly, it reveals the potential for ethnicised interpretations of law and justice and the strengthening belief that even government judges should serve only in their home areas. Attempts to ascertain customary laws are likely to only cement the idea that law is ethnic, exposing the fundamental tensions between cultural rights and universal norms, and ultimately between ethnic or regional federalism and the centralized state.

## Conclusion

The strategy for customary law ascertainment in South Sudan was the product of the articulation of longstanding government agendas with recent rule of law promotion efforts by international donors. Rule of law has shifted over the last two decades from a marginal issue to one recognized as a key pillar of development and stability. But, as many commentators have noted, the record of success is paltry (Samuels 2006; Jensen 2006). And the development of a virtual rule of law industry with a proliferation of guidance, prescribed end states and best practice are partly to blame (Isser forthcoming). Those promoting justice reform tend to do so from a fixed template based on idealized norms and institutional structures. Deviance from these ideals is then identified as the problem, and the task becomes to reform the laws and institutions to meet these ideals. In such circumstances, customary law and legal pluralism raise particular anxieties as they challenge the template. However, in the haste to 'get right' the laws and institutions, what gets overlooked is the question of *justice*, and its multiple and contextual meanings. The legalistic approach fails to understand justice as a

manifestation of social and economic circumstances and as a dynamic process. It tends to essentialize legal orders into a customary-state dichotomy, or seeks to shoehorn ‘living law’ into fixed forms, rather than engaging with the more complex, hybrid and fluid system that prevails. This approach can also be used to mask or obscure the political motives and consequences of restructuring the legal order, and of shifting power from local, often semi-autonomous, actors to state institutions.<sup>15</sup>

An alternative approach that takes as its point of departure empirical realities concerning judicial practices, their local political, social and economic contexts, and their often flexible handling of laws has a far better chance of generating policy options that might deliver socially embedded and sustainable results. It helps us identify how well-intentioned policies may backfire and fail to achieve their goals when put into practice. The alternative approach also understands legal systems not as end-states that can be engineered by governments and international agencies, but as the product of internal processes of contestation, competing local interests, changing socio-economic circumstances and corresponding justice demands.

As the Rumbek example demonstrates, law is a political contest at all levels, from legislation to litigation. Attempts by governments and agencies to ensure greater certainty and consistency by defining laws are likely instead to become just one part of a body of resources that litigants and courts draw upon in arguing and settling cases – and a written law may be an asset for one litigant and an obstacle for another. Of course states are unlikely in principle to tolerate the notion of flexibility and living law that we have presented as positive aspects of the local justice system in South Sudan. But nor in the current context can the state extend full control over this system. In the gap between the legalistic ambitions of the state and the realities on the ground, litigants were exploiting any available resources with which to advance their cases. It is in this gap that people were themselves promoting ‘rule of law’ and generating change in the courts – and it is in this gap that interventions should be located. Between the ambitious goals of rule of law reform and the political constraints of a post-conflict context, there may be considerable opportunity to work with litigants and public to enhance the resources of information and knowledge that people were seeking to mobilise in their court cases. The *idea* of ‘the law’ has tremendous power and meaning in

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<sup>15</sup> See Moore (1973) on the ‘semi-autonomous social field’.

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South Sudan, and is bound up very closely with the idea of the state. But if the goal of policy is to promote change, reform and participation, then there may be more to be gained from allowing this idea of law to be deployed and debated by individual litigants, than by enabling certain actors to define and restrict its meaning through a recorded ascertainment.

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