



# Research report

# Land and Justice pathways in South Sudan

Van Vollenhoven Institute for Law, Governance and Society (VVI)

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## **Colophon**

This research report is part of the Just Future consortium, a five-year alliance of various partners from the Global North and South, with financial support from the Dutch Ministry of Foreign Affairs.

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## Preface

The Just Future consortium is a five-year alliance of various partners from the Global North and South, with financial support from the Dutch Ministry of Foreign Affairs. The aim of Just Future is supporting improved accessibility, responsibility and accountability of security and justice institutions, and inclusive political decision-making and peace-processes, to be achieved by the mobilization of civil society for collective action and advocacy. The work of the consortium is focused on six fragile and conflict-affected countries: Afghanistan, Burundi, Democratic Republic of Congo, Mali, Niger, South Sudan.

As one of the consortium's research partners, Leiden University's Van Vollenhoven Institute for Law Governance and Development (VVI) conducts research together with local partners to inform advocacy, lobbying and programming that contribute to access to justice. This focus on access to justice looks into the responsiveness, accountability and people-centeredness of justice providers, as well as on the ability of justice seekers, particularly from excluded constituencies, to resolve disputes and to claim and defend their rights.

In the first phase of the Just Future consortium (2021-2022) VVI has focused on studying land justice in South Sudan, considering that pervasive insecure access to land is one of the main issues around which people seek justice solutions in fragile and conflict-affected contexts. This research report aims at contributing to the existing knowledge on practical land justice interventions and dynamics of land justice in South Sudan.

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## Abbreviations and acronyms

CMGs- Community Mediation Groups.

CPA- Comprehensive Peace Agreement.

FGD- Focus group discussion (FGD)

R-ARCSS- Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan.

S/NFI- Shelter/Non-food items Cluster.

SPLA- Sudan People's Liberation Army.

SPLM- Sudan People's Liberation Movement.

SSLS- South Sudan Law Society.

SSP- South Sudanese Pounds.

VVI- Van Vollenhoven Institute for Law Governance and Development.

# Research report

## Land and Justice pathways in South Sudan

### Executive summary

The history of South Sudan has been marked by persistent conflict, both before and after the country's independence in 2011, which has exacerbated the already complex web of overlapping land claims and unclear land rights. Many South Sudanese people, especially women, lack land tenure security. This report, based on qualitative research implemented in the South Sudanese cities of Torit and Wau in 2021 and 2022, aims to investigate practical interventions for land justice and the dynamics of land justice in South Sudan. To do so, the report focuses on three main topics. First, it provides an overview of *land administration* in South Sudan. Second, it investigates *land-dispute resolution mechanisms*, with a particular focus on the Community Mediation Groups (CMGs) implemented by the South Sudan Law Society (SSLS). Finally, it discusses *women's land rights* in South Sudan in customary and statutory systems, the paths available for women to claim their rights, and women's voices and roles in positions of leadership.

Land administration by state institutions in South Sudan is marked by a weak institutional framework, highly limited human, financial, and material resources, and a prevalence of arbitrary practices. The legal framework has various gaps and contradictions, especially between the 2009 Land Act and the 2011 Constitution. For instance, it is unclear whether individuals or groups can have full ownership or only leasehold rights over land, and the land rights of displaced people remain contested. The mandates of various state institutions also remain unclear, leading to various gaps and overlaps in practice. Land registration and demarcation are especially problematic tools of land administration. Without much law to guide their processes, or avenues to address grievances caused by them, land demarcation and registration are marked by broad discretion from state officials and are a source of much controversy, corruption, and conflict. In practice, land demarcation has often compromised the tenure security of numerous individuals, especially the most vulnerable, created disputes between the state and communities, and generated internal conflicts within communities. Expropriation and land use regulation lack an adequate legal framework and are implemented through ad hoc practices of state officials, often to the detriment of the most poor and vulnerable.

In such a complex scenario, establishing land-related dispute resolution mechanisms is key for conflict prevention and state building. However, this is not an easy endeavour; South Sudanese justice seekers have limited access to mechanisms for addressing their land disputes. The limited number of statutory courts, combined with hefty fees and long delays, make these courts almost inaccessible to the great majority of the South Sudanese people. Moreover, people with documents find it much easier to prove their claim to land than those who must prove their rights through witness testimonies and markers such as fruit trees or graves. This is detrimental for all people who do not have a formally documented land right. With the customary courts excluded from deciding cases that deal with registered lands, there is in practice a justice gap for land-related dispute mechanisms. The CMGs created by SSLS provided a solution for people who could not access the courts. The transparent and inclusive methods adopted, combined with the support provided by lawyers were key factors highlighted by interviewed clients. Moreover, the activities and presence of CMGs also seem to have impacted in society in other ways, such as forcing some transparency into the practices of state institutions and assisting people to access and deal with state institutions like the statutory courts. However, a lack of funding has for now stopped the work of CMGs.

Women are in an especially difficult position regarding land rights. As in many Sub-Saharan African countries, customary norms of most groups in South Sudan give women only derivative rights to land, based on their positions as wives, daughters, or sisters. However, war and displacement have undermined traditional family structures and customary

obligations of support by male relatives, leaving women vulnerable in the existing gendered land relations. While, on the books, statutory law establishes several principles that generally forbid discrimination against women, there are various gaps and inconsistencies that make the legal protection of their rights difficult. For instance, the general principle of equal rights to inheritance established in the Constitution has not yet been concretized in a statute or regulations on inheritance, leaving women dependent on (discriminatory) customary norms, and without a legal path to claim their inheritance rights. In practice women experience various forms of discrimination and difficulties to safeguard their rights, even when they interact with the formal system. For instance, women who individually own land are labelled by many as ‘spoiled’, ‘loose’, and even prostitutes. Women’s rights to land are also often disregarded by state officials during land demarcation and registration processes. Some individuals and groups actively try to combat these gendered conceptions, and the reported growing number of women in leadership positions is an indication that some change is taking place. But these champions of women’s rights and female leaders report various limitations, such as push-back from male leaders, and a lack of coordination with, and support from, women in higher positions of power.

In conclusion, the waves of conflict, displacement and (colonial) occupation in South Sudan have generated a complex web of land-related grievances, severely undermining land tenure security, especially for vulnerable populations. State-led land administration, despite its intended goal of promoting peaceful and equitable land use, often exacerbates grievances and injustices. Land demarcation, registration, and expropriation processes, coupled with unclear legal frameworks, are marked by broad discretion from state officials, and are often another source of uncertainty and grievances over land rights. The limited capacity of judicial systems, paired with the restrictions imposed on customary courts to address disputes over registered land, leave people without pathways to address land disputes, especially the most vulnerable. Alternative dispute resolution mechanisms such as the CMGs, if carefully implemented, offer low-cost solutions that go beyond just addressing specific cases, but also assist people in accessing and dealing with state institutions and convey a message to state institutions that they can and are being held accountable. This is a first but important step in a new and fragile country such as South Sudan towards the creation of a rule of law, where law checks the activities of state agents. Women are in an especially fragile position. While legislation can play a role in fighting discrimination, practical enforcement of laws, administrative reforms, and societal shifts in gender norms are equally crucial. A broader societal dialogue challenging gendered land rights and stigmatisation of women who own land, and promoting women's empowerment, supported by initiatives like CMGs and community dialogues, is essential for achieving lasting change in women's land tenure security. Recommendations for the above-mentioned points can be found at the end of each chapter.

## Chapter 1 - Introduction

### 1.1- Land justice, peace building, and access to justice

Land is intimately connected to identity, community and livelihoods. Relations among people, as individuals or groups, and between citizens and the state, define how rights to use, control, and transfer land are allocated within societies. Moreover, for many people, especially poor communities, land is their most valuable asset and their main source of livelihood (Cotula, 2012: 57; Deininger et al., 2012: 15). The possibility of losing their land puts their survival at risk, and their reaction against threats can be especially violent (Shipton, 1994: 347). When a land user has confidence that they will not be arbitrarily deprived of their rights, and certainty that those rights to land will be recognized and protected if challenged, they can be said to have secure land tenure. Unequal power relations and wealth distribution in most fragile and conflict-affected societies, coupled with the operation of multiple and overlapping land tenure systems, (re)produce and reinforce insecure land tenure for many people. Pervasive insecure land tenure is one of the main issues around which people seek justice solutions in fragile and conflict-affected contexts.

Moreover, insecure access to land is a key driver of conflict, and a bottleneck to recovery. In fragile contexts, interpersonal and intercommunal contestation over land access is a major driver of violence and can cascade into (or be manipulated by political actors to produce) large-scale conflict. Dysfunctional land governance, weak justice systems, politics of exclusion that feed land grabbing and dispossession, and criminality associated with natural resource exploitation are all land-related drivers of conflict. Rapid urbanization, climate change, and other macro phenomena further increase violent competition over land. Therefore, effective land justice pathways are essential to protect people's rights, but also to address conflict and promote sustainable peace. More effective tools and approaches for strengthening access to land justice are needed in fragile and conflict-affected contexts. South Sudan is a clear example of this interconnection between land tenure security, conflicts and access to justice.

### 1.2- Land-related conflict in South Sudan

As the world's youngest country (2011), South Sudan did not have an easy start. Its history is marked by conflict before and after independence, including two long and violent civil wars since the 1956 independence of Sudan from British colonial rule, and internal political turmoil since independence. The two civil wars were fuelled by struggles over recognition of land rights, unfair dispossession and control over land resources (Badiy, 2014: 51; World Bank, 2014: 13; Simone, 2022: 146). Several interconnected factors can explain the prevalence of land-related conflict in South Sudan.

Intercommunal conflicts over land have been a recurrent reality in South Sudan. Although land-related tensions and conflicts between communities have always existed, the turmoil caused by war, combined with the legal recognition of customary communal land rights since independence have intensified pre-existing tensions over land (Simone, 2015; 2022: 143, Deng, 2021a). Ethnic community membership has become not only linked to access and control over landed resources (Stone, 2014: 16), but – through the overlap of customary and administrative boundaries – also connected to control of territory (Badiy, 2012: 19; Rolandsen and Kindersley 2017, 24). Questions of land and boundaries become interwoven with access to political power (Pendle & Anei, 2018: 20), and competition over this political power and resources are often expressed as territorial disputes between increasingly exclusive ethno-territorial polities (Pritchard 2020). Communities have been trying to delineate hard boundaries to their land, 'so as to assert their rights to natural resources and craft political constituencies in their favor' (Deng, 2015: 1).

These shifts have led to increased tensions and conflicts between ethnic groups and clans, as strengthening particularistic identities can serve as a way to access material



entitlements.<sup>1</sup> This entrenchment of ethnicity, access to land and political power has serious consequences for peacebuilding and nation building efforts in South Sudan, as ethnicity can be used to mobilize large groups to defend ‘community’ resources (Pantuliano, 2007: 9; Simone, 2015: 69), which can quickly degenerate into violence along ethnic lines. Deng (2013: 1) describes inter-communal violence as one of ‘the most intractable problems confronting the justice system’.

The return of millions of southern Sudanese displaced internally or across borders during the various wars further contributed to existing tensions and disputes over land. UNHCR estimates there are currently 4.3 million South Sudanese people displaced, of whom about 2 million are residing outside of the country, and many of them are attempting to return home.<sup>2</sup> Returnees often find their former lands occupied, by community members or new settlers, sometimes belonging to or liaised with the military (Justin & Leeuwen, 2016; Deng, 2021: 9). For instance, Sudan People's Liberation Army (SPLA) soldiers have often been accused of occupying, constructing on, and selling plots they do not own, as well as refusing to vacate these plots when their rightful owners return. They claim the right to do so because they have shed their blood in the fight for the land. (Pantuliano 2007: 5; Odhiambo 2007: 9; Leonardi, 2011). This issue gets even more complicated when considering that customary laws in South Sudan mostly recognize a person's right to return to their land, regardless of the amount of time that has lapsed as long as the person has left the land with the intention of returning (Odhiambo 2007, 8; Mennen 2012, 16). Other problems such as lack of papers to prove their rights further complicate the position of returnees when reclaiming their land, especially in urban areas. Women's situation is even more difficult as the identity documents they were issued during displacement, such as refugee cards, are often in the name of their husbands or fathers (Stone 2014, 9).

There are some reports that customary systems in agro-pastoral communities were able to adapt and deal with the issue of returnees (Rolandsen, 2009: 25; Mennen, 2012: 13). But many returnees have settled in or near urban areas with or without consent of the government, most often with limited tenure security and exposed to further displacement by state authorities and resident communities (Odhiambo, 2007: 9; Deng, 2021: 8). The restricted and problematic processes to legally secure land rights, and the limited capacity of the justice system leave then exposed to abuses and insecurity (Chapter 3). According to Pantuliano (2009: 156), the humanitarian community has been slow in understanding how land issues hamper return and reintegration.

Issues with land rights are especially difficult for women in South Sudan. In most communities, customary norms severely restrict women's rights to land, which is often dependent on a male relative. Conflict and displacement have exacerbated this issue for women, leaving them widowed, divorced or abandoned and heading their households, but without any or only with precarious rights over land for their housing and livelihoods (See Chapter 4). While South Sudan's Constitution, the 2009 Land Act, and the 2009 Local Government Act all stipulate that women have equal rights to land, there is a wide gap between legal provisions and common practice. In the literature on women's land rights there is a growing recognition of the link between norms that are detrimental to women and women's limited role in mechanisms of decision-making and dispute settlement. Improving women's participation and empowerment (Ubink & van Rooij, 2011) is, thus, an important aspect of ending discrimination in both customary and formal justice systems but progresses in this area have been limited.

The limitations of the existing state systems for land administration further contribute to land-related conflict in South Sudan. As detailed in Chapter 2, processes such as land demarcation and registration, expropriation and urban planning are poorly regulated, and

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<sup>1</sup> Political decisions such as the unilateral 2015 presidential decree increasing the states from 10 to 28 (later repealed), further contribute to more confusion between customary claims to land and administrative state control over land, and further undermined the ongoing peace process (Rolandsen & Kindersley 2017, 23; Wight, 2017: 15; Mayai & Tiitmamer, 2020: 2; Pritchard, 2020).

<sup>2</sup> See <https://www.unrefugees.org/emergencies/south-sudan/>.

the institutions that implement them have limited resources. In practice, demarcation and delimitation are implemented through ad hoc processes that expose, especially the most vulnerable people, to much discretion and abuse from state officials. Problems such as formal land rights being issued to persons other than the long-term users of the land, and land documents to the same piece of land being issued to more than one party are common in South Sudan.

This complex scenario of tensions and conflict over land has adverse impacts on community safety, food security, and economic development. The most marginalized people—women, youth, the poorest households, and people living in displacement—struggle to securely access land and resolve disputes over land in a timely, fair and consistent manner. The objective of this report is to explore practical land justice interventions and dynamics of land justice in South Sudan. To do so, the report first sets the scene of the research, by describing the main characteristics and issues of land administration in South Sudan. Afterwards, it focuses on the two main topics that drove the research: (alternative) land-dispute resolution mechanisms; and women’s rights to land.

### **1.3- Research methodology and limitations**

The design and implementation of this research are the result of close teamwork between Just Future partners. The concept note for the research was designed after a literature review on land disputes and conflict resolution in South Sudan, through a series of meetings between South Sudan Law Society (SSLS), Steward Women, Cordaid South Sudan, and the Van Vollenhoven Institute for Law Governance and Development (VVI). The research aims at contributing to the literature on land justice in South Sudan; aligning with the operational activities, agendas, and concerns of the South Sudanese partners; and addressing security concerns connected to land disputes.

Torit<sup>3</sup> and Wau<sup>4</sup> were selected as the main sites for fieldwork. The main reason for the choice of these two locations were: the Community-based Mediation Groups (CMGs) created in both areas; the limited available literature on these two locations; and the relatively peaceful situation in these areas, which allowed for data collection on this sensitive topic. The research was implemented in 2021 and 2022, by a team of two VVI researchers, one local research coordinator, and two teams of two local assistants each (male and female), and in close collaboration with SSLS and Cordaid South Sudan staff.

The research was conducted through a qualitative methodological approach, primarily based on interviews, focus group discussions, and observations. After a first period of field research of three weeks in Torit and Wau, two teams of local assistants continued the research. A second two-week field visit to Torit allowed the team to conduct further interviews and focus group discussions to fill in some of the gaps in previous fieldwork and assess the accuracy of some preliminary findings with interviewees from previous activities. During the study, 30 qualitative semi-structured interviews and eight focus group discussions were held with a total of 154 respondents, including local mediators, people involved in land disputes, local chiefs (men and women) at various levels, women groups’ representatives, state officials from different ministries, court representatives, lawyers, national and international NGO workers and human rights commissioners. Respondents were asked questions about their access to land; family decision-making and gender relations; involvement of both customary and official actors and institutions in land management; tenure security and dispute settlement; and historical changes regarding these issues. The authors defined the key groups to be interviewed and the local assistants identified key representatives of each group. The interviews were conducted in English or

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<sup>33</sup> Torit Town has served as the state capital of Eastern Equatoria and is also the headquarters of Torit County. As a result, much of the state’s infrastructure and services were centralized in this area.

<sup>4</sup> Wau Town is the capital of Western Bahr el-Ghazal State. As the state capital, Wau also host many government institutions that are critical for the functioning of the state.

in local languages (translated by the local assistants), depending on the preference of the interviewees. Two sense-making workshops after field trips to share and validate the research findings were conducted with Just Future partners.

Time, budget, and security constraints limited the research activities mainly to the urban areas of Torit and Wau, which, in a country as diverse as South Sudan, is a shortcoming of this research. Although the local assistants could do some research outside urban centres, and the literature review provided an overview of the situation in other areas of the country, the findings about land-related issues outside the urban areas of Torit and Wau are limited. Nevertheless, the findings of this research shed light on several important issues and questions that are relevant throughout the country and can guide further research on the topic.

This report is divided into five chapters, with the central Chapters 2, 3 and 4 ending with their own conclusion and recommendations. After this introductory chapter, Chapter 2 provides an overview of land administration in South Sudan, starting with a short historical overview of land administration in the country, followed by an analysis of formal land rights and the existing legal gaps and contradictions. This chapter also investigates the process of land demarcation and registration, as well as expropriation and land use regulation. Chapter 3 focuses on land-related dispute resolution mechanisms. It starts by looking at the roles and limitations of statutory courts in addressing land-related disputes, followed by a similar analysis of chiefs and customary courts. The report then explores the work of Community Mediation Groups and provides a short overview of other forums for dispute resolution. Chapter 4 discusses women's land rights in South Sudan. It starts by providing an overview of existing literature on gendered customary rights, followed by an analysis of women's land rights in South Sudan, and the specific findings of this research in Wau and Torit. Finally, the report looks into the women's land rights in the statutory system and describes findings about women's voices and their roles in positions of leadership. Chapter 5 provides the final conclusions and reflections on the findings of this research.

## Chapter 2 - Land administration

### 2.1- Introduction

This section describes the main norms, structures and practices of South Sudan's land administration system(s),<sup>5</sup> both originating from the state and from other sources such as customary systems, and which are key to understand disputes over land, women's land rights, and pathways for land justice. Land administration by state institutions in South Sudan is marked by a weak institutional framework with serious limitations of human, financial and material resources, and arbitrary practices. The weakness of the formal legal and administrative system goes hand in hand with a continued relevance of traditional self-governance and customary norms and justice systems, which enjoy great legitimacy and are an important locus of local governance and dispute resolution. Statutory law operates alongside customary norms, social norms and ad hoc practice, that together form "a complex interlocking system of plural legal orders" (Mennen, 2012: 10). Land administration in South Sudan can be regarded as an area of *limited statehood* (Risse & Stollenwerk 2018),<sup>6</sup> where state institutions have a weak capacity to "steer" the existing local mechanisms of self-governance (Sørensen & Triantafillou, 2016: 1). Land relations are closely connected to clan structures and intra-family relationships, it is a field where customary and cultural norms have a profound impact.

The following sections offer a concise historical overview of land administration in South Sudan. They also describe how contemporary state laws regulate land rights, highlighting their main gaps and contradictions. Additionally, the rules governing land demarcation and registration, expropriation, and land use regulation are discussed, along with an exploration of the institutions responsible for land administration.

A note of caution is in order. Writing about state law in South Sudan comes with the challenge of clearly determining which laws are in place. First, the transition to independence left questions about which norms and institutions remained in force. The 2005 Interim Constitution of Southern Sudan and the 2011 Transitional Constitution both established that previous laws and institutions remain in place, aiming to ensure a smooth transition from the Sudanese to the interim and independence time (art. 208.3 and 198 respectively). However, legislation approved since then rarely explicitly repeals previous legislation, leaving unclear which Sudanese laws remain in place. For instance, the 2009 Land Act establishes that previous clashing law is repealed, but it does not identify such legislation (art. 2; see also Marongwe, 2013:4). Furthermore, the use of a different official language and the complexity of the Sudanese legal framework – a combination of statutory laws, judge-made rules, customary norms and Sharia law (Babiker, 2018: 132) – limit the access to, and knowledge about, Sudanese legislation by South Sudanese legal professionals who were not trained in this system and do not speak Arabic. Second, there is no online national repository of legislation, which limits the knowledge about and access to national and state-level legislation (see Deng, 2014: 31). Pre-independence Sudanese laws that might still be in force in South Sudan are also not widely available for practitioners and researchers alike. Moreover, court decisions are not publicly available online, making it difficult to know the case law of South Sudanese courts. Creating a centralized, free, online, and up-to-date repository of legislation would be an important contribution to strengthening the rule of law in the country (cf. Bedner, 2018).

### 2.2- A short historical overview of land administration in South Sudan

Like in many other colonial ventures, the Anglo-Egyptian Condominium used land administration as a way of affirming its rule over the territory, promoting the exploitation of land, and facilitating access to natural resources (Simone, 2022: 33). However, colonial

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<sup>5</sup> By land administration system we refer to the norms, institutions and practices, which regulate rights and obligations over land and the mechanisms to address disputes over them (Almeida, 2022: 21).

<sup>6</sup> Most states are neither fully failed nor fully consolidated but can rather be placed on a continuum from failed/failing states to consolidated states.

rules had little impact in the Southern regions where the state had limited reach and economic interest (Rolandsen, 2009: 19), and in practice land there remained to be administered by chiefs or land priests according to customary law (Simone, 2022: 146). The Sudanese regime that followed the Anglo-Egyptian Condominium continued to base land administration on colonial legislation and practices that favoured state control of land but became more invasive of local land rights and legally eliminated the land claims of most communities (Deng, 2014: 11; Pantuliano, 2007: 3; Babiker, 2018: 132). Struggles over recognition of land rights, unfair dispossession, and control over land resources were a central part of the grievances that lead to the two civil wars (World Bank, 2014: 13; Simone, 2022: 146).

The significance of land disputes in conflict, as well as their importance in preventing future conflicts in South Sudan, was recognized in the 2005 Comprehensive Peace Agreement (CPA). Although the CPA did not include actionable rules regarding land administration, it established the objective of progressively developing and amending land-related legislation and created a National Land Commission and a Southern Sudan Land Commission (Section 2 of the CPA; Pantuliano, 2007: 3). The 2005 Interim Constitution of Southern Sudan further elaborated on the role of these two land commissions (art. 181 and 182) and established some basic provisions about the protection of customary rights to land and the right to adequate consultation and compensation in case of expropriation (art. 180). However, the lack of a more detailed legal and institutional framework that could deal with issues underlying conflict and displacement continued to be a problem (Pantuliano, 2007: 7). The Land Act, combined with the Local Government Act and the Investment Promotion Act – all from 2009 – created a more solid legal ground for land administration but, as further detailed in section 2.4, gaps in the legal and institutional framework remain a problem.

The 2018 Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) highlighted again the issues on land administration as both cause and consequence of conflict.<sup>7</sup> The agreement establishes the government's obligation of reviewing the existing land legislation and policy to address issues such as land grabbing and of organizing conflict mediation (art. 4.8.2). However, since then not much has happened regarding land administration in South Sudan.

### **2.3- Formal land rights and institutional roles in South Sudan**

A central function of land-related legislation is to establish the different types of land rights that exist in a country. The 'bundle of rights and obligations' metaphor is useful to clarify the set of legal rights and obligations associated with land. According to this metaphor, the collection of all possible rights and obligations connected to land can be grouped in a bundle of 'sticks' (Benda- Beckmann *et al.*, 2006: 15; Barry, 2015: 14). This includes rights such as possession, control, exclusion, enjoyment and disposition, and obligations such as the payment of fees/rent/taxes, and handover control of land after a certain date. Each land right has a different bundle of 'sticks' (i.e., rights and obligations), and they can change with time, space, and the source that legitimates them (Almeida, 2022: 16). Individuals and communities can hold different bundles of 'sticks' to the same piece of land, for instance the owner and the tenant of a piece of land enjoy different rights and obligations over it. This section analyses the most relevant land-related legislation in South Sudan (listed in Table 1), and the land rights it establishes.<sup>8</sup>

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<sup>7</sup> The transitional period established in the R-ARCSS has been recently (August 2022) extended for 24 months.

<sup>8</sup> While several authors make references to South Sudanese legislation, to the best of our knowledge, no comprehensive analysis of the legal framework on land rights in South Sudan has been written yet.

**Table 1 – Land Legislation in South Sudan**

Legislation	Year
The Comprehensive Peace Agreement	2005
The Interim Constitution of Southern Sudan	2005
Presidential Decree No. 52/2006 that creates the South Sudan Land Commission	2006
The Land Act	2009 <sup>9</sup>
Investment Promotion Act	2009
Local Government Act	2009
Transitional Constitution of the Republic of South Sudan	2011
(Draft) Land Policy (2013) <sup>10</sup>	Waiting for approval
Revitalized Agreement on the Resolution of the conflict in the Republic of South Sudan (R-ARCSS)	2018

In summary, the 2009 Land Act defines ownership as the right to use and occupy land in perpetuity (art. 4), and establishes several derivative land rights, such as lease and sublease (art. 18 to 27), easements (art. 28 to 30), usufruct (art. 31 to 34), and mortgage (art. 34 to 38). It also establishes the legal recognition of customary land rights, i.e. land rights that derive from customary norms, both of individual and communal nature (art. 8.3, 8.4). The legal recognition of these rights is especially relevant considering that most South Sudanese people access land through customary systems. Art. 28 of the 2011 Transitional Constitution of the Republic of South Sudan (hereinafter Constitution) establishes the right to acquire and own *property*, and the right to not be expropriated unless for public interest and upon the payment of fair compensation, nor confiscated unless ordered by a court of law.<sup>11</sup> As discussed in section 2.6 regarding urban planning, the right to and restrictions on construction on land remain mostly unregulated.

The 2018 R-ARCSS also has a number of provisions on land. For instance, art. 3.1.1.4 creates the state obligation of establishing mechanisms for identification and documentation of land from refugees and IDPs; Art. 4.8.1.13 repeats the right to compensation in case of expropriation for exploitation of underground natural resources, and art. 4.8.1.14.12 the right of people to be consulted in these processes. The R-ARCSS also establishes the obligation of the government to, within 12 months, review the National Land Policy and the Land Act and, within 18 months, establish an ‘independent registry on lands’ (art. 4.8.2.1). However, these deadlines have passed a long time ago, without many results.

As described section 1.2, customary limits to the right of women to own land put them in an especially fragile position in society (Deng, 2021: 23). Since the end of the first civil war in 2005, South Sudanese statutory law has progressively tried to address this issue and curb the discrimination of customary systems. For instance, while the 2005 CPA

<sup>9</sup> A number of references, such as the R-ARCSS, refer to this as the 2008 Land Act instead of 2009.

<sup>10</sup> The draft Land Policy has been sent to the National Legislative Assembly in 2013, after approval by the Council of Ministers, but since then remains unapproved. See <https://land-links.org/2013/02/council-of-ministers-passes-south-sudan-land-policy/> and Deng, 2021a: 17; Simone, 2022: 149. Being a provisional draft waiting for approval for a very long time, and without a clear path to its promulgation, we opted to not include its content in the legal analysis.

<sup>11</sup> See also art. 170.10 of the Constitution and art. 8.1, 8.2, and 73 to 77 of the Land Act. There is no specific act on expropriation, it is instead regulated in different pieces of legislation such as the Land Act and the Local Government Act.

stated that personal and family matters were to be governed by customary law and that all national legislation shall be based on ‘popular consensus and the values and customs of the people of Sudan’ (para 3.2.3, 6.4), the 2011 Transitional Constitution balances the commitment of recognizing the customary order with modern and democratic institutions (Hessbruegge, 2012: 304). The 2011 Constitution establishes important provisions for protecting women’s land rights, such as affirming the principle of equality between men and women (art 16.1) and establishing a specific provision regarding equal rights to own *property* and inherit it from their husbands (art. 16.5).<sup>12</sup> However, we discuss in section 2.4 that these provisions also raise some questions. The Draft Land Policy (2011, 4) describes a wide gap between legal provisions recognizing equal rights of women to land and common (customary) practice in which ‘women’s land rights remain largely conditional, derived through their marital or childbearing status and dispossession of widows, daughters, and divorced women is common’. However, as described above, the Land Policy is still waiting to be debated in parliament.

Administratively, South Sudan is divided into (subnational) States, counties, *payams* and *bomas*, and authority over land administration is divided (and disputed) between central government, government of states, and communities (Deng & Mittal, 2013: 13; Badiey, 2014). At national level various aspects of land administration are shared between the Ministry of Housing, Physical Planning and Environment; the Ministry of Agriculture, Forestry, Cooperatives and Rural Development; The Ministry of Wildlife, Conservation and Tourism; the Ministry of Roads and Bridges; the Ministry of Water and Irrigation; and the Ministry of Petroleum and Mining (Deng, 2014: 23; Oyono & Galuak 2015, 7).<sup>13</sup> At national level the 2011 Constitution also creates the *Land Commission* (art. 171), following the previous *National Land Commission* and *Southern Sudan Land Commission* created by the 2005 Comprehensive Peace Agreement (art. 2.6, 2.7), the 2005 Constitution (art. 181), the Presidential Decree No. 52/2006, and the Land Act (Marongwe, 2013:5).<sup>14</sup>

It is at state-level that most decisions on land-related issues are made (Marongwe, 2013: 5; Deng, 2014: 23). The state Ministry of Housing, Physical Planning and Environment plays a central role in land administration and, as extensively reported in this study, it is also the target of much criticism.<sup>15</sup> The Land Act creates the County Land Authority(ies) (art. 44 to 47), which are mostly an extension of the Local Government Councils (Marongwe, 2013: 5), regulated by the 2009 Local Government Act. The Land Act also creates the Payam Land Councils (art. 48 to 51). However, only a few of these authorities and councils have been established in practice (Deng, 2014: 23). The Constitution (art. 166 and 167), and the Land Act (art. 15 and 27) also acknowledge the role of traditional authorities in the management of land under customary law.<sup>16</sup>

The South Sudanese legal and institutional framework is marked by various gaps and contradictions, especially between the 2009 Land Act and the 2011 Constitution, and unclear mandates of different state institutions. The following section discusses the most

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<sup>12</sup> See also art. 110 of the 2009 Local Government Act. The Constitution also establishes an obligation for all levels of government to approve and implement legislation that combats customary practices and traditions that can harm women’s rights (art. 16.4.b).

<sup>13</sup> In line of what was said in section 2.1 about access to legislation, the lack of a legal repository, as well as a government webpage, does not allow for a clear assessment of the names and roles of the different ministries. Deng provides a detailed list of institutions and roles (2014: 24), but no references on where to confirm their mandates.

<sup>14</sup> However, the 2011 Constitution says nothing about the roles of the Land Commission or the faith of the previous ones. According to Deng (2014: 88), in 2014 this commission still did not have a clear mandate. The 2018 R-ARCSS establishes the obligation of restructuring and reconstitute the Land Commission at national level (art. 1.19.1.11) and empowering land commissions at different levels of government to develop and implement land-related legislation (art. 4.8.2.1.3), but to our best knowledge there is no progress at this level.

<sup>15</sup> On the constitutional powers given to states and local governments see art. 162 to 165 of the Constitution.

<sup>16</sup> See also art. 88 and 89 of the 2009 Local Government Act.

relevant legal gaps, and the section after gives some examples of institutional contradictions in land demarcation and registration.

## 2.4- Legal gaps and contradictions

### 2.4a- Recognition of customary rights

The Land Act establishes several provisions on the legal recognition of customary land rights (defined as rights on land conferred by or derived from customs or customary law or practices), of individual and communal nature (art. 4, 8.3, 8.4). The Land Act also establishes that customary land shall be demarcated and registered, and that customary rights 'have equal force and effect in law with freehold or leasehold rights acquired through statutory allocation, registration or transaction' (art. 8.5 and 8.6 of the Land Act). Through this process the law creates the opportunity for individualization of land previously held under customary tenure (Deng, 2014: 30). The Constitution also establishes that the government 'shall recognize customary land rights under customary law' (art. 170.7), although it is less explicit about possible individual customary rights.<sup>17</sup> No legislation establishes rules about communities' membership, their representation, and decision-making power. These legal gaps leave various practical questions unanswered: Can individuals claim land based on customary rights, or are they dependent on a communal claim? Is it community leaders who can make decisions regarding communal land? And would that require the consent of the individuals and families that use the land, sometimes for several generations?<sup>18</sup>

### 2.4b- 'All land is owned by the people'

The Land Act and the Constitution raise several other important questions. One is related to the often-proclaimed maxim that in South Sudan land is owned by the people. Article 169.1 of the Constitution, in line with art. 7.1 and 10.1 of the Land Act, establishes that 'All land in South Sudan is owned by the people of South Sudan and its usage shall be regulated by the government (...)'. This provision has its origins in the Second Sudanese Civil War, where the motto that 'the land belongs to the people' was used by Sudan People's Liberation Movement (SPLM) to obtain support and enlist fighters against Sudan and its expansive land policies debated in section 2.2 (Leeuwen et al., 2018: 296; Braak, 2022: 90).<sup>19</sup> The interpretation of this provision is a source of much confusion and contestation (see Deng, 2021a: 16).<sup>20</sup> The provision is referred to by many people to justify their right to not be dispossessed by the state, arguing that the Constitution establishes that the land belongs to the *people*, not the *state*.<sup>21</sup> On the other hand, state officials use the same provision to justify the dispossession of land, saying the land belongs to the people in general, represented by the state, and not individuals (Badiy, 2014: Chapter 3; Deng, 2014: 53).

### 2.4c- Ownership (freehold) versus leasehold

The legal framework does not make clear what rights people and communities can have over land. The Land Act clearly establishes that individuals and communities can have

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<sup>17</sup> Art. 170.5 of the Constitution. See also art. 170.7, 170.8 and 170.9.

<sup>18</sup> Research in other countries shows that when state legislation or practice allows customary leaders to make land deals on behalf of their communities, this often leads to such leaders personally benefitting while the community members lose their rights to land. This is for instance the case in South Africa, where community members have successfully taken their leaders to court for making such land deals without their involvement. See for instance (Ubink and Pickering 2021; Claassens 2018).

<sup>19</sup> Other authors refer instead the motto: 'land belongs to the *community*'. See Deng & Mittal, 2013: 15; Badiy, 2014: Chapter 3. Simone (2022: 147) reflects on the reasons for swapping *community* with *people*.

<sup>20</sup> Two possible, more literal interpretations of this provision would be that (1) no state ownership of land is possible, because the people are the ones who own the land in South Sudan, or that (2) all land is owned by the state if one considers the state as the representative of the Sudanese people collectively. Neither of these interpretations seems to have support in other articles of these laws, but that does not stop the confusion caused by this provision. A third, maybe more benign interpretation of this provision, is that only nationals (i.e., state, communities and individuals) can own land in South Sudan, which also seems to be supported by art. 14 of the Land Act.

<sup>21</sup> Interview Lawyers, 05.12.2021, Wau.



ownership (or freehold) of land (art. 4; 7.2.b; 8.6; 12.a). The Constitution is less clear about this right, defining private land as the land registered as *leasehold* in the name of individuals (art.170.6), and never mentioning freehold or leasehold when referring to community land (art. 170.2.b; 170.5). This raises the question whether or not the Constitution allows full ownership of land. This question is especially pertinent when considering that the 2009 Land Act precedes the 2011 Constitution, and the Constitution has a higher hierarchical value than the Act.<sup>22</sup>

This issue is not an inconsequential detail of legal interpretation. In our research we found signs of possible future problems. From our interviews with lawyers it became clear that, although people consider themselves to own land, in urban areas what they receive from the state is a land lease document (*leasehold*; see also Deng, 2014: 31).<sup>23</sup> For now, in Wau and Torit such 'leases' are not connected with any legal obligations of a tenant (e.g., payment of rent, limited time in the contract), but respondents reported political discussions that such leases could become, for instance, temporary or dependent on the payment of rent.<sup>24</sup>

#### **2.4d- Land rights of displaced people**

Another significant gap in the existing legislation results from the limited and unclear provisions regarding issues of displacement and land occupation caused by the several waves of conflict in the country (Leeuwen et al., 2018: 296). A very common story heard in South Sudan is that of displaced people returning to their land, only to find it occupied by someone else or the state. Art. 78 and following of the Land Act establish some provisions on this issue; it says that 'A person may be entitled to restitution of a right in land if he or she lost her or his right after an involuntary displacement as a result of the civil war starting from May 16, 1983' (art. 78.1), and that 'The restitution may be done regardless of whether the right in land referred to was taken over by an individual or the government' (art. 78.2). The law also says that spouses and legal heirs can claim these rights (art. 78.3). However, these provisions have a limited reach, these claims must be submitted within 3 years from the entry into force of the Land Act (so by 2012; art. 78.4),<sup>25</sup> therefore excluding all of those displaced by conflict since then.

Also relevant in the Land Act is a statute of limitation, which could be also described as adverse possession (art. 82). Through this legal mechanism, a person in continuous possession of land for a period of time established by law, can acquire a right over that land, even if the land was before owned by another. Adverse possession is present in the legal framework of many countries, and it is an especially quick and cheap way of providing legal tenure security in cases where weak administrative and judicial systems do not allow for more complex processes. Art. 81.2 establishes that 'Any person who in good faith occupied a land belonging to another person or group of persons may not be deprived of the right therein without compensation'. Art. 81.4 prescribes a period of 30 years of continuous occupation in case of bad-faith occupation.<sup>26</sup> However, these provisions raise questions regarding their implementation in practice; for instance, without a temporal timeframe for acquiring rights through good faith occupation (art. 81.2), does it mean that even a short occupation in good faith is enough to acquire rights over land?<sup>27</sup>

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<sup>22</sup> See a reflection on these issues published by Ajo Noel Julius K. in the Sudan Tribune (<https://sudantribune.com/article54381/>).

<sup>23</sup> We asked these lawyers why people receive leasehold documents and not ownership ones, but they did not know the reason. Braak (2022) quotes several people claiming that they 'bought a lease', which illustrate well this confusion between ownership and lease rights.

<sup>24</sup> In other areas of the country, such as Juba, this may be different. See for instance Badiey 2013, 64.

<sup>25</sup> This point is a good example of the issues created by the lack of an organized legal repository; despite much research it was not possible to determine the date in 2009 at which the Land Act entered into force.

<sup>26</sup> See here also art. 84 on unlawful occupancy and art. 89 on bona-fide occupancy.

<sup>27</sup> Other legal questions can be raised, for instance, how to define good and bad faith? Also, if art. 170.6 of the Constitution described in section 2.4c really means that private rights over land are limited to registered rights, this provision has no practical application.

#### **2.4e- Women's land rights**

The 2011 Constitution establishes that: 'women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased' (art. 16.5). While this provision is relevant for protecting women's land rights, a more careful reading raises several questions. For instance, by referring specifically to the right of women to inherit land from their husbands, is this provision excluding their right to inherit land from parents or descendants? Considering art. 13.4 of the Land Act, which has a similar provision without any reference to husbands, one could argue that the constitutional legislator did not intend to limit women's rights to inheritance, but the text of the Constitution leaves room for other interpretations. The problem becomes even more complex when considering that South Sudan has no legislation on family law and inheritance (Deng 2014, 34, 68, 90; World Bank, 2014: 23), leaving key questions unanswered, such as a clear identification of legal heirs, how inheritance is shared by the different legal heirs, and which are the legal steps of an inheritance process. In practice inheritance is regulated by customary practices that often discriminate against women (Deng, 2019: 23), and the formal system does not offer women a workable alternative.

#### **2.4f- Conclusion**

This section shows that the legal framework on land rights in South Sudan has various gaps and contradictions that create many uncertainties regarding who has which rights over land. The complexity of land-related issues, combined with problems in the lawmaking process can explain some of the gaps and contradictions of the legal framework. However, it is worth to highlight that the 2011 Constitution, in comparison with the 2009 Land Act, seems to be more conservative on the paths available for the recognition of land rights (Simone, 2022: 149), for instance by leaving unclear which rights over land individuals and communities can have. Moreover, the legal framework lacks key regulations such as the representation and decision-making processes of communities, and rules on family law and inheritance.

#### **2.5- Land demarcation and registration**

One of the main tools used in South Sudan for land management is land demarcation and registration. Demarcation and registration are the processes through which state entities survey the boundaries of land (demarcation), and recognize or allocate rights to that land, recording them in a registry (registration) for public knowledge and tenure security (Almeida, 2022: 20). However, as the findings of this section show, and in line with research findings elsewhere (Atwood, 1990; Ubink, 2009; Bruce, 2012; Otto & Hoekema, 2012), land registration can become a source of conflict and tensions if not carefully designed and implemented.

Land demarcation and registration is not new in South Sudan; already in the beginning of the 20th century the Anglo-Egyptian regime invested heavily in land registration in the (north) Sudanese territory. Legislation such as the Land Settlement and Registration Ordinance of 1925, required that everyone should submit their claims to the land registry (World Bank 2014: 13; Allen, 2017). However, as in many other colonial ventures, there was limited local participation in the registration process, which mostly favoured elites and the state. During the 1970s and 1980s, already as an independent country, Sudan approved legislation that further enforced the role of land registration by determining that unregistered land belonged to the government (Pantuliano, 2007: 3; Babiker, 2018: 132). State-led displacement from community land for large-scale agriculture schemes and oil-related concessions by the northern government gave origin to various disputes over land and fuelled the independence movement in the southern region (Badiy, 2014: 51). This section focuses on land demarcation and registration since the independence of South Sudan, showing that despite being prioritized by government as a main tool for land administration, it is also a source of various problems and conflicts.

## **2.5a- Envisaged benefits of demarcation and registration**

The vast literature on the use of land demarcation and registration processes as a land administration tool in post-conflict countries has shown some successes but also many pitfalls. In many countries, with scenarios of uncertainty regarding who has which land rights like South Sudan, many tend to point demarcation and registration as a silver bullet to address such problems. As famously proclaimed by De Soto (2000) and supported by many others, land demarcation and registration will clarify who has which rights and allow more tenure security and the use of land as collateral, which will result in peace and economic development (Bledsoe, 2006: 143). However, as highlighted by many authors and proven repeatedly through various examples of failed land registration attempts worldwide, such views are based on faulty and overly simplistic assumptions. They overlook issues such as the contentious nature of land rights, the political struggles about who has control over land, the limitations of administrative capacity, and the legal gaps and contradictions that legislation over land often contain (Otto, 2009; Bruce, 2012). Moreover, land registration is often used for land capture by elites, to the detriment of those that don't have the same knowledge and power to navigate complicated and skewed administrative and legal systems (Dekker, 2005: 133). Women and vulnerable groups are also often excluded from land registration processes (Barry & Fourie, 2001: 2). The nefarious consequences of land demarcation and registration become even more evident when characteristics such as communal land tenure, pastoral rights, and complex local structures of land governance are not accounted for by state systems of land registration (Bledsoe, 2006: 150; Delvile, 2010: 26; Barry, 2015: 7, 15). Therefore, authors recommend extreme caution when designing and implementing processes of land demarcation and registration (Bruce et al., 1994). Consistent with existing literature, our research revealed that land demarcation and registration in our study areas often served as a catalyst for conflicts and insecurity.

## **2.5b- Legal and institutional framework for land demarcation and registration**

The South Sudanese legal framework on land demarcation and registration remains very unclear. As discussed in section 2.2, in theory the Sudanese legislation – including the one on land demarcation and registration, more specifically the 1925 Land Settlement and Registration Ordinance – remained in place after independence, until repealed by national legislation.<sup>28</sup> The Land Act establishes some rules about registration of land rights (art. 53 to 60), but those provisions do not detail the demarcation and registration process, and leave unclear if Sudanese laws are still in place (Marongwe, 2013: 4). As it happens with other areas of land administration, land demarcation and registration seem to be happening through ad hoc processes, developed by state officials.<sup>29</sup>

Institutionally, the Land Act determines that the land registry shall be kept by the Ministry of Housing, Physical Planning and Environment and decentralized to the ministries at state level (art. 54). However, in cities such as Juba, Wau, Malakal, Torit, Renk and Bor, the land registry is located at the High Court, with the Ministry retaining the role of surveying and allocating land (Deng, 2014: 59).<sup>30</sup> However, it is difficult to determine the legal nature of this registry; our respondents explained that the creation and functioning of this registry was based on the Constitution and the 2009 Land Act, but no regulation on this

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<sup>28</sup> Marongwe (2013: 1) states that 'South Sudan inherited little in terms of a functioning land administration system/bureaucracy from preceding governments. Statutory institutions in the emerging new institutional landscape are a blend of old institutions from the pre-Comprehensive Peace Agreement (CPA) of 2005 and the new from the post-CPA political dispensation'.

<sup>29</sup> The objective of developing a land registry and issuing land titles was highlighted in the 2018 R-ARCSS, which expressly established a period of 18 months for the creation of an independent land registry at all levels of government (art. 4.8.2.1.2 of the R-ARCSS), but also here no details were given about how a land registry would work. In conclusion, the law gives little guidance on the process of land demarcation and registration.

<sup>30</sup> Interestingly, the Sudanese 1925 Land Settlement and Registration Ordinance also put the land registry under the judiciary (Marongwe, 2013: 4). According to our respondents, in Torit, Renk and Bor the registries at the High Courts were only created in 2019.

issue can be found there.<sup>31</sup> This land registry at the courts has a number of advantages and disadvantages. On the one hand, having the registry separated from the land officials might operate as a mechanism of control on their functioning, preventing abuses and corruption, although there is no guarantee that it will. On the other hand, it adds another institution to the process, raising more issues of coordination, financing, and further complicates the process for those who want to register land. In fact, many of our respondents, especially in Torit, complained about the confusion regarding the legitimacy for demarcating and registering land, which is at times disputed between the state Ministry, municipalities, and the court registry.

### **2.5c- Land registration and demarcation in practice**

Land demarcation and registration is happening at large scale in urban and peri-urban areas of South Sudan, under the assumption that such processes would solve the existing land disputes and prevent new ones (Braak, 2022: 99), and often based on the promise that they will bring state services to the demarcated areas. However, without much law to guide its process, nor avenues to protect people's rights, land demarcation and registration are marked by a broad discretion from state officials and are a source of much controversy, corruption, and disputes (Mennen, 2012a: 14; Simone, 2015: 67; Deng, 2021a: 11; Braak, 2022: 96).<sup>32</sup>

In Torit and Wau land registration involved confusing, time-consuming, and expensive steps, dependent on the discretion of state officials and with a lot of leeway for various kinds of rent-seeking and abuse. In both places the land registration starts with visits to the sites, followed by demarcation of land parcels and the distribution of tokens with a land parcel number, with which people can continue the registry process (see Deng, 2014: 36). Sometimes people get a token for the land they claim, sometimes not. In peri-urban areas of Torit and Wau farmers are often informed by the Ministry that their land is going to be demarcated, and they can keep only one small parcel of their land, while the rest is taken by the state (Cf. Mennen, 2012a: 14; Simone, 2015: 64; Braak, 2022: 97). Sometimes these people were able to negotiate with state officials to keep a few more plots, for instance to distribute among their sons, but nevertheless they lose most of the land through demarcation. There are no clear rules defining whether and if so, how much land owned by a family or community will accrue to the state, for them to allocate to new owners/leaseholders.

Receiving the token is not the end of the process, as people are supposed to take their tokens to the Land Registry to get their lands registered and acquire formal documents to prove it. However, often people do not undertake this because they don't understand the registration process, and/or because they lack the funds necessary to do so.<sup>33</sup> This opens up a major opportunity for rent-seeking by officials at the Ministry, who can see from their files which plots have not been formally registered after demarcation. Many respondents reported cases where staff at the Ministry sold such plots to a third party, resulting in conflicting claims between those on the land and those who acquired proof of registration (see Badiey, 2014: 134).

Problems with land demarcation and registration are especially acute for women. In line with other research (e.g., World Bank, 2014: 23; Deng, 2014: 33), several respondents

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<sup>31</sup> According to our respondents, Sudan, Egypt and Kenya are some of the countries where the land registry is placed at the courts, and from where inspiration was taken.

<sup>32</sup> Despite this broad discretion, land registration processes followed in Torit and Wau showed many similarities, which seems to imply that the processes find some inspiration in historical practices, based on Sudanese law or other sources, but respondents were not able to point to the legal basis or origin of such practices.

<sup>33</sup> During our fieldwork we came across various complaints about the costs of land registration. While the costs reported by the Ministry were not too expensive (approx. 15000 SSP + 4500SSP at the court registry), to these costs one must add 'informal fees', as well as the time and costs spent on pursuing the registration at different institutions. Deng (2014: 36, 38) gives a much higher estimation of the official costs, which exemplifies how the costs of this process are arbitrarily decided.

complained about state officials discriminating against women during demarcation and registration. We discuss this issue in more detail in Chapter 4.

The involvement of chiefs in the registration process seems to be mixed. In Wau we were told that chiefs were actively participating in rent-seeking activities related to land demarcation and registration.<sup>34</sup> Also in Wau, chiefs were giving out residency certificates tied to particular plots of land. While in theory these certificates can help people document their history on the land against third parties, practice was showing differently. Chiefs are often either afraid to not give residency certificates to people who already come with documents from the state, or happy to make some money by providing them, or even initiating schemes of giving out (multiple) residency certificates for the same piece of land. In Wau, chiefs were commonly described by respondents as either irrelevant in land issues, or as part of the problem. In Torit, respondents were more positive about the role of chiefs, saying that they participate as witnesses in land disputes to prove community members' ownership of certain plots of land. Also, several block and payam chiefs in the area were taking pro-active actions regarding land demarcation (see section 3.3)

We did not come across any accounts of demarcation and registration of community lands in the name of a community as a group (see also Deng, 2014: 32), but there are situations in which communities in urban and peri-urban areas promote demarcation and registration of individual plots in their areas (Deng, 2014: 37). Instead of waiting to be approached by the Ministry, communities were organizing themselves for land registration. For instance, in Torit several communities were discussing how to organize themselves internally, to prepare for individual land registration by the Ministry.<sup>35</sup> These communities argued that this could increase their control over the process and influence its outcome. A female sub-chief that reported this process also explained how they were making sure everyone was included in the process, for instance by giving time for displaced people who used to live in Torit to also make their claims.

However, such approach is not a guarantee for a successful demarcation process for the community. For instance, communities might not be prepared for unexpected problems and conflict that land demarcation in practice raises, or for demands from state officials, such as that a significant part of their land is siphoned off. Moreover, community-led demarcation processes can be used by a stronger group to disempower or force out another group in their area (see Deng, 2014: 37). Respondents from Wau reported a growing segregation of neighbourhoods based on ethnicity, in part promoted by land demarcation and registration. By excluding weaker groups from the land demarcation and registration process, dominant groups can establish a stronger control over the area and push others out (See also Simone, 2015: 70 footnote 6). Besides intimidation, other tactics such as neighbours and chiefs giving biased or untruthful testimonials about land rights are common tactics to exclude certain groups. Factors such as the naming of neighbourhoods in relation to specific ethnicities and the existence of segregated schools are exacerbating the environment of segregation, a matter of significant concern among our respondents in Wau.

## 2.5d- Conclusion

This section shows how land demarcation and registration are used as central tools for land administration in South Sudan but, instead of enhancing land security, they are often causing conflict. From a legal perspective, demarcation and registration are scarcely regulated, and their practical implementation often unfolds through ad hoc procedures that give state officials significant discretionary power, frequently to the detriment of the most vulnerable. Furthermore, as discussed in more detail in Chapter 3, demarcation and registration lack effective dispute resolution mechanisms capable of addressing the inevitable conflicts that arise from such processes, and statutory courts are of limited

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<sup>34</sup> For other reports of chiefs abusing their power regarding land rights, see for instance Badiey, 2014: 106; Mennen, 2012: 23.

<sup>35</sup> Deng (2014: 37) also reports cases in which the registry is kept at the community level.

access to most South Sudanese people. Consequently, land demarcation has compromised the tenure security of numerous individuals, created disputes between the state and communities, and generated internal conflicts within communities themselves (Badiy, 2012: 111). The opportunities for corruption and personal gain arising from land demarcation and registration likely diminish the motivation of politicians and state officials to implement substantial changes to this process. This raises the question of why officials and institutions persist in pursuing these processes, especially when their application appears to be closely linked to a multitude of problems (see also Deng 2021). One point that would be worth exploring in further research is to what extent this lack of legal guidance in land demarcation and registration is also problematic for the street-level bureaucrats who have to implement this process, forcing them to improvise, and exposing them to all kinds of accusations of arbitrariness and corruption (Deng, 2014: 59; cf. Almeida, 2022: 244).

## 2.6- Expropriation and land use regulation

Land expropriation and land use regulation are two important tools of land administration, but in South Sudan they are poorly regulated. The Constitution limits the expropriation to public interest purposes, and upon the payment of fair compensation and through a process established in law (art. 28, 170.10 and 170.11).<sup>36</sup> The 2009 Land Act elaborates further on the expropriation process, establishing that the Government, State Governments, and the Ministry are responsible to prepare and implement an expropriation plan, but municipalities and town councils can also be involved in the process (art. 73.1 to 73.4). Article 74 elaborates further on this expropriation plan, establishing that expropriation should be a consultative process, and listing some requisites for an expropriation plan. The Land Act (art. 72.1) also establishes that in case of expropriation the State Government or a private company shall ‘proceed with a resettlement plan for the communities affected by an expropriation plan (...)’ but does not include any further details about these plans. Finally, the act also establishes some rules regarding how to calculate the amount of compensation (art. 75 and 76), and the possibility of those affected by an expropriation to appeal to court (art. 77). Despite these provisions, the expropriation process remains inadequately regulated, missing parts of the expropriation process, such as the steps for identifying land rights over the property, and the competence to declare the public purpose of a project.

To the best of our knowledge there is no legislation regulating land use in South Sudan. While the 2013 draft Land Policy highlights the need of a Town and Country Planning Act, such an act has not been approved.<sup>37</sup> Without much regulation in law, the processes that involve expropriation and land use regulation are marked by high discretion of state officials and arbitrariness.

One key finding of our research is that the process of land demarcation and registration is often paired with ad hoc processes of land use regulation and de facto expropriation (see also Deng, 2021a: 12). During the demarcation process state officials determine that some parts of the demarcated area will be used for public services. Such decisions seem to be taken without involvement or consultation of the local populations and often ignore private rights over those areas, performing a de facto expropriation (see also Deng, 2014: 36). The poorer and more vulnerable people are more easily asked to relocate somewhere else without any compensation nor support (see Braak, 2023: 67). If any compensation is paid, it is usually provided through the allocation of alternative land plots, yet frequently these plots are located at a considerable distance and are of lower quality. Poor people

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<sup>36</sup> As the literature shows, determining what public interest is in any country can be a source of much controversy (Eisenberg, 1995; Lund, 2008; Cotula, 2013; Wolford et al., 2013). Interestingly, the 2009 Land Act lists a number of reasons for public interest, although it also leaves the door open to other unmentioned reasons (art. 73.5).

<sup>37</sup> Despite the lack of regulation, state institutions at different levels appear to follow similar practices when managing land use. This suggests that these processes may draw inspiration from historical practices predating independence.

can be especially affected, with state officials saying that they will not give them a plot in a better area because those being dispossessed don't have the financial capacity to build there. One lawyer in Torit reported that he had won two cases in court against the state, in which this kind of de facto expropriation had happened. However, as we discuss in section 3.2, access to lawyers and courts is very limited.

The classification of land into different classes, for which different obligations are attached, is also a source of much abuses and grievances.<sup>38</sup> Like in other processes described of land demarcation and registration described in section 2.5, no respondent could clearly identify legislation where these classifications and obligations are regulated, but they are imposed in practice.<sup>39</sup> For instance, state officials told us that the holders of a plot of Class 1 must immediately develop their land – sometimes into multi-story buildings – while Class 2 holders do not have this obligation. However, respondents also described how this classification is at times used as a mechanism for discrimination, social exclusion, and displacement. By arbitrarily upgrading the class of land, state officials start threatening people that they have to build a multi-story building on their land, or they will otherwise lose it. Under this threat, and without means to comply with such demands, poor people are forced to sell quickly and at a low price, allowing state officials and elites to obtain cheap prime land.

In conclusion, in combination with land demarcation and registration, also ad hoc processes of land expropriation, urban planning and classification of land are often used by state authorities to take land from the people, particularly from the most poor and vulnerable ones.

## **2.7- Land administration in South Sudan – conclusions and recommendations**

Land administration in South Sudan is marked by a weak legal and institutional framework. There is a high degree of legal uncertainty regarding which land rights are recognized by law and the process for that recognition. In practice, arbitrary processes of land demarcation and registration, expropriation, land use regulation and land classification are commonly used, often to the detriment of people residing and farming on the land, and with limited capacity to defend themselves.<sup>40</sup> Land administration by state entities is often a source of land-related grievances and insecurity.

These conclusions lead us to the following recommendations:

### **Demarcation and registration**

- Carefully consider the pros and cons of implementing land demarcation and registration in each area. While land demarcation and registration are often promoted as a tool to address land-related issues, they are in practice also sources of conflict, grievances and abuse. Priority should be given to areas where demarcation and registration can address already existing problems (e.g., high-level of disputes; rapidly developing land market).
- Carefully study land demarcation and registration processes. Improvements such as minimizing the steps to be taken by clients and reducing possibilities for errors and corruption should be considered. For instance, land holders may not continue the registration process after receiving a demarcation token, which can result in conflict and abuse; the process must be done in one go.
- Better demarcation and registration processes require that the public is informed and consulted throughout. There must also be supervision mechanisms and access to legal aid for those affected by the process.

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<sup>38</sup> Connected with this is also the issuing of build permits. We were told by Ministry staff in Torit that building permit system started to be implemented, but we did not explore this topic further.

<sup>39</sup> Badiey (2014: 131) reports that such systems have a British origin.

<sup>40</sup> For a deeper reflection on the discrepancies between the law and the work of state officials see Braak, 2022.

- Demarcation and registration processes should take displaced people into consideration. While this is a difficult and politically loaded topic – beginning with the challenge of determining who should be considered displaced – without meaningful participation from them, land demarcation and registration risk adding another layer of injustice to an already complex scenario of land claims.
- Clarify the role of chiefs in demarcation and registration processes. Their participation can have advantages (e.g., they can mediate between the community and the state), and disadvantages (e.g., risk of rent-seeking and ethnic discrimination). The design of these processes should account for such advantages and disadvantages, and try to maximize the potential of the chiefs, without opening doors for corruption. For instance, making the recognition of land rights dependent on some kind of certification by a chief is very often a source of abuse and grievances.
- Consider the inclusion of community-driven demarcation processes in legislation, with the necessary caution to avoid capture of the process by the chiefs and powerful community members.
- Regulate and make public all fees involved in the demarcation and registration processes. Public radio campaigns and posters in public institutions, can reduce the possibility of illegal fees being charged.
- Donors should consider how best to support the Ministry of Housing, Physical Planning and Environment to improve its demarcation and registration process.

### **Land rights**

- Study and revise existing legislation on land rights, clearly defining which land rights and their respective obligations exist in the South Sudanese legal framework. For instance, clarify whether individual and collective ownership of land are possible and, if so, give people the documentation that corresponds to such rights, instead of leaseholds.
- Clarify the processes through which people and communities acquire rights over land. For instance, clearly establish which rights long-term occupants of land can acquire over it (adverse possession). Such clarification must take into consideration the various waves of displacement in South Sudan, and the benefits and disadvantages of each option. For instance, recognizing adverse possession can solidify the rights of those on the land, but weaken the rights of those displaced.

### **Expropriation, urban planning and land classification**

- Carefully study and regulate the expropriation process, beyond the limited articles established in the Land Act. Aim at approving a law that details all steps of the process, including project design, consultation, negotiation, calculation of compensations, the physical taking of the land, and grievances mechanisms available.
- Establish clear provisions on land use and stop any practices that do not follow a pre-established legal process.
- Regulate the process of land classification, making it more transparent and inclusive. Avoid provisions that can result in dispossession and further exclusion of poor families.

### **Public awareness and corruption prevention**

- Promote land dialogues that involve all key players: communities, chiefs, state officials and politicians. According to community members, lawyers and representatives of civil society organisations, having these debates in public could help to highlight certain issues, force commitments, and promote a less blunt violation of people's rights by public administration. They warned that such process should be well-prepared at the community level. Politicians and state officials were



resistant to this idea, raising concerns about how such processes could be used for political manipulation and even cause conflict and violence. Their opposition could be interpreted as supporting respondents' ideas that such processes put officials on the spot and make their actions more visible, but the mentioned risk of sparking conflict also must be considered.

- Supply training, equipment, and technical support for the work of courts and official institutions. For instance, disputants now need to pay the expenses for a judge to do a site visit of their land. This is inhibiting poor people's ability to prove their land ownership in court.
- Create more public awareness about land administration in general. Even state officials said that the community was not aware of their work, and that better knowledge about it was necessary.
- Support strategic litigation against the most important corrupt officials and land institutions. Lawyers kept telling us that one way of dealing with the problems of the Ministry would be the courts prosecuting individuals at the Ministry, instead of engaging only with the Ministry as an institution. The Ministry as a whole is also not held accountable.
- Include the issues raised by land administration as part of the larger debates regarding rule of law and democratic institutions.

## Chapter 3 - Land-related dispute resolution mechanisms

### 3.1- Introduction

As described in section 1.2, the several waves of conflict, displacement, and dispossession in South Sudan created a complex scenario regarding land rights and land-related conflict, which has negative impacts on those involved in individual disputes, but also raises the risk of large-scale conflict. Strengthening land-related dispute resolution mechanisms is key for conflict prevention and state building. However, this is not an easy endeavour. This section focuses on the existing mechanisms for land-related dispute resolution and provides recommendations on this matter.

### 3.2- Statutory courts

The South Sudanese statutory courts are regulated by the Judiciary Act of 2008, which establishes Payam and County level Courts, one High Court in each of the 10 states of the country, 3 Courts of Appeal, and the Supreme Court located in the capital Juba.<sup>41</sup> Since the signing of the 2005 Comprehensive Peace Agreement, much effort and money have been invested in developing the South Sudanese judiciary, but the various waves of conflict have severely damaged the already fragile state institutions involved in the justice sector (Cutsem & Galand, 2007; Ibreck et al., 2017: 1; Kindersley, 2019: 66). The problems are many: first, the number of statutory courts is still very low, and in more remote locations of the country there is simply no statutory court to turn to (Braak & Jacobs, 2016: 9, 15; Deng, 2013: 20; ICJ, 2014: 5; Leonardi et al., 2010: 21). Secondly, accessing the courts entails substantial court fees, particularly in land-related cases, where these fees can reach up to 10 percent of the land's value. Additionally, individuals must factor in the expenses associated with hiring a lawyer, as their legal representation can significantly influence the outcome of a case within the adversarial system of South Sudan. Third, the complexity and delays of court procedures further deter people from using them. Additionally, the combination of long court cases with hefty costs offers opportunities for those with more resources to drag the case in court, and force a less wealthy party to give up. These problems make statutory courts inaccessible to most South Sudanese people (Braak, 2016: 30).

Despite these limitations, statutory courts are the only legally acknowledged path for many land-related disputes in urban and peri-urban areas.<sup>42</sup> As discussed in the next section, customary courts do not have jurisdiction over demarcated lands, which leaves land-related disputes over those lands to the jurisdiction of statutory courts. As we further elaborate in section 3.4 and 3.5, there are unofficial fora for dispute resolution. However, in cases where a mediated solution cannot be reached, or in disputes with the state, the statutory courts are the only option available. In summary, demarcation changes the arena for dispute-resolution.

Moreover, demarcation has another effect on the land disputes that reach the courts. Many of our respondents reported official land documentation and statements of state officials are highly regarded by judges. Other means of proof, such as testimonials of neighbours and markers on the ground like fruit trees and graves, are much less considered and more difficult to even present in court. Respondents reported some cases where people without documents managed to win their cases in court, but these cases were challenging. They required the party to bring witnesses to court, often several times. Bringing witnesses implied high costs, and at times witnesses are threatened by the other party. Basing land claims on markers such as fruit trees require expensive field visits, and its role as a proof of a land right is not expressly mentioned in law, leaving this assessment to the discretion of the judges.

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<sup>41</sup> Leonardi et al. (2010: 21) highlight that locally these courts are often known by other names.

<sup>42</sup> Braak (2016: 40) reports on the existence of a Land Dispute Committee within the Yambio County Land Authority. However, the 2009 Land Act does not establish land dispute committees within the county land authorities, nor does it list dispute resolution as one of their attributions (Article 46).

Land officials also tried to prevent people without formal papers from taking land disputes to court by telling them that they will not stand a chance in court, turning these state officials into justice gatekeepers. In Wau, the lawyers interviewed also explained how cases against the state can result in serious retaliation, and therefore they avoid them. Moreover, the lawyers we interviewed in Torit and Wau complained that even when they get a decision from the court it is difficult to implement it, as the Ministry does not always comply.

Besides unjust outcomes in individual cases, land disputes are also a source of more collective tensions in those cases where members of a community perceive an administrative or judicial decision as unfair to their neighbour and resist outsiders to come onto the land. As we were told by a lawyer in Torit, “The land becomes a war ground, often the land has to remain empty”.<sup>43</sup> Despite these problems, and to our surprise, most of our respondents showed a high trust in statutory courts (cf. Leonardi et al., 2010: 39). Most of them said that they perceived the courts as being generally fair, except in cases involving very powerful people. Power, money, access to military power, and weapons are used to bring and threaten witnesses and judges.

In conclusion, while the statutory courts seem to be reasonably well-trusted by the population, at least as long as the other party is not a ‘big man’, there are several limitations to their capacity to provide justice for land-related disputes. Lack of courts, very high costs and long delays prevent most South Sudanese people from accessing these courts. Moreover, statutory courts easily accept documentation and state officials’ testimonials as proof of land rights, making the use of courts less effective for those that need to prove their rights based on witnesses and landmarks. Finally, the decision to remove demarcated land from the jurisdiction of customary courts made statutory courts the only official fora for land-related dispute resolution in considerable parts of urban and peri-urban areas. The result in practice is a gap of dispute resolution mechanisms to address land-related cases.

### 3.3- Chiefs and customary courts

In South Sudan the customary courts are legally recognized and formally integrated as part of the country’s justice system. Customary courts are a crucial forum for justice provision due to their familiarity, easy and low-cost process, speediness, and proximity to the people (Hessbruegge, 2012: 299; Deng, 2013: 23; Braak, 2016: 37). The inclusion of customary law and courts as part of the national justice system was done partly with political and ideological objectives of affirming the South Sudanese identity, but also with the practical objective of overcoming the limitations of the statutory courts (Leonardi et al., 2011: 112).<sup>44</sup> The customary courts are regulated by the Local Government Act 2009. Based on this law, customary courts are divided into: Town Bench Courts in each Quarter Council at the municipal level, and A Courts at the Boma level in rural areas, headed by a single chief; B Courts at Payam level, headed by a panel of chiefs; and finally C Courts, at County level, headed by a paramount chief (Braak & Jacobs, 2016: 9; Leonardi, 2019: 13).<sup>45</sup> The higher the level, the higher the number of chiefs that are involved in decision-making (Mennen, 2012: 10). The fact that customary courts fall under responsibility of the Ministry of Local Government and not the judiciary raises issues regarding separation of powers (Deng, 2013: 28). Moreover, the courts that one can find in practice often do not match the legal structure established in law (Leonardi et al., 2010: 20).

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<sup>43</sup> FGD with Lawyers and court professionals, Torit 28.06.2021.

<sup>44</sup> Leonardi et al. (2010: 20) also refer to a proliferation of ‘informal’ courts since 2005.

<sup>45</sup> Although called chiefs, in urban town benches these chiefs are elected from the urban population, are more literate than rural chiefs, and have close connections with magistrates, prosecutors, and the police (Deng 2013,22).

The authority and perceived legitimacy of chiefs varies substantially (Badiy, 2013; Leonardi, 2013: Chapter 9; Justin & Leeuwen, 2016: 429, Braak, 2022: Chapter 5). On the one hand, new state and central government authorities have reduced or at least blurred the importance and authority of chieftaincy (Mennen 2012, 19; Leonardi, 2013: 181), while on the other hand the incorporation of certain (levels of) chiefs in state administration and connections with the army has increased the power of some of them (Costa, 2018: 6). The authority of chiefs is furthermore challenged by other authoritative figures, such as warlords and army commanders, and the ubiquity of arms in the country (Leonardi et al., 2010: 48; Mennen, 2012: 20). The traditional emphasis on reconciliation and community consultation has in some areas been eroded by powerful chiefs (Mennen, 2012: 19).

Chiefs are generally held in high regard as the repositories of the customary laws and oral legal histories of their communities, but those who are seen as biased and advocating for unfair decisions lose credibility and respect from their people and lose prominence on the court panel (Leonardi et al., 2010: 40; Justin & Leeuwen, 2016: 429). In both areas of our study, more women chiefs were starting to be elected, particularly at the lower level, but with ambitions of going up in the hierarchy. In Torit the highest paramount chief of the state was also a woman. In both areas, women leaders seemed to work hard to get broad community involvement and inclusive councils. This topic is further discussed in section 4.7.

There are several reports of chiefs abusing their positions on land-related cases (Mennen, 2012: 23; Badiy, 2012: 106). During our field work, especially in Wau, respondents were very critical of the role of chiefs in addressing land disputes, highlighting how they are often the cause of those disputes, such as in the case of the residency certificates mentioned in section 2.5c.

Customary courts have jurisdiction over ‘customary disputes’ which they have to decide ‘in accordance with the customs, traditions, norms and ethics’ of the local population (art. 98.1 of the 2009 Local Government Act). Before being brought to a customary court, disputes are often discussed with heads of family or clan elders. The customary court system co-exists with the statutory court system. Statutory courts have jurisdiction over most crimes and civil suits with a certain monetary value, which have been excluded from the customary courts. They also have appellate jurisdiction over customary courts. However, in areas where statutory courts have not yet been established, customary courts often act as first instance court for civil and criminal cases, including homicide (Deng, 2013: 21). As mentioned in the previous section, customary courts do not have jurisdiction over disputes involving demarcated land which, combined with the limited access to statutory courts, leaves a justice gap in one of the most prevalent types of disputes in urban and peri-urban areas.<sup>46</sup> While it is likely that customary courts still take on cases involving demarcated lands, particularly in areas with limited access to state courts (cf. Mennen, 2012: 25; Justin & Leeuwen, 2016: 428), in Torit a 2016 decision of the President of the High Court instructing the customary courts to not decide demarcated land related cases, and customary courts indeed seem to refer such cases to state courts.<sup>47</sup> In Wau respondents reported a same stricter application of these decisions. As it is discussed in the following section, the creation of community mediation groups (CMGs) has been a response of non-governmental organizations to these justice gaps.

While chiefs, at least in urban areas, cannot decide land-related cases in customary courts, they do still play a role in land disputes. For instance, Ministry staff in Torit described to us how at times chiefs come to their office with questions and requests about land-related conflicts. Also in Torit, respondents highlighted the role of chiefs in providing testimonials

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<sup>46</sup> This lack of jurisdiction cannot be clearly identified in any specific piece of legislation but was reported by several interviewees.

<sup>47</sup> Some of the lawyers interviewed speculated if such diligence of the High Court in keeping jurisdiction over the land cases was not, in part, motivated by an interest in maintaining an influx of court fees.

regarding existing land rights. Nevertheless, due to this restriction in their mandate, customary courts are not the solution for many of the land-related disputes in urban and peri-urban areas.

### **3.4- Community Mediation Groups**

As we highlight in section 2.5, land demarcation and registration are sources of many land-related grievances in South Sudan, particularly in urban and peri-urban areas. Moreover, they also create a justice gap, considering that the customary courts cannot decide on issues connected with demarcated land, but statutory courts are inaccessible to most South Sudanese people. This section looks at the Community Mediation Groups (CMGs), as a solution to address this justice gap.

#### **3.4a- The work of Community Mediation Groups**

To create legitimate mechanisms to settle land-related disputes, in 2016 civil society organization South Sudan Law Society (SSLS) established several Community Mediation Groups (CMGs) that aimed at mediating land-related conflict inside communities. The objective was to appoint and train mediators to address local disputes in their geographical area, undertake awareness raising campaigns tailored to the needs of their local communities, liaise with relevant government departments, and refer cases to the lawyers connected to SSLS. The format of the CMGs was designed in-house by SSLS, inspired by a paralegal project in Zimbabwe, and as part of the orientations of the Shelter/Non-food items (S/NFI) Cluster.<sup>48</sup> The aims of the project were to mitigate the limited number of legal professionals and poor access to dispute-resolution mechanisms; promote community cohesion by bringing community members to work together; and provide a sustainable solution that could live beyond the project cycle.<sup>49</sup> The CMGs were implemented in 4 locations (Torit, Wau, Yei, and Minle), and a total of 60 CMGs were created. However, in 2020 the project funding ended and since then SSLS has been looking for further funding to restart the work of CMGs.

The process of creating a CMG started with a selection of community members willing to be part of these groups; basic literacy, gender diversity and the absence of a criminal record were the criteria for the selection of members. While not specifically required, in most cases the selection process gathered members of diverse ethnic groups.<sup>50</sup> The CMG members then went through a 20-day training process that included topics such as land law, customs, and skills in community engagement, divided into 4 blocks, which also allowed them to interweave initial activities with the training process. A course manual complemented the training. There were several cases in which the number of female mediators outnumbered the male ones. A key part of this process was the background support given to these groups by SSLS lawyers, first as trainers, mediators and counsellors, and taking cases where the mediation had not succeeded to court.

#### **3.4b- CMGs in practice**

During our fieldwork we interviewed clients, mediators, and lawyers involved with the CMGs in Torit and Wau, and all groups gave us very positive feedback on the results of this project. Clients highlighted foremost the fact that the CMGs were free, not charging either formal or informal fees, and operated quickly, without the delays people associate with statutory courts. One CMG client told the story of how, when summoned to come and talk with the CMG about the land conflict he had with his neighbour, he prepared the 'usual' bribe money, only to be surprised that no money was asked.<sup>51</sup> At the same time clients stated that they felt no rush in the mediation process, each party could present

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<sup>48</sup> This cluster brings together several national and international organizations, and aims to coordinate their activities, prioritizing areas of intervention and avoiding duplication of responses.

<sup>49</sup> SSLS representatives also highlighted that the connections between land-related issues and gender-based violence were another reason for creating this project.

<sup>50</sup> In Wau the CMG also included a member from local government, from the Ministry of Physical Infrastructure, a chief, a youth representative, and a woman representative.

<sup>51</sup> Interview male CMG client, Torit, 25 November 2021.

their story in their good time, which made them feel listened to. They also reported that the CMGs were avoiding the adversarial part of the courts.<sup>52</sup> They would go through a rather quick but unhurried process of fact-gathering, through hearing the story of both sides of the dispute, speaking with witnesses, and (in cases of land disputes) undertaking site visits. Clients reported that they felt their stories and experiences were validated and understood by the community mediators. One of them described it as follows: ‘The CMG people saw the marks left on me, they felt concern.’<sup>53</sup> Moreover, the support from lawyers gave an important additional legitimacy to the CMGs.<sup>54</sup> As stated by two CMG clients: ‘I trust the CMG for one reason: the presence of the lawyers. They are trained and licensed by the government’.<sup>55</sup> ‘I trust them because they are legal people, they give legal advice’.<sup>56</sup>

Another aspect highlighted by CMG mediators, and confirmed by interviewed clients, was the effort made to make the mediation process impartial and fair. This was linked to both character traits of the mediators and lawyers – with clients describing them as impartial, honest, good, committed, hardworking, and having humanity – and to processual aspects. To avoid bias, decisions about the mediation process are made by the majority, and mediators who are familiar with either of the parties do not take part in the mediation. One client reports that he felt that the mediators acted ‘without fear or favour’ of any of the parties.<sup>57</sup> A mediator considers their success to be based on the fact that they always tell the clients the truth: ‘[We tell them] this is how we see it’.<sup>58</sup> The mediator adds that they seek to find a solution that is fair, which can include telling the party who first approached them that they are wrong.

As land disputes in South Sudan frequently have an ethnic component,<sup>59</sup> a community mediator explained the importance of treating everyone impartially: ‘We are all from different tribes. We have one principle: non-discrimination. We accept complaints from any person. We focus on the problem, not on who comes from where’.<sup>60</sup> This is borne out by the variety of clients in the mediations conducted by the CMGs, which include men and women, young and old people, of various tribal backgrounds. The selection of mediators did not include any explicit criteria for ethnic diversity, but the selection of volunteers from different locations in town that the groups ended up including people from all kinds of ethnic groups. The CMGs were also gender inclusive. Two sorts of reasons were mentioned to explain why women mediators were regarded as a necessity. First, to make the CMG feel open to female clients. In the words of a female community mediator: ‘If all the people you face in a dispute are men, you feel they are biased. This is what we see in the customary courts’.<sup>61</sup> The second reason highlights the approach and style women supposedly bring to the CMG. According to a male mediator: ‘Women have the sense of peace. They can make someone feel guilty and come to us. They always tell the truth and without fear’.<sup>62</sup> A male client added: ‘Women are important. Women talk peace with sympathy, with facts. We have to empower them. In this world women speak peace with sincerity. Women are paramount.’<sup>63</sup>

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<sup>52</sup> The literature highlights the importance of keeping mediation and acceptance of the outcome voluntary (Cf. Harrington & Merry, 1988: 717, Hedeon, 2004: 115). This requires the existence of alternative methods of dispute resolution, including at last instance, access to an impartial, well-functioning, formal court.

<sup>53</sup> Interview female CMG client, Wau, 3 December 2021.

<sup>54</sup> As highlighted by Franco et al. (2018: 113), the work of paralegals can be hampered by scepticism of the abilities of paralegals, due to a ‘lawyer-centred consciousness’ among citizens, government officials, and the paralegals themselves.

<sup>55</sup> Client (male), Interview CMG clients, Wau, 5 December 2021.

<sup>56</sup> Client (female), Interview CMG clients, Wau, 5 December 2021.

<sup>57</sup> Interview male client CMG, Torit, 25 November 2021.

<sup>58</sup> Interview CMG mediators, Wau, 2 December 2021.

<sup>59</sup> It is important to note that conflicts with strong political and ethnic overtones are currently too hot to handle for CMGs as well as courts. They require political solutions and peace processes.

<sup>60</sup> Interview CMG mediators, Wau, 2 December 2021.

<sup>61</sup> Interview female CMG mediators, Torit, 24 November 2021.

<sup>62</sup> Interview male CMG mediators, Torit, 24 November 2021.

<sup>63</sup> Interview male client CMG, Torit, 25 November 2021.

Burrell et al. (1988) in an American study show that an emphasis on mediation training may lead to minimal differences in gender behaviour between male and female mediators. But the authors, and several others (Albert et al., 2005: 219), also point out that despite limited actual differences, persistent, stereotypical gender-based expectations likely influence disputants' perceptions. In the case of the CMGs, the community mediators receive limited training and bring strong gender stereotypes, which makes it likely that there are both actual and perceived differences between how men and women mediators act. The inclusion of women in a highly patriarchal society such as South Sudan did not always go easy, both male and female mediators reported that some participants in mediations treated the women in their group as 'just women',<sup>64</sup> or that a disputing party preferred to speak with a male mediator.<sup>65</sup> However, in general participants reported they did not care for the gender of the mediators as long as they were helped with their dispute, and mediators felt such behaviour did not really hamper the mediation. A female mediator explains: 'We don't mind what they say. It is not really impacting the work, or communications with the courts, but you can feel discouraged, feel like they don't want you.'<sup>66</sup> A male mediator from the same CMG feels that 'the women in our group are very strong. They go ahead even if people abuse them verbally. They have no fear'.<sup>67</sup> Besides gender-inclusivity, the mediators were also selected from different locations, which was to facilitate outreach but also to create a feeling of being understood: 'we are part of you, not from the outside, we will help to solve the issue or refer you to the right entities'.<sup>68</sup>

During the various interviews, CMG clients and community members did not voice any specific complaints about the work of the CMGs. While this might be in part consequence of the limitations in freely accessing communities and respondents, the fact that many people have no other options for accessing justice seemed to be an important factor in valuing the CMGs positively. Nevertheless, Both CMG mediators and supporters of their work acknowledged some limitations. For instance, the work of CMGs cannot address more complicated cases in which the level of conflict is very high, or when powerful people or state entities are involved. Moreover, and despite being designed with sustainability in mind, the CMG concept is still dependent on external funding and, when such funding is not available, their work tends to stop.

### **3.4c- Impact of CMGs' work**

Through our interviews we got the impression that the work of the CMGs positively impacted on the communities where they were implemented. First, CMGs were mediating disputes for which disputants, as identified above, did not have other clear fora for mediation or adjudication. Even those respondents whose disputes had not (yet) been favourably resolved, reported that they highly valued the CMGs for providing an avenue for addressing their grievances, where before none had existed for them.<sup>69</sup> According to a client: 'They stand with your rights, with the truth'.<sup>70</sup> In cases where one of the parties in the dispute refused mediation or cooperation the CMGs were sometimes able to facilitate access to courts through the support of SLS lawyers. Most clients reported that they would not have been able to take the case to court themselves or did take the case to court but ran out of funds before the end of the process. In the words of a mediator, 'It was as if the community was longing for this [the creation of the CMG]. A lot of land related issues existed but the community did not know how to address them. It was as if the group has come to relieve them of the existing land issues'.<sup>71</sup>

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<sup>64</sup> Interviews with two groups of CMG mediators, one consisting of men the other of women, Torit, 24 November 2021.

<sup>65</sup> Interview male CMG mediator, Wau, 3 December 2021.

<sup>66</sup> Interview female CMG mediators, Torit, 24 November 2021.

<sup>67</sup> Interview male CMG mediators, Torit, 24 November 2021.

<sup>68</sup> Interview CMG mediators, Wau, 2 December 2021.

<sup>69</sup> On this point see also the findings of Leonardi et al. (2010) about people's preference for mediated solutions.

<sup>70</sup> Interview female CMG client, Wau, 3 December 2021.

<sup>71</sup> Interview male CMG mediators, Torit, 24 November 2021.

When mediating private land disputes, the work of the CMGs often encountered unprofessional or corrupt practices of state officials. In such cases, the CMGs facilitated interaction with state officials and departments, for instance by providing the client with an official letter from a lawyer demanding access to certain documents. In cases where the state department stayed unresponsive, such cases could be taken to court. One mediator in Torit told us how the support of a lawyer helped them to successfully file a case in court against the Directorate of Land and Housing for refusing to provide access to public documents and how, from that point onwards, state officials – presumably fearing to be exposed in court – became much more cooperative.<sup>72</sup>

The work of the CMGs thus provided people with access to dispute settlement institutions, and managed in various cases to effectively strengthen the tenure security of participants that were in fear of losing their land. Mediation is often said to only work well in situation of relative power equality between the parties, and to otherwise work to the detriment of the less powerful (Hensler 2003: 173; Maru, 2006: 450). The practice of GMCs in Wau and Torit, however, shows that CMGs serve communities that would otherwise have no path to justice and the shadow of the law (including the real possibility of taking reluctant parties in mediation to court), thus helping to level the playing field (cf. Maru, 2006: 450-1; Berenschot & Rinaldi, 2018).

Another relevant impact of the CMGs' work at the community level was their role in educating the public about their rights, both through legal awareness campaigns and through the outcome of their mediations, of which details and results often were disseminated by word of mouth.<sup>73</sup> Furthermore, the involvement of lawyers was helping to make the legal system legible for both the community mediators and the clients. One interviewee noted that '[c]ourt processes can be long, and hard to understand. It helps that the lawyers explain and give encouragement'.<sup>74</sup> Beyond mediation of disputes, improving access to administrative and judicial state institutions, and the raising of legal awareness, the involvement of CMGs also allowed the gathering of information about land-related conflicts and possible tensions building up inside communities, which was relevant for early conflict prevention interventions. According to SSLs, the work of CMGs plays an important role in providing a mechanism for transitional justice, as it provides a forum to address grievances caused by the various waves of conflict.

Whereas the local relevance and popularity of CMGs thus are quite clear, another highly relevant question, particularly for post-conflict states, is whether CMGs will most likely challenge or support the building of a stronger legal system and the empirical legitimacy of the state. Is it to be expected that the increasing popularity and use of informal dispute settlement institutions detract from the popularity and empirical legitimacy of formal institutions, inhibiting the maturation of the legal system and the rule of law? Or could informal dispute settlement institutions – with proper linkages to the formal system – perhaps also strengthen formal institutions, both judicial and administrative?

Through their emphasis on laws and legal procedures, CMGs produce and give empirical legitimacy to state law and institutions, and 'perform stateness'.<sup>75</sup> Resolving disputes at the local level and holding state agencies accountable – two functions respondents consistently reported they were unable to effectuate without the CMGs – can furthermore impart popular confidence in the law and formal institutions. In South Sudan much official behaviour remains unscrutinised by the users and the general public, and there is limited public accounting of the executive towards representative political organs. Changing the free-for-all executive field into one where officials face a real risk of being held

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<sup>72</sup> Interview male CMG mediators, Torit, 24 November 2021.

<sup>73</sup> Cf. Maru, 2006: 450.

<sup>74</sup> Interview CMG client, Wau, 5 December 2021.

<sup>75</sup> Anthropological literature has increasingly shown that institutions and persons who are not officially associated with the state may be involved *de facto* in the execution of public authority (Lund, 2006: 676). Law is one of the 'symbolic languages of authority' through which stateness is performed (Hansen & Stepputat 2001).



accountable, their malfeasances made visible, could mark an important change. Providing poorer citizens with access to courts leads to people seeing and hearing about powerful persons and state institutions being challenged and held accountable in court. This can enhance the prestige of the court, 'give life to the rule of law' (Hensler, 2003: 196) and create a positive synergy between the CMGs and the courts (cf. Stromseth et al., 2006: 239).

There are some important conditions for community mediation programming to benefit the poor and underprivileged. One such condition is that mediation is voluntary, and disputing parties are not forced to accept a proposed solution (cf. Harrington & Merry, 1988; Hedeem, 2004: 115). This requires the existence of alternative methods of dispute resolution, including an available ultimate resort to an impartial, well-functioning, formal court. Without a credible threat of litigation there would also not be a substantial shadow of the law. This means that whereas community mediation programs can be a driver to increasing access to justice in countries with a fledgling legal system, this will always also require court reform and development.<sup>76</sup> The effectiveness of South Sudan's CMGs in contributing to the development of a better functioning legal system depends on the training of lay community mediators, but with sufficient support of public interest lawyers, and courts that function relatively well and effectively protect the rights of poor citizens. In post-conflict countries with low numbers of formally trained lawyers, weak courts and difficulties of sustaining stable long-term donor funding, this may be a hard-to-take hurdle.

Another condition concerns the skills and knowledge of the mediators. Community mediators can play an important educational function, but this requires them to have good understanding and representation of the law, for which proper knowledge and skills training is necessary. Limited funding is connected to a rapid turnover of volunteer staff (Cf. Dugard & Drage, 2018: 87), which will hamper the development of a body of well-trained and skilled community mediators.

### **3.4d- Conclusion**

The inclusive, community-led, and transparent work of the CMGs seems to have had a positive impact in addressing land disputes inside and outside communities. The CMGs seem to have the ability to fill some of the justice gaps caused by the limitations of jurisdiction of the customary courts on the one hand, and the difficulty for many people in accessing statutory courts on the other. Besides reducing conflict, increasing legal awareness and promoting community cohesion, the pressure of community mediators backed by lawyers can induce the first important steps on the long and arduous road to more access to justice for common citizens. This includes a government that is itself also held accountable, and formal courts that publicly articulate rights and the values embodied in the law. These processes can contribute to citizens' trust in the rule of law and the empirical legitimacy of the legal system, highly important developments in weak states in the process of state and nation building. The groundwork performed by CMGs, coupled with the recourse to adjudication supported by lawyers, is indispensable for addressing conflicts that cannot be resolved through alternative means. It is also key in strengthening the authority of the legal system, thereby fostering accountability among officials within land departments and elsewhere. Community education and mediation alone would leave all those unwilling to abide by the law – prominently among them those with more power, money, and corrupt officials – scot-free. It is the ultimate resort to adjudication that provides a credible threat that actors who violate rights of poorer citizens will be sought out, made visible, and called to account. In this, the support of lawyers is fundamental, which makes this kind of solution dependent on constant funding, and therefore not fully sustainable, as its current status attests. Considering what seems to be a very positive outcome, the abrupt ending of the work of CMGs raises questions

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<sup>76</sup> Court decisions are furthermore needed for the production of rules and precedents, although their educational function is limited if they are not published and made available to a wider audience.

about the alignment of the visions, objectives and operational and financial practices of local NGOs and those of the international donors.

### **3.5- Other forums for dispute resolution**

Besides state courts, customary courts and CMGs, there are various other state and non-state fora for land-related dispute resolution. For instance, church leaders regularly mediate disputes, some involving land issues.<sup>77</sup> Churches also share information about land rights, and sometimes pool money for helping people with the payment of land registration fees. They are also aware of their potential role as interlocutors with the political elites but acknowledged that they have been too quiet regarding land-related issues, to avoid confrontation with the government. In Torit the state Ministry of Housing, Physical Planning and Environment used to have a Land Dispute Mediation Board, but this board was terminated in 2018.<sup>78</sup> Other organizations such as the Human Rights Commission also envision themselves as possible mediators of land disputes and protecting people against abuses of state officials.<sup>79</sup> However, the commissioners complained about their lack of resources and political leverage to intervene in land-related cases. In conclusion, while there are other forums available for dispute resolution, in our research we did not come across any that was paying a major role in addressing land-related conflict.

### **3.6. Land-related dispute resolution mechanisms - Conclusions and recommendations**

South Sudanese justice seekers have limited access to mechanisms for addressing their land disputes. The reduced number of statutory courts, combined with hefty fees and long delays make them almost inaccessible to the great majority of the South Sudanese people. Moreover, people with documents find it much easier to prove their claim to land than those who need to prove their rights through witness testimonies and markers such as fruit trees or graves. This is detrimental for all those people who don't have a formally documented land right. With the customary courts excluded from deciding cases in registered areas, there is in practice a justice gap for land-related dispute mechanisms. The CMGs created by SSSLs provided a solution for people who could not access the courts. The transparent and inclusive methods adopted, combined with the support provided by lawyers seems to have pleased their clients. Moreover, their work also seems to have created other relevant impacts in society, such as forcing some transparency into the practices of state institutions and approaching people from formal systems like the court. However, lack of funding has for now stopped the work of CMGs.

These conclusions lead us to the following recommendations:

- Consider legal solutions that allow for the recognition of land rights independently of documentation. For instance, the Mozambican law explicitly says that those who use the land for more than 10 years have a land use right over that land, independently of having any documentation.<sup>80</sup> This type of provision allows people to legitimate their land claims and have stronger legal arguments when trying to protect their rights in court. Moreover, this type of simple provision is more easily understood and appropriated by the people. As detailed above, current provisions on the legal recognition of customary rights and the possibility of adverse possession raise several legal questions and cannot be easily known and invoked by the population in general, making the role of land documentation much more prevalent in court, and unequal for those that cannot get those documents.

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<sup>77</sup> Interview religious leaders, 27.06.2023, Torit.

<sup>78</sup> Interview Ministry staff, 29.06.2023, Torit.

<sup>79</sup> Interview Human Rights Commissioners, 30.06.2023, Torit.

<sup>80</sup> See for instance art. 12 and 13.2 of the Mozambican Land Law (Law 19/1997).

- Establish legal mechanisms and practical incentives that recognize diverse forms of evidence for land rights beyond documents. This could include provisions explicitly acknowledging alternative means of proving land rights, such as local markers, trees, local witnesses, and graves, as well as support statutory courts with funds for site visits.
- Carefully study and assess to what extent involving the customary courts in a certain capacity in disputes over demarcated land would allow for better access to justice.
- Support the continuation of the CMGs and study the possibility to make them a more institutionalized solution, with more stable funding systems and a longer-term strategy.
- While promoting the continuation of the CMGs, take into consideration the fact that mediation is only truly voluntary and effective if taking the dispute into a different forum is a real possibility. This means that the support of lawyers to the CMGs and payments of court fees need to be continued and strengthened, and community mediation programs need to be combined with court reform and development, as mediation needs a shadow of the law to be effective and fair in protecting the weaker parties.
- Develop further trainings for mediators, including refresher training programs for those that went through the training process before.
- Consider further research on the spill over effects of CMGs' work into the wider society, and possible ways of maximizing those effects.
- Develop public information campaigns on people's rights and pathways for justice. As highlighted above regarding the work of CMGs, knowledge about success cases and their process gives those with unsolved grievances knowledge and ideas on how and where to address them.
- Support strategic litigation against the most important corrupt officials and land institutions as a whole. Lawyers kept telling us that one way of dealing with the problems of the Ministry would be the courts prosecuting individuals at the Ministry, instead of engaging only with the Ministry as an institution. More accountability at the Ministry level would reduce the number of conflicts caused by corrupt practices during demarcation and registration.

## Chapter 4 - Women's land rights in South Sudan

### 4.1- Introduction:

Chapter 4 is focused on women's land rights. First, the report provides an overview of the literature that describes and explains various examples of gendered customary land tenure systems in Sub-Saharan Africa, in which women's land rights are derivative, based on their positions as wives, daughters, sisters. After, the report focuses on the specific case of South Sudan, first through analysis of existing literature and then by providing research findings from Wau and Torit. It argues that war and displacement have undermined traditional families and customary obligations of support by male relatives, leaving women vulnerable in the existing gendered land relations. After that, the report looks at statutory norms regarding women's land rights, and to what extent and how these impact on the lives of women in Torit and Wau. This is followed by an analysis of the different mechanisms of dispute resolution – including statutory courts, customary authorities, and the CMGs – and women's voice and leadership. Finally, the report concludes with recommendations regarding women's land rights.

### 4.2- Gendered customary land rights

Under customary tenure systems of Sub-Saharan Africa, the landholding community is the descent group. In patrilineal societies, descent and property are traced through the male line, and control of land usually rests with male heads of households. These heads are expected to take some land for their own cultivation and share the rest with their wife/wives, adult sons, daughters still living at home and possibly siblings. Women usually marry men from outside their own community and move to the community of the husband (patrilocal). Matrilineal societies are somewhat more diverse, and their tenure system is more complex. Descent and property in these societies follow the female line, but control over property and positions of authority lie with male family members – brothers, uncles, male cousins. Marriages can be matrilocal, patrilocal or both spouses, hailing from the same community, may remain living where they did before the marriage (Lastarria-Cornhiel, 1997: 1322-1324). Where land in matrilineal communities is usually passed on from men to men, there are exceptions to this rule (see for instance Peters, 1997, 2010 writing about Malawi's Shire Highlands).

In both matrilineal and patrilineal communities, it is thus usually men who occupy the positions of authority and most property remains under the control of men (Chigbu, 2019: 132; Doss et al. 2018, 71; Fenrich et al, 2001: 273-276; Lastarria-Cornhiel, 1997: 1322-1324). Women largely have derivative, secondary rights of access to land through their family, based on their status as daughters or wives (Chigbu, 2019: 127). In most African countries, women have considerably less access to land than men (Lambrecht, 2016: 188). The rationale behind the gendered nature of customary tenure is mainly twofold. First, men are regarded as the main providers of the household. Fathers, husbands, sons and uncles are to care for girls and women. Lambrecht (2016, 194) concludes from this relationship of care that: "Compared to men, it is therefore seen as less important for women to accumulate wealth ... which justifies giving less access to land for women and allocating less fertile land to women." In patrilocal customary systems the fact that women on their marriage move to where the husband resides furthermore fosters an expectation among parents that daughters in intact marriages do not require sizeable inheritances from their parents (Kumar & Quisumbing, 2012: 583-4).

The second rationale relates to the fact that in customary tenure systems land is strongly connected to the continuance of the extended family or lineage. To guarantee the survival of the family, land needs to stay in the family. In societies where daughters are expected to marry outside of the clan and join the community of their husbands, ownership rights to land in their birth families or rights to inherit land are unnecessary. These married women are generally granted use rights to land of their husband. When the husband dies, his family land – and sometimes also parts of his individually acquired property – is often

claimed by his family, leaving the widow dependent on her husband's family unless she chooses to return to her own family or remarry into a new family (Peterman, 2012: 550). "Widow chasing" is a common occurrence across Africa's spectrum of ethnic groups, faiths, regions, and educational and income position (Namubiri-Mwaura, 2014; Owen, 2002; Palmer, 2002; Ubink, 2011). It is likely that women who are separated or divorced face similar, or in some cases even more restrictive, asset discrimination as widows, contingent on the nature of the separation (Peterman, 2012: 563). Within these debates it is important to keep in mind that the positionality of women – as wives, daughters, sisters, widows – affects their claims to land. Norms that are detrimental for a certain group of women may be beneficial for another and vice versa.<sup>81</sup>

Tenure security of women under customary systems historically was much higher than it currently is (Lastarria-Cornhiel, 1997: 1320). The gender ideology of the colonial powers, the spread of Islam and colonial and postcolonial land interventions all "reinforced existing gender disparities or engendered new forms" (German, 2022: 134). Over time, customary rights became decoupled from customary obligations (Bennett, 2008, writing about South Africa; Grant, 2006 on South Africa; Mtengeti-Migiro, 1991, on Tanzania; Ndulo, 1985 on Zambia; Stewart and Tsanga, 2007 on Zimbabwe). Duties intricately connected to rights in the customary system, for instance of a head of family or successor, were "demoted to mere morality or conventionality" (Bennett, 2008: 41). In other areas, women's rights to land eroded from a right to a privilege (Nukunya, 1972: 15). In contexts of growing commercialization, land scarcity and population growth, this enabled male and elite co-optation of land privileges (Amanor, 2001; Kapur, 2011; Leonardi & Santschi, 2016; Ubink, 2008). Women have at times successfully contested the efforts by male relatives to exclude them from land ownership in customary and official courts (see for instance examples from South Africa in Grant, 2006; Tanzania in Wanitzek, 2008: 46-48; and Malawi in Peters, 2010). The literature provides examples of many other forms of female agency, such as women pressuring their families to respect their perceived entitlements to land or women undertaking certain agricultural activities to gain greater autonomy over parcels of land (Carney & Watts, 1991; Stewart & Tsanga, 2007: 145; Nukunya, 1972). Nevertheless, women's land rights remain problematic in many African countries.

### **4.3- Women's land rights in South Sudan**

In South Sudan, an estimated 87% of the population hold their land under customary tenure (Deng, 2014: 22). Most groups in South Sudan observe patrilineal descent. Clans and sections have, however, always absorbed outsiders into their communities and lineages, which included transfers of land (Leonardi & Santschi, 2016: 8). In South Sudan's customary tenure systems women traditionally do not own land independently. As the customary inheritance systems are aimed at the retention of property and material wealth within the male lineage, women generally have limited and conditional access to lands, derived from their position as wives, daughters or sisters (Jok et al., 2004: 33-7). Men inherit land from their fathers and women are supposed to marry and acquire rights to land through their husbands. Single women may be granted access rights via their male family members, but widows and other women without husbands or families are in a highly vulnerable position and are regularly denied access to community land (Deng, 2021: 22-23; FAO, 2019: 6; Mennen, 2012: 17; Wabwire, 2020: 42). The payment of bride wealth by the husband's family to the wife's family further complicates women's position. Divorce would trigger a claim to restitution of (part of) the bride wealth – a fact that leads to considerable pressure on women not to divorce (Stern, 2011: 18; Hessbruegge, 2012: 308). Even upon the death of their husbands, the marriage contract is not broken unless widows return the bride wealth and divorce their deceased husband. As a result, they cannot marry outside of their deceased husband's family. To ensure the widow's protection and support, widows may be "inherited" by a male relative of the deceased husband, with more or less say for the widow in this decision. In such a levirate marriage

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<sup>81</sup> For instance, when widows are given only limited use rights on the death of their husbands to protect the land ownership of the lineage, this benefits women in the lineage.

the widow is still considered married to her deceased husband but one of his brothers or other male relatives takes over the role he played (Stern, 2011: 21; Buchanan, 2019: 21). As a result “a woman’s procreative capabilities are never ‘wasted’ and she is never without a husband to care for her and her children” (Beswick, 2001: 37). During the war, when so many men lost their lives, the incidence of widow inheritance decreased and widows were increasingly left unassisted by their former husband’s families (Beswick, 2001: 47; Stern, 2011: 21). This issue is also connected to the increasing refusal of first wives to accept other women into their more nuclear family (Beswick, 2001: 48).

While the customary obligation of fathers, husbands, sons and uncles to care for girls and women used to provide a safety net that guaranteed women access to land (Deng, 2021: 22-23), the well-functioning of this system requires intact families and marriages. Conflict and displacement, as well as the HIV/AIDS pandemic, have left many women widowed, divorced or abandoned, and placed them outside of the customary safety net (Beswick 2001, 47; Stern 2011, 21). There are now many women-headed households (Buchanan, 2019: 7), and many women without male guardians through whom they can access land. When traditional family structures dissolve, customary tenure systems often do not grant enough security for women and other dependents (Stone, 2014: 9). In a study by Stone (2014: 9), 71 percent of 76 female returnees reported violence or threats of violence related to housing, land and property. The same study also shows that women report a much higher rate of landlessness and that men are six times more likely than women to have a piece of land and not feel at risk of eviction (Stone, 2014: 39). These women often have no documents to prove any land rights, do not have money to buy urban land, and find it difficult to negotiate access to community land with traditional authorities who often hold on to traditional notions of property ownership (Stone, 2014). When they are given land, for instance if a traditional authority identifies a woman as vulnerable because she has children but no husband, the land given is often of lower quality (Mennen, 2012: 18, 22). According to Mennen (2012, 18), ‘(g)overnment officials and chiefs often fail to grasp the growing need to change perceptions and practices with regards to land ownership’.

In addition, there is a breakdown of customary norms, particularly in urban areas where land is increasingly scarce and valuable. A monetized war economy has replaced economies based on social reciprocity and interdependence, which may lead to men preferring to capitalize on land over providing for female dependents (see Deng, 2021: 1, 23). Leonardi & Santschi (2011: 113) for instance show that recent rises in the monetary value of land have led to a questioning of transfers of lands to daughters, matrilineal nephews, or friends and newcomers from outside the patrilineage, and of the permanency of earlier gifts or transfers, even if these took place several generations ago. The following section gives an overview of our findings on this topic in Torit and Wau.

#### **4.4- Women’s land rights in practice: evidence from Wau and Torit**

In line with the literature sketched above, we encountered numerous reports in Wau and Torit of discrimination against women in customary land tenure systems. Respondents – both men and women – were well aware of the fact that state law grants women equal rights to land, but legal provisions seemed to have made few inroads so far into customary practices. They reported some differences between customary groups, for instance that daughters from agricultural clans and Muslim groups in Wau could inherit some land, in contrast with pastoralist clans in Wau and general practice in Torit. Notwithstanding some differences, women and men from both towns widely reported severe challenges for accessing and holding on to land. A religious leader explained it as follows: “Here in Africa people say that the women don’t have land rights. Women marry and go to their new family’s house, only boys have right to take the land. The girl child is often denied inheritance rights because of the belief that she will be married of”.<sup>82</sup>

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<sup>82</sup> Interview religious leaders, 27.06.22, Torit.

Several stories illustrated the limited say women have over land, even when they played a role in obtaining or upgrading the land. For example, Mrs. S explained that her husband housed his second wife with sons in the land where she used to live with her daughters, despite the fact that she had arranged and cleared the place herself and made it habitable.<sup>83</sup> There were also several reports of women being dispossessed of land by family members as well as strangers: ‘We know that when you stay on your husband’s land, his family may chase you off when the husband dies’.<sup>84</sup> Many women recounted stories of land granted to them by fathers or husbands that was refused to them by relatives once the male grantor died. “The problem is with inheritance, women’s rights are denied”, said an official from the Ministry of Gender.<sup>85</sup> Divorce – already difficult to obtain due to requirements to return the dowry – usually negates any claims to land shared with the ex-husband.<sup>86</sup> Two Human Rights Commissioners also highlighted that ‘women don’t know their rights’ and that ‘Women still believe in the traditional system, sometimes they are the ones following these practices’.<sup>87</sup>

Women from both agriculturalist and pastoralist groups reported a belief that reference to statutory law was not helpful in convincing husbands to grant them land. A woman in Torit reported that ‘the only thing that may work is when you have given birth to boys. You can then say: “think of your boys”. They can inherit the land. Maybe you can take care of it until they are big enough. But if you only have girls, you stand no chance’. Other women agreed that if a woman gives birth to only girls, they saw no way to convince their husband to give them land. ‘He will even hide the papers, keep it a secret that he has them’, one of the women stated.<sup>88</sup> A female lawyer in Wau similarly stated that even an educated woman like her does not know where the land papers are held, and that her husband would surely get angry if she would ask him about it.<sup>89</sup>

Men use two main reasons to explain the perpetuation of this system. The first goes back to one of the rationales mentioned earlier, namely the continuation of land in the hands of the family. Two men passionately shared the following stories during a focus group discussion:

‘My brother bought and built houses here in the names of his two wives and others in his own name. When he died, both wives sold off the property registered in their names. The second wife went further and filed for a divorce. Now these two women have parted ways with us, and they have moved on with the proceeds from these properties. But the women sold the land their kids should live on.’

‘A relative of mine married and put the plot in the name of his wife. He then died. The lady married someone else, and he [the new husband] is now staying there. They tried to reclaim the land, but they failed.’<sup>90</sup>

Men also make arguments related to the virtues of a good wife to oppose stronger land rights for women. They state that an upright woman is one who understands and stays under the authority of the husband. A woman with a plot of her own, on the other hand, is seen as spoiled, loose, a prostitute: ‘Even if a lady constructs that house, the male family member will not enter that house, the neighbours will think that she is a prostitute’.<sup>91</sup> A chief in Wau explained that ‘[t]he custom here is different from Torit, is not so much that women cannot have land or a house on their own. But the husband will never go there to live, it is a tabu. She can rent the house, but they will not go to live there. In that case they will separate’.<sup>92</sup> During one FGD in Torit, a woman said that registering a plot of land in

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<sup>83</sup> FGD women, 26.11.2021, Torit.

<sup>84</sup> Interview four women leaders, 03.12.21, Wau.

<sup>85</sup> Interview, 30.06.2022, Torit.

<sup>86</sup> Interview Chief, 28.11.2021, Torit.

<sup>87</sup> Interview with Human Rights Commissioners, 30.06.2022, Torit.

<sup>88</sup> FGD women, 26.11.2021, Torit.

<sup>89</sup> FGD Community Mediation Group, 02.12.2021, Wau.

<sup>90</sup> FGD Men, 27.11.2021, Torit.

<sup>91</sup> FGD men, 06.12.2021, Wau.

<sup>92</sup> Interview male chiefs, 03.12.2021, Wau.

your own name as a woman '[is] a sure way of getting a divorce. The husband will send you away. He will think that you must have another man'. A second woman adds: 'There was a lady who was employed here in Torit and the husband stays in Juba. From her salary, she decided to buy a plot and registered it in the name of her uncle, to provide her daughters with access to land. Upon hearing the news, the husband questioned her decision for buying plots and registering it in her uncle's name. The conflict resulted in divorce'.<sup>93</sup> This labelling of women as bad and spoiled is employed to counter women's clamouring for more independence. A man explained: 'Going out independently is the problem. Wanting to be responsible for herself. Spoiled refers to her own administration, that no one knows what she is doing. She is outside of family control mechanisms'.<sup>94</sup> Another man described that if parents are able to buy plots for their kids, this could include a plot for a daughter, but 'you don't let her know that the plot is bought in her name. This is simply to avoid the girl from leaving her husband and deciding to stay on her own in that plot'.<sup>95</sup>

While in general women's land rights are still heavily restricted by customary norms, several respondents mentioned some changes in perceptions and practices. According to a female respondent: 'Previously, when I was young, men were in control of everything. But through awareness and time spent outside of Sudan, we see some change in the understanding of people'.<sup>96</sup> A male respondent states: 'In the past it was difficult for ladies to access land but now there is a slight change and the government, especially the court, is granting them the right to land'.<sup>97</sup> Some women indeed claim the right to inherit family property. When they bring these claims to chiefs, many of whom are trained on new statutory rights, some chiefs oppose women's claims, while others refer them to state courts. The protection state courts offer women is a bit of a mixed bag (see the following section).

In both towns, more progressive men reported registering lands in the name of their wives and daughters. To prevent family disputes after their death, these men preferred to buy land for wives and daughters rather than to bequeath part of the family land. They also explicitly included the family in their decisions. One man said: 'I called all my close relatives and handed these lands to my kids in front of them, so that they know that it is me who has given these plots to all my kids. I also told them that the kids reserve the right to do whatever they want with their plots, including the girls'.<sup>98</sup> Respondents also described that women who can secure independent sources of money now have the opportunity to buy and register land in their own name and this indeed increasingly happens, particularly in Wau (cf. Deng, 2021). However, this is only an option for women with independent means, and several women report that this requires connections with influential men. As detailed in the following section, many women reported discriminatory practices during land demarcation and registration.

Deng (2016: 11) argues that there is 'some evidence of evolving attitudes' on women's property rights, resulting from the rise of women to leadership positions in government and civil society; the influx of new ideas from the diaspora; and the large number of war-induced female-headed households. The results of our research in Torit and Wau are mixed; several voices are calling for change regarding women's land rights, and while this has resulted in some changed practices in some families, the overall patterns are still largely in line with patriarchal customary notions of land ownership and family relations. A male chief in Torit summarized the effects of conflict on women's land rights. On the one hand, he said, women are becoming more aware of their rights and therefore more independent but, on the other hand, conflict seems to have made men more irresponsible towards their families. This puts women in the difficult situation of still having limited land

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<sup>93</sup> FGD Women, 26.11.2021, Torit.

<sup>94</sup> FGD Men, 27.11.2021, Torit.

<sup>95</sup> FGD men, 06.12.2021, Wau.

<sup>96</sup> (FGD Women, 4.12.2021, Wau.

<sup>97</sup> FGD Men, 27.11.2021, Torit.

<sup>98</sup> FGD Men, 27.11.2021, Torit.



rights under customary land tenure systems, without the traditional family support that was associated with it.<sup>99</sup>

#### **4.5- Women's land rights in the statutory system**

States and donors involved in land tenure programming are showing an increasing interest in gendered land relations. They often see improving women's access to and ownership of land as a way to strengthen women's bargaining and decision-making power in the domestic sphere as well as in their communities and other public arenas. This is expected to improve female, child and household food security, nutrition, and health, and to reduce domestic violence, and it is also seen as having a positive impact on agricultural productivity.<sup>100</sup> Based on this understanding of the benefits of stronger women's land rights, governments, foreign donors and international organizations have heavily invested in inducing changes in gendered land relations, with a special focus on state legislation.

As detailed in section 2.4e, the South Sudanese statutory law explicitly establishes in the Constitution and other key legislation such as the 2009 Land Act the right of women to own land, and the obligations of different state agencies to take action to protect this right. However, and besides questions raised by the legal texts discussed in section 2.4, the South Sudanese legal framework is marked by various gaps that limit the power of women to operationalize this right. The lack of inheritance regulations is a clear example of these legal gaps (World Bank, 2014: 23).

Another issue is what happens when state institutions are called upon to protect women's statutory rights. State officials interviewed were quick to point out that their institutions treated women fairly, but we heard all kinds of complaints of discrimination against women by state officials. For instance, officials not demarcating land in the name of women and widows and using the opportunity for sexual exploitation.<sup>101</sup> Several people in Torit and Wau reported that state officials tell women to register the land in the name of their husbands or sons instead of registering land in their name, and easily dismiss any of their complaints about the fairness of the process (see Deng, 2021: 25). In Torit, several women reported that, at the Department of Land and Housing, there is an internal order that a woman can only register land in the name of her husband, son(s) or brother(s). They were told they are just women, too powerless to stand up for their rights, or were asked for sexual favours. Other issues such as the lack of transparency regarding the (high) fees charged for demarcation and registration are also especially problematic for widows and other women in positions of vulnerability. There is extensive research on how some careful design of land demarcation of registration processes can help to strengthening women's land rights (Enemark et al., 2015; Sutz, 2021), but the implementation of such measures is often dependent on a legal framework that promotes them. We came across some examples of land demarcation and registration processes where women were fairly treated, but in general the discretionary nature of the process – in part caused by the lack of an adequate legal framework – contributed to the exclusion of many women (Deng, 2014: 90).

#### **4.6- Women's land rights and dispute resolution mechanisms**

As outlined earlier, the courts in South Sudan are generally perceived as fair by the populace. However, accessing these courts presents significant challenges, particularly for women. Apart from the high court fees, which are even more burdensome for women in vulnerable circumstances, there exists a pervasive social stigma associated with resorting to the legal system for family matters. This stigma is notably more pronounced for women, and for those who find themselves in precarious situations of dependency on other family

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<sup>99</sup> Interview male chief, 27.11.2021, Torit.

<sup>100</sup> Among others, Chigbu, 2019: 127; Cooper, 2012: 642; Cooper & Bird, 2012: 528, 534; Kumar & Quisumbing, 2012: 574; Lambrecht, 2016: 188; Panda & Agarwal, 2005; Palmer, 2002: 1.

<sup>101</sup> FGD women, 26.11.2021, Torit; FGD religious leaders, 27.06.2022, Torit.

members, navigating this social stigma becomes even more intricate. For instance, a lawyer in Torit reported that ‘[i]n our communities taking cases to court is in general an abomination, when you go to court you are breaking away from family and customary practices. Especially in the village, people will start cursing you. Women will be afraid that the family curse them’.<sup>102</sup> Respondents also highlighted that the knowledge women have about their (formal) rights, and the paths to secure them through the courts is limited.

We also inquired with our respondents about the practical protection afforded to women's land rights by the courts when women manage to access them. The results were mixed. In some cases, respondents reported that women are fairly treated in court, judges know the law and protect women's rights to land. A male respondent states: ‘In the past it was difficult for ladies to access land but now there is a slight change and the government, especially the court, is granting them the right to land’.<sup>103</sup> But for instance in Wau, a female lawyer reported that the person of the judge heavily influences the outcome; out of the three judges there, two tend to protect women's rights to land, but the other one not.

The high value given by courts to land documents further complicates their use by women. As mentioned in the previous section, gender discrimination by state officials when trying to obtain land-related documents is a common complaint of women. Even when they reach the courts, they have more difficulty in proving their rights to land. Winning a court case also may not be the panacea, as it can lead to conflict with male relatives, and a stigma of being a bad woman, as well as the fact that often court decisions remain unimplemented in practice. Women reported that even with a court ruling in their favour they felt uncertain regarding their rights to land.<sup>104</sup>

Customary courts and chiefs offer limited recourse for women to address their land-related disputes. First, as discussed in section 3.3, their jurisdiction over land-related cases is limited. Second, in many cases male chiefs tend to favour men in their decisions and discourage women to fight for their rights. As a female respondent told us, ‘(t)he chiefs alone cannot manage, some of the chiefs are who label us as “just women” and are not protective of our rights. If these chiefs were actively involved and taking the lead role in promoting and protecting our rights, we would realize some positive change’.<sup>105</sup> Moreover, some chiefs are perceived as corrupt and problematic, which further discouraged women to recur to them. We came across situations in which chiefs were helping women to address their land grievances, for instance by mediating their interactions with the Ministry, or informally mediating a dispute with another party. Nevertheless, such cases much depend on the personality of the chief. We discuss in the following section the growing involvement of women in traditional leadership positions and the role it can have in these situations.

As highlighted in section 3.4, the CMGs can play a very important role in filling the existing gap in dispute resolution mechanisms, caused by the difficult access to courts and the limited role of customary authorities in intervening in land-related conflict in urban areas. The role of CMGs is even more important in the case of women; for many of our female interviewees, the transparent and non-discriminatory process developed by the CMGs seemed to be the safer path for solving their land disputes. For instance, a female CMG client in Wau reported that ‘[t]he issue was pushed to the chief, 3 times, but there was no success (...) I decided to go to court. Every time they told me to come back tomorrow, until my money was finished. That was when I got the information about the CMG. I went there, was referred to 2 lawyers. It was not an easy case, they even needed 2 lawyers to

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<sup>102</sup> FGD Lawyers and court officials, 28.06.2022, Torit.

<sup>103</sup> FGD Men, 27.11.2021, Torit. See for instance the success story of 10 women in Juba recovering their land from land grabbers through a court case here: <https://www.eyeradio.org/10-juba-women-win-court-battle-against-land-grabbers/>

<sup>104</sup> FGD women, 26.11.2021, Torit.

<sup>105</sup> FGD women, 26.11.2021, Torit.

deal with it'.<sup>106</sup> Another female client also stated: 'The two lawyers that helped me were so committed and hardworking. They gave me a lot of support. I am very grateful; I would not have been able to help my mother-in-law otherwise'.<sup>107</sup>

In conclusion, while access to justice mechanisms in South Sudan is complicated for many people, it is even more difficult for women in fragile positions. When women are able to access courts, particularly if they manage to secure a lawyer's services, good results have been achieved, although some judges remain reluctant to grant women land rights. Moreover, a positive decision by the court does not necessarily result in a positive outcome, considering the difficulties of implementing court decisions and the possible backlash from families and communities that women often experience. The role of chiefs in these cases is often limited if not counterproductive, as they are often a source of discrimination. The CMGs seemed to have created a much-needed space for women to bring their land-related grievances, both due to the easier access and process, and the more transparent and less discriminatory process.

#### **4.7- Women's voice and leadership**

The literature has been showing a clear link between norms that are detrimental to women and women's limited role in mechanisms of customary decision-making and dispute settlement (Ubink, 2011; 2013; Deng, 2013, 48). Improving women's participation or enhancing their 'customary legal empowerment' (Ubink & van Rooij, 2011), is thus an important aspect of ending discrimination in customary justice systems. During our research in Torit and Wau we could observe that women were increasingly elected for chieftaincy positions, particularly at lower level, and many of them showed ambitions of going up in the hierarchy. In Torit the highest paramount chief of the state was also a woman. The general impression was that these women leaders understood well the political nature, strengths and limitations of their position, and they reported to focus on broad community involvement in local decision-making and in creating inclusive environment in their councils. As one of these chiefs told us, '(w)e are now advocating for women to become Boma chiefs and even Paramount Chiefs. If we have female chiefs even at the local level, we will have peace because the intercommunal violence will be minimized. ... As chiefs, we are now setting the foundation for women in leadership. We will focus both at the high level and low levels'.<sup>108</sup>

The reception of these women chiefs was mixed. Some were received well by their communities and supported by male chiefs, others met with resistance. In a FGD with a group of female chiefs in Torit they reported that '[w]hen we address the male chiefs, sometimes they feel that we are just women. Some male chiefs feel they are always right, and they don't want their wrongs to be corrected. They often feel threatened when their mistakes are pointed out. They don't feel comfortable. There are even issues of sexual violence that may arise. ... However, there are some male chiefs who are appreciative and supportive to the work of female chiefs'.<sup>109</sup> In Wau a group of women was also critical about the choices of women for these positions, claiming that '[w]e need more strong and influential women to take these positions. Now, these women are just there because of the [the legal quote for 35% representation of women]. They go for the illiterate ones, so the men can have control'.<sup>110</sup>

Many women respondents in both Wau and Torit complained about a lack of cooperation between women in positions of power at different levels of society. They reported little to no contacts between local community leaders and female members of parliament or ministers that could voice their positions at national level. Also at state level they reported

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<sup>106</sup> Interview GMG client, 03.12.2021, Wau.

<sup>107</sup> Interview CMG clients, 05.12.2021, Wau.

<sup>108</sup> FGD female chiefs, 28.11.2021, Torit.

<sup>109</sup> FGD female chiefs, 28.11.2021, Torit.

<sup>110</sup> FGD women, 04.12.2021, Wau.

few synergies between women at different levels of power. For instance, the 16-day action against gender-based violence that took place in Torit during one of our visits saw little participation of the female paramount chief or female politicians. Many of our female interviewees commented on this issue and were interested in a stronger connection with women at other levels but were not sure how to make it happen. Lower-level female chiefs complained that '[w]omen at top leadership political positions do not have consensus among themselves and do not work closely with us. Women at all levels should demonstrate patriotism and transcend beyond their tribal and political lines'.<sup>111</sup>

In conclusion, in Wau and Torit there is a growing number of women taking up leadership positions, which may indicate a growing voice for women and changing social perceptions of the roles and rights of women in society. However, the role of these women in leadership positions is still marked by challenges, such as opposition from male chiefs in higher positions, and mixed receptions of their work by community members. The lack of synergy between women in leadership position at different levels seems to further limit their capacity for promoting change regarding women's rights. Nevertheless, support to women in leadership positions could positively influence land-related issues that women experience, both via these leaders' direct involvement in such land issues and via the transformation women in leadership roles may bring to social perceptions of women's position in society.

#### **4.8- Women's land rights in South Sudan - Conclusions and recommendations**

Women in South Sudan experience serious limitations regarding land rights. Customarily most land rights of women are derivative, based on their positions as wives, daughters, sisters, while war and displacement have undermined traditional families and customary obligations of support by male relatives, which used to provide women with a safety net. While on the books statutory law protects women's land rights, in practice women experience discrimination and difficulties to safeguard their rights, even when they interact with the formal system, for instance through demarcation and registration processes. The growing number of women in leadership positions is an indication that some change is taking place, but these leaders report various limitations such as push back from male leaderships, and lack of coordination and support from women in higher positions of power.

These conclusions lead us to the following recommendations:

- Prioritize the drafting of legislation on inheritance, and in such legislation consider the points in which state officials' and court discretion can lead to women's discrimination. While legal change alone does not guarantee societal changes, it gives hooks for promoting change. However, legislation on inheritance must be carefully studied and crafted, to deal with the practices of different customary groups, but also the potential for conflict that such legislation can cause.
- Consider strategies such as campaigns that target the negative discourse around women's land rights. For instance, campaigns that question the stigma of 'spoiled women who want to be too independent' and loose women. Instead, they can highlight the reality of many women-headed households due to war and dislocations, with women being the ones who take care of the children, responsible hard workers. As men are less able or willing to take responsibility for raising their children and providing for their wives these days, women need to be supported and have secure rights in land to be able to provide for themselves and their families. In post-conflict South Sudan, the underlying rationale of gendered land notions that women have access to land via their husbands and that men take care of women and children is often no longer valid. As women play an increasing role in providing for their families, it is in the interest of families to strengthen their access to and security of land.

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<sup>111</sup> FGD female chiefs, 28.11.2021, Torit.

- Develop public information campaigns on people's rights and pathways for accessing justice.
- Facilitate the building of stronger coalitions between (women) politicians, women's groups, NGOs, progressive (women) chiefs. Stakeholders also highlight the importance of including men in these coalitions and lamented the fact that international donors seemed to increasingly approach women's issues in women-only fora.
- Create specific rules and procedures to promote joint registration of land by couples and eliminate obstacles for women to register their land (e.g., no fees for women and couple registrations).
- Develop training programs on women's land rights specifically targeted at state officials and judges. These trainings should include a legal component, but also equivalent strategies as discussed above, aimed at challenging the stigmas that prevent women from owning land.
- Create supervision mechanisms that prevent gender discrimination by state officials.

## Chapter 5 – Final reflections and recommendations for future research

### 5.1- Final reflections

This report explores practical land justice interventions and dynamics of land justice in South Sudan. In Chapter 2, the report outlines the characteristics and issues related to land administration in South Sudan. Chapter 3 explores land dispute resolution mechanisms, while Chapter 4 delves into women's land rights. Each of these chapters concludes with specific recommendations. This section offers a concise summary of the conclusions discussed earlier and reflects on the primary findings and contributions of this report.

The several waves of conflict and displacement experienced in South Sudan resulted in numerous, complex land-related grievances, which severely limit land tenure security in the country, especially for populations in fragile situations. The formal land tenure system has limited capacity to address these issues, and this research shows that, instead of the stated goals of promoting peaceful and fair use of land, state-led land administration is a source of many grievances and injustices. Land demarcation and registration, combined with arbitrary processes of expropriation, urban planning and classification of land are a source of many new grievances, which only a few have the knowledge and financial capacity to fight. This research shows that legal gaps and contradictions between norms create a very unclear legal framework that, together with other issues such as weak rule of law and low administrative capacity, leave people uncertain about their land rights, and give state officials a broad discretion in their work.

As broadly shown in the literature and in this report, the administrative and judicial capacity of state institutions in South Sudan is very limited, which is a natural consequence of the several waves of war and displacement that marked the country for so many years. It is also not likely that the capacity of state institutions to provide efficient and fair public administration and justice systems will be quickly developed. Therefore, before aiming at expanding state systems and furthering the state power to administer land, national and international institutions working on land-related matters in South Sudan should understand and try to minimize the negative impacts of the state-led land administration that already exists, and which is in part failing its objectives. This change in approach also requires a careful consideration of customary land tenure systems, including an assessment of where they are providing efficient land administration or a source of problems. An approach that acknowledges and incorporates the beneficial aspects of customary land administration systems enables a more efficient use of state resources in places where state intervention is needed, rather than replacing systems that already providing effective land administration (Bruce & Migot-Adholla, 1994; Bruce, 2012). Such a shift in the land administration approach is important to decrease the number of land-related conflicts, and to ensure the broader legitimacy of state systems. These systems need to become legitimate in the eyes of the different groups, they need to be seen as a solution to people's problems rather than a source of new ones. Otherwise, state systems risk jeopardizing the efforts of state building (Badiy, 2012: 21).

One aspect that could improve land administration is the provision of better and more accessible mechanisms for dispute resolution. This research shows that South Sudanese people have limited avenues to address their land-related disputes. Customary courts have a limited role in addressing one type of highly prevalent disputes, namely disputes involving demarcated lands, as customary courts do not have formal jurisdiction to decide such cases. On the other hand, statutory courts do not exist everywhere, are expensive, and take a long time in deciding the cases, which makes these courts almost inaccessible to the great majority of the South Sudanese people. Moreover, those without formal land documents have difficulties in proving their rights in court. In other words, many people do not in practice have access to a forum to take their land-related grievances.

In this scenario, the CMGs provide an interesting solution for a much-needed service, creating an accessible, transparent and quick platform for addressing land disputes that otherwise would remain unresolved. Moreover, the impact of the CMGs was not limited to the role they play in individual disputes. CMGs enhanced legal awareness in the communities, both through trainings and via word-of-mouth dissemination of mediation outcomes; facilitated interaction with and created more scrutiny of the work of public institutions; functioned as early warning system for escalation conflicts in the community; and, via the lawyers, enabled access to courts. For the effective functioning of CMGs, the support role of lawyers is essential. Lawyers provide legal training and supervision and enhance the professional stature of both project and mediators, they also help with formal requests for information or services from land institutions, and in last resort, can take cases to state courts. Moreover, by approaching people from the courts, the CMGs also contribute to enhancing the prestige of the court, '[giving] life to the rule of law' (Hensler 2003: 196) and fostering a positive synergy between the CMGs and the courts (cf. Stromseth et al., 2006: 239). The CMGs are not a panacea for all land disputes, they are not able to address very complex cases, nor cases involving very powerful people or the state, but they remain a fairly cheap solution to provide justice to groups that otherwise will remain excluded from any other mechanisms of access to justice.

These findings on the work of CMGs highlight the need for more research on justice providers in South Sudan, and the need to adapt interventions in this area to solutions that can maximize the use of resources. The ending of a successful project such as the CMGs raises questions regarding a possible gap between local knowledge, local NGOs understanding of the field, and international donors and their funding priorities and practices.

Finally, this report confirms the position in the literature that women in South Sudan generally have derivative land rights, with limited tenure security. In the current context, where decades of conflict and displacement have resulted in many women-headed households and women who cannot rely on husbands and male relatives for access to land, this position makes the livelihoods of women and their children highly precarious. The law can play a role in addressing this problem, and the South Sudanese legal framework, despite problems and gaps, points into the right direction. However, gaps such as norms on inheritance rights that clarify the position of women and prevent gender discrimination remain, and new legislation in this area could further strengthen women's rights to land. The approval of protective legislation is not per se a guarantee that practices on the ground will improve, the literature is replete of examples where legislative reforms to create more transparent land administration procedures, and to provide gender equal access and rights to land have had limited effect (Manji, 2003; Palmer, 2002: 4). The effectiveness of the laws relies on people's awareness of them, as well as women's capacity to assert their rights, vis-à-vis the potential for social repercussions from family or their existing support network (Bior, 2013: 3; Lambrecht 2016, 191, 196). In addition, the enforcement of such laws is also dependent on operative administrative practices and well-functioning, accessible courts and other mechanisms for conflict resolution. These changes require great political will, as they usually lead to immense opposition from groups that benefited from the previous arrangements, men prominently among them (Chigbu, 2019; Kameri-Mbote, 2009: 93; Namubiri-Mwaura, 2014: 3; Owen, 2002; Palmer, 2002: 2). Nevertheless, having more protective and better-designed laws can be an important contribution for a better outcome (World Bank, 2017: 83; Almeida, 2022: 245).

The effects of more protective legislation can only be achieved with matching changes in the political and social discourse. State and non-state actors working in this matter should consider how they can alter the collective view of women and land. For instance, can a societal discussion be initiated that challenges the underlying rationale of gendered land rights – that men take care of women and families – as it is often no longer valid in current societal configurations? Or that queries the painting of women with land rights as something negative, and instead argue that such depicting is harmful not only for women,

but for their families, and for society in general? This research shows that there are progressive community actors – women and men – that could play an important role in promoting such changes, but they are limited in their interaction with other key stakeholders, and in their means to bring their influence on more rural and more conservative areas. In a context of limited statehood, it is particularly important that improvements in women’s land tenure security do not rely only on state tools and agents such as laws and courts. Supporting initiatives that foster change in political and societal discourse and facilitate broader dialogue on the issue of women’s land rights, is essential for achieving lasting societal change. Initiatives such as the CMGs highlighted in section 3.4, and the promotion of community dialogue can give space to progressive voices that already exist in the communities, promote synergies between them, and challenge the underlying discourse regarding women’s land rights.

## **5.2- Recommendations for further research**

Decades of civil war and conflict have brought many changes to the lives of South Sudanese people and have placed serious limitations on where and how research can occur, pushing researchers into safer regions and mostly urban and peri-urban areas. As a result, politicians, civil servants, development actors, and academics have limited research-based information to guide their policies, laws, and interventions. More research on the local realities of the various South Sudanese communities, showing their ways of local governance and giving voice to local communities is crucial for increasing the role that stakeholders can have in improving the living conditions of the South Sudanese people (Oyono & Galuak 2015, 28). From our research we identified several paths for future research necessary for stronger land security of the people of South Sudan. Those are:

- State and non-state land administration practices in rural areas.
- Land-related inheritance practices of different ethnic groups.
- Processes of community-led land demarcation and registration.
- Impact of community mediation on rule of law building efforts
- Growing role of women in leadership positions.



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