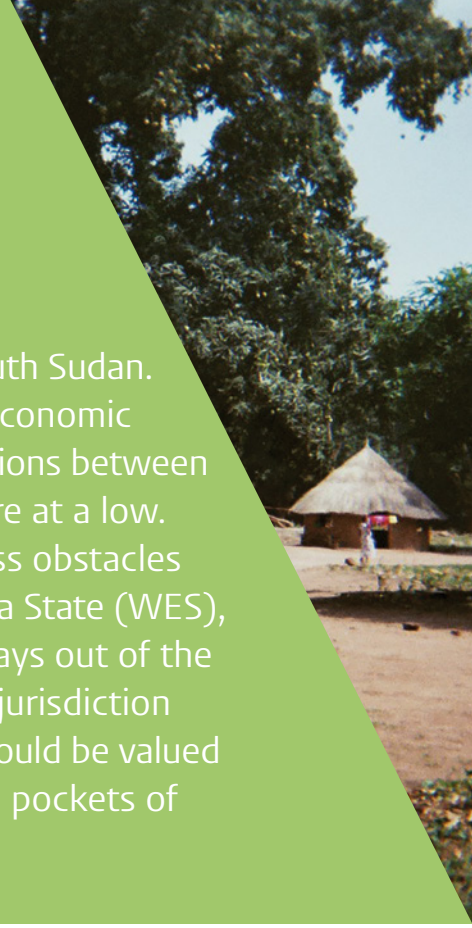
Policy Brief South Sudan
Working with local institutions to improve the provision of justice



The present is one of the hardest times in the recent history of South Sudan. Fragmented violent conflict, a political deadlock and a crippling economic crisis are making everyday life extremely difficult. Further, the relations between the South Sudanese government and its international partners are at a low. Local customary and state justice provision is faced with countless obstacles and challenges. Based on socio-legal research in Western Equatoria State (WES), this paper highlights dilemmas and lines for debating local-led ways out of the quagmire by improving coordination and possibly expanding the jurisdiction for customary courts. This brief argues that local developments should be valued in their own right, and that regional innovations in more peaceful pockets of the country may light the way for other areas.

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Donors: should we stay or should we go?

Many organizations are wondering whether it is sensible to invest in anything but humanitarian aid under current conditions in South Sudan. But it is a vast country, and insecurity can be fragmented and localized. Still areas not directly affected by violence are at times forgotten by the humanitarian community and deemed too risky for development assistance. This policy brief argues that those areas offer a more conducive environment for development engagement, and that the most conflict-affected areas can benefit from such initiatives too. A positive example is the World Food Programme's sourcing maize from a local farmers' association in Yambio to support starving populations elsewhere in the country.[1] It is worth considering localized developments in their own right, and to stimulate local-level innovations that may light the way for other areas. Having said that, gains made at the local level are vulnerable when the national conflict endures, so a political solution for that conflict remains essential.

Projects: flexibility and local networks

Elements of insecurity, poverty and rapid change have been perpetual qualities of socio-political life in this region arguably since before Sudan's independence in 1956. Perhaps unsurprisingly, much of the assistance that the South has received and continues to receive was humanitarian in nature. For the development assistance between 2005 and 2010, a critical multi-donor evaluation noted a heavy focus on socio-economic development (i.e. basic service delivery), based on a theory of change in which underdevelopment was assumed to contribute to conflict directly (Bennett, 2010). What is more, donors often had to make a trade-off between quick results on the one hand, and the sustainability of their efforts on the other (eg. through improved capacity building).[2]

Development practitioners in South Sudan would be wise to take insecurity and change as a premise, and construct their engagement accordingly: projects are best when they have long-term goals but remain flexible and adaptive, and when they stimulate local networks that will outlive the timespan of a project.[3] Doing so requires an understanding of local (elite) interests in promoting or hindering change. In this light, the functioning of local justice systems could be supported by fostering constructive connections between customary and state judges and the local administration.

Land: major source of conflict

Driven by insecurity and drawn by the prospects of a more prosperous and peaceful life, many people have flocked to the cities of WES.[4] The increased pressure on land is both a consequence and cause of conflict.[5] In recent years, efforts by local government to formalize land tenure have resulted in increased friction within and among communities.[6] In Yambio a new institution called the County Land Authority was set up in 2013 in line with the Land Act (2009). It has made important strides in resolving land disputes, but the donor funding has phased out and local government has not taken over the payment of its staff. The institution is thus left fragile to inefficiency and corruption. Given the

weak institutional context and economic crisis, it would be wise if the local government would refrain from expropriating citizens through its demarcation process as long as it has no budget or land to compensate the dispossessed. The literature on similar processes warns that tenure formalization is often not the most effective way to improve citizens' tenure security, that it rarely benefits the poor and powerless, and that the established cadastres or registries are often unsustainable.[7]

Where disputes over land occur between members of different ethnic groups, there is a real risk of escalation and especially so when disputants feel that local authorities are partial.[8] In such instances, inclusive context-specific resolutions could be fostered where the elders and traditional authorities of the respective communities agree on the terms of land use, while the county commissioner, police and judiciary pledge support for its enforcement.[9] Recent research in Aweil East suggests that fruitful modus operandi can be achieved where access to grazing land is opened up while arable land remains more cautiously governed.[10]

Women: still behind, but taking action

Despite legislative safeguards the position of women in South Sudanese society remains especially precarious in many ways. Domestic violence and neglect are widespread, women's aspirations for development are often stifled, and various forms of gender-based violence are common. Sometimes a widow is chased away from the land of her late husband by her in-laws, a practice called 'widow chasing.' When that happens it is not self-evident that she is welcomed back by her own family. Women's effective post-divorce rights are meagre – especially on custody and property. Their access to justice can be obstructed by fear of stigma, cost, distance and lack of knowledge.

... access to courts alone does not equate access to justice.

Still the situation is not only grim: our research found that women initiated between 30 and 44 percent of the cases in customary courts.[11] In some cases they followed the appellate chain all the way to the high court.[12] What is more, substantively things are changing and both customary and statutory courts were at times willing to recognize women's rights to property and inheritance. The enforcement of such rulings is often partial, and the processes are hindered by intimidation with violence and witch-craft. But some powerful women continue to push for social change and use the law and court system to do so. This research highlights that legislative change and improved access to justice are useful, but not sufficient to improve the position of women. Many laws remain ink on paper in the absence of enforcement, and access to courts alone does not equate access to justice. The position of outsiders promoting normative change in this regard is not strong: especially traditional authorities and elders are often skeptical of human rights and its advocates.

Customary courts omnipresence and functioning

Customary A, B, and C-courts are present throughout the country (Leonardi et al, 2010) and WES (Braak, 2016). The traditional authorities (TA's)[13] that hear cases in these courts as well as outside of them, remain the quintessential justice providers for large swaths of the population. TA's tend to stay longer when insecurity increases than state judges, and they are normally native to the area in which they work. The justice they offer is generally affordable, accessible (in terms of distance and complexity) and swift. Importantly, some TA's have inherited their title and position, but some have also been appointed or elected by their community. As a general rule the panel of three judges also counts one woman, and at times it is mixed ethnically. Decisions of customary courts can be appealed to in state courts, but that process can be expensive, slow and complicated – especially so in areas without state courts. Through the Local Government Act (2009) TA's have been incorporated into government, and higher-level ones get a small salary from the state.

Customary courts and TA's come with challenges rooted in their lack of capacity (general lack of resources, limited knowledge of the law, low levels of education), and in the discrepancy between their normative beliefs and statutory law (unfavorable approach of women, belief in witchcraft, dislike of 'human rights' as a body of norms and the actors that promote them). Customary courts sometimes hand down rulings that violate both customary and statutory norms of fairness, and they can be keen to sentence defendants in part because they rely on court revenues for their income. But there is a fair degree of downward accountability, as unpopular TA's and courts can 'lose people': people will simply stop bringing their disputes. In other instances, controversial TA's can be fired by the county commissioner.[14]

The jurisdiction of customary courts is limited to civil disputes,[15] and they cannot sentence people to prison. In reality they often do hear criminal cases and sometimes sentence people to prison and/or lashes. Litigants bring criminal cases to customary courts because the state courts are often not accessible, but also because customary courts offer quick, accessible and affordable local justice and frequently demand compensation for the victims.[16] Customary courts are faced with a dilemma when disputants bring cases that fall outside of their jurisdiction (such as criminal cases):

1) to deal with those disputes;
2) to keep suspects in pre-trial detention and wait until a state judge arrives;
3) to refer disputants to the nearest competent court; or
4) not to deal with those cases at all.

This research has found that the first and second strategy are most commonly chosen.[17] The first strategy is at odds with the law and therefore problematic in the eyes of state judges. The second and third strategy

align with state legislation most closely, but can result in prolonged court cases, insurmountable costs for litigants, and sometimes suspects spending years in pre-trial detention.[18]

Faced with the limited capacity of the statutory legal system, some donors may choose to invest in accessible justice provision by supporting TA's. There seems to be a strong demand among lower-level TA's (B-court judges and below) for 'guidance' on technical competences, jurisdiction, and the link with the state. In the past though, donor-supported trainings to TA's were often framed as capacity building, but perceived by TA's to be normatively loaded (in favour of human rights).

Statutory courts struggle: decentralization risks weakening them

There is a deep and widening gap between the letter of the law (both substantive and procedural) and its implementation in practice. Rights are disregarded, obligations neglected, and jurisdictions overstepped. What is more, the legal framework in many instances presupposes the presence of countless institutions at that have simply not been established. This brief argues that the discrepancy between law and practice risks further undermining the credibility of the state, and that it would be better if legislation and policies were realistic and pragmatic.

The capacity of the state judiciary is limited (e.g. lack of trained judges, lack of budgets, insecurity) and is likely to remain so for years to come. This capacity should be enhanced, but for the short and medium term the government and its international partners would do good to be pragmatic in improving accessible justice – especially for cases that fall outside of the jurisdiction of customary courts. Mobile courts could be supported to address urgent justice needs, but they depend on an enabling environment and do not solve systemic problems.[19] Local government could also organize to transport suspects of serious criminal offenses to the nearest competent state court.

It is unclear if the decentralization into 28 states will be followed by decentralization of the judiciary, but there is a risk that the already limited human and financial resources of the state judiciary will be spread even more thinly. Legally, each state is to have a High Court, and each county a County Court, but practically that seems unfeasible. At the time of writing the decentralization decree has been partially implemented by the executive,[20] but not by the judiciary.[21]

Linking the state and customary courts

State and customary courts are especially weak when it comes to the enforcement of their rulings. In civil cases the enforcement is left to the litigants in question, and in criminal cases the police or prison services are entrusted with it. But when we visited litigants a full year after their dispute had been settled in the high court, we found that disputes had often not ended in reality. The losing party was sometimes able to ignore the ruling or resist it by intimidating the complainant.

One way of improving the provision of local justice and its enforcement, would be through better and more flexible coordination between state and county governments and customary and statutory courts. State legislatures and judiciaries should think boldly with TA's about improving access to justice in areas where there are no statutory courts. Solutions can vary from something as simple as regular phone consultations to more drastic measures such as (temporarily) expanding the jurisdiction of customary courts to include certain criminal offences. If customary courts would be granted criminal jurisdiction, it is crucial that the oversight mechanisms of the judiciary as well as the appellate chain are improved. The Judiciary Act (2008) envisages the supervision by the president of every state's High Court of all the judiciary. Presently, many state judges do not regard customary courts as part of the judiciary proper. Should the presidents of state courts be able to overcome their reluctance to engage with customary courts, they could help to enhance the quality of justice being administered locally as well as improve their own understanding of locally relevant customary laws.

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Customary court clerks could be key to the improved coordination between local administration and customary courts. The clerk is responsible for keeping the court records and filling forms on court revenues. In theory they are to receive a salary from the payam or county government, but in our research we found that this only happened in the state capital Yambio and not in surrounding counties. He is often the only person who can read or write, and is sometimes asked by court members to read provisions of a statutory law. Customary clerks could be invited for a state-wide training, designed and executed based on a needs assessment and in partnership with the high court president and a specialist. The training could address the best ways of keeping court records and revenue administration, and answer questions that clerks may have. This would enhance the quality of appeals and oversight throughout the judicial chain. As a positive corollary, court clerks could thereafter help court members to improve procedural justice.

Justice reform is not merely a technical matter, it is also very political. This is why all relevant local stakeholders (i.e. the county commissioner, judges, customary court members, paramount chief, legal administrator) should be included in debates to design locally feasible and desirable *modus operandi,* based on the opportunities and constraints of their particular setting. The central and state governments could create legal, and ideally financial, space for such local experiments in line with the Local Government Act, and perhaps establish minimum requirements. Donors could facilitate and support capacity building as deemed relevant to support such local configurations.

Conclusion

South Sudan is in the midst of turbulent times again, and its people, government and supporters are faced with countless dilemmas. The present context is fragile in every meaning of the word, and programming should always anticipate rapid change: for better or worse. This policy brief has opted for an unconventional approach: pragmatic idealism in which justice reform is first and foremost based on an assessment of the realities of justice provision on the ground, and in which localized cooperation between the customary and state judiciary is seen as fundamental to improvement. In South Sudan institutional connections are often weak, but personal connections can be strong. Those connections can be harnessed for the advancement of a more effective justice system.

While the national crisis oscillates on the continuum between war and peace, people's everyday lives continue to evolve around the pursuit of happiness. The local justice sector is crucial for resolving disputes that occur at this level. But it is presently not well-equipped to handle disputes involving the state or armed factions. Therefore, outside actors should think critically about the leverage they have to support a constructive political settlement that may move the country to a more peaceful politics and to eventually help make justice at the local level the standard rather than a vulnerable exception.

The full research report is available at: http://www.universiteitleiden.nl/en/research/research-projects/law/supporting-primary-justice-in-insecure-contexts-south-sudan-and-afghanistan

Further reading

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Endnotes

1 *Sudan Tribune* (13 September 2016). WFP contracts Yambio farmers to supply maize grains. Available at: http://sudantribune.com/spip.php?article60229
2 Bennett, J. et al. 2010. *Aiding the Peace.*
3 See also Kleinfeld, 2015. *Plan for Sailing Boats, not Trains.*
4 In October 2015, WES has been split up into Gbudwe, Maridi and Amadi States through "Establishment Order Number 36/2015 for the Creation of 28 States."
5 Chapter 2.6 'Land disputes and ethnicity in Maridi' in Braak, B.J. 2016. *Exploring Primary Justice in South Sudan – Challenges, concerns, and elements that work.*
6 ibid. '2.4 Demarcation and land dispossession'.
7 Bruce, J.W. 2012. Simple Solutions to Complex Problems: Land Formalisation as a 'Silver Bullet. In: Otto, J.M. and Hoekema, A. *Fair Land Governance: How to Legalise Land Rights for Rural Development.* Leiden: Leiden University Press.
8 Braak, B.J. 2016, '2.6 Land disputes & ethnicity in Maridi.'
9 Ibid.
10 Santschi, M. (forthcoming).
11 In the five customary courts that this research has digitalized the court records from.
12 Braak, B.J. 2016, '2.1 Women's paths to claiming land in court.'
13 In South Sudan, the term 'traditional' authority (not 'informal', 'non-state', or 'customary') is used, also in legislation. This is not to say that their form and function was not profoundly shaped by encounters with the various outsiders occupying the region.
14 Braak, B.J. 2016, '2.2 Customary courts and traditional authorities.'
15 Unless a competent statutory court refers the criminal case to a customary court.
16 Leonardi, C. et al. 2010. *Local Justice in Southern Sudan.*
17 Braak, B.J. 2016, '2.7 The Mobile Court of Judge Kaya.'
18 Ibid.
19 Ibid.
20 Schomerus, M. and Aalen, L. (ed) 2016. *Considering the state.*
21 Personal communication with high-level judicial official, 12 Sept 2016.

Credits

This brief was written by Bruno Braak for policy makers and development practitioners working in the field of law and development in South Sudan. It offers recommendations based on a socio-legal research project on land and family disputes and their resolution in customary and statutory forums in Western Equatoria State. This research is part of the project 'Supporting Primary Justice in Insecure Contexts: South Sudan and Afghanistan'. This project was funded by the Netherlands Ministry of Foreign Affairs and administered by NWO-WOTRO in collaboration with the Knowledge Platform on Security and Rule of Law. Research was carried out between September 2014 and March 2016 in partnership with the Justice and Peace Commission of the Catholic Diocese of Tombura-Yambio.

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