Falling Through the Cracks

Reflections on Customary Law and the Imprisonment of Women in South Sudan

A project of: the Strategic Initiative for Women in the Horn of Africa (SIHA)

Complied by: Deidre Clancy
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## Acronyms

<table>
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<th>Acronym</th>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and People's Rights</td>
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<tr>
<td>CEDAW</td>
<td>Convention Against All Forms of Discrimination Against Women</td>
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<td>CPA</td>
<td>Comprehensive Peace Agreement</td>
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<td>FGM</td>
<td>Female Genital Mutilation</td>
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<td>GOSS</td>
<td>Government of South Sudan</td>
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<tr>
<td>HIV/AIDS</td>
<td>Human immune deficiency virus / advanced immune deficiency virus</td>
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<tr>
<td>IDP</td>
<td>Internally Displaced Person</td>
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<tr>
<td>I/NGO</td>
<td>International / Non Governmental Organisation</td>
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<tr>
<td>PLACE</td>
<td>Peoples Legal Aid Centre</td>
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<td>SIHA</td>
<td>The Strategic Initiative for Women in the Horn of Africa</td>
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<tr>
<td>SPLA/M</td>
<td>Sudanese Peoples Liberation Army/Movement</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNICEF</td>
<td>United Nations Children Fund</td>
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<td>UNMIS</td>
<td>United Nations Mission in Sudan</td>
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<td>WOTAP</td>
<td>Women's Training and Promotion</td>
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Foreword

"Why don’t you go and build a school or something”

Comment from an officer in South Sudan to a SIHA researcher

The objective of this research paper is to shed light onto women’s human rights in the newly independent Republic of South Sudan and to call attention to the thousands of women who are adversely affected through their engagement with the current customary and statutory legal systems.

Over the past half-century, the women of South Sudan have carried the burden of violent conflict and the accompanying disintegration of their communities, as well as endured the agony of displacement and life in refugee camps. These women remained resolute in the face of racism, discriminatory policies and attitudes during the 39 years of civil war that plagued the Sudan, striving to earn a living and sustain their families and communities amid extreme hardships.

Many of these women have not had the opportunity to sit at the benches of formal education institutions; however, they have learned from their ongoing privation and struggle to confront the challenges that they deal with on a daily basis. This is not to undermine the merit of formal education; rather, it is to challenge the notion that quantifiable development policies like education are the solution to “Africa’s problems”. Rather that we should acknowledge that equal access to education elsewhere in the world has been the result of the mainstreaming of human rights and democratic principles.

Associated with this is the complex and delicate nature of identity politics in South Sudan. Indeed, one of the most pressing issues facing the people of this emerging nation is how they will be able to create an identity based on human rights while also initiating a development process that provides citizens with basic services, such as education, health care and clean water and sanitation. This is a dilemma that has been evident in many of Africa’s nation-states and has led to the creation of an identity where people are defined in relation to their progress and what they can show in terms of development, with achievements in human rights and democracy taking a back seat to some sort of tangible prosperity. It is critical to bear in mind that without equitable human rights, development will not be attained.
As women activists and human rights defenders in the Horn of Africa, SIHA is aware that the key to positive social change does not lie solely in economic and political processes. It is also about addressing the traditions, practices and views that perpetuate prejudice policies and human/women rights violations.

Against the relativist argument that emphasizes cultural specificity and dismisses custom as a strictly community- or society-based concern, this paper focuses on the narratives of women in South Sudan who have been victimized through repression under customary law systems. Accordingly, this paper challenges the now popular notion that customary law should be empowered as a tool for conflict resolution, which without strong rule of law behind it, can become dysfunctional, leading to massive conflict within and between communities. Using customary legal frameworks without due consideration for the consequences of their application, as well as the basic capacity of traditional institutions has resulted in women being held hostage to the dowry system, which as a system itself is often manipulated and adjusted by certain stakeholders and actors within the community, made worse by the deprivation and poverty in the new Republic of South Sudan. The use of customary law systems has led to the dehumanization and detainment of women and is something that needs to be addressed with the universality of human rights in mind and with women's contribution to the livelihoods of their families and communities being disassociated from the dowry system altogether.

This paper has tried to highlight these issues by giving a voice to the women who have been and continue to be persecuted under the traditional law system in South Sudan. It illustrates the ways in which the often-ambiguous legal frameworks of customary law perpetuate violence and discrimination against women and how, when it comes to women's human rights, these are patriarchal institutions that contribute to gender-based violence and the victimization of women and young girls. In this study we attempted to provide an analysis of the current statutory law in South Sudan and stressed the importance of empowering the present Bill of Rights, which can be used as a tool of advocacy for women's human rights. In the end, we have tried to draw attention to the conditions of thousands of women who are being oppressed under the current legal framework on the basis of their gender identity and how these conditions are hindering women and girl's development, as well as their contribution to the nation-building process in the newly independent state.

Finally, this paper has been the concern of the SIHA Network and its members inside South Sudan for the past five years and it is the product of the effort of a large number of Southern Sudanese women and men all with diverse backgrounds as activists, grass-roots leaders, and elites who supported the findings of this research. Without all of their hard work and devotion this research paper would not have been possible.
Acknowledgements

This research paper has been the undertaking of Deirdre Clancy, a human rights lawyer and the current co-director of the International Refugee Rights Initiative based in Kampala, Uganda. SIHA would like to thank Deirdre, who made herself available to conduct this research, despite her pre-existing responsibilities and engagements. In light of her legal expertise, her knowledge of South Sudan, her feminist orientation and her understanding and appreciation of local communities’ cultures and perceptions, Deirdre was certainly among the most experienced and knowledgeable researchers SIHA could have asked for, especially for such a complex and controversial task.

The research paper would not have seen the light without the generous support of Oxfam Novib. We are very grateful for their commitment and support to women’s human rights in South Sudan and across the Horn of Africa.

This study has been based on the primary field work of Ms. Bashair Ahmed, a consultant contracted to work for SIHA in 2009. The field research took place in Juba, Rumbek and Wau during March, April and June of 2009, with further research undertaken in October and November 2010 by Ms. Anke Kluppels, Ms Liemia Al Jaily and Achol Dut and members of the SIHA Network Programme team. In July of the same year, Deirdre Clancy had also held several meetings and community consultations in Juba.

SIHA extends its gratitude to Ms. Regina-Naynkir Akok at the University of Regina (Canada –SK) and Dr Lucy Hovil, Senior Researcher at the International Refugee Rights Initiative who edited and reviewed this text, as their comments and additions formed an integral part of this paper.

In November 2011, SIHA partners discussed the findings of the report in a consultation meeting held in Juba, South Sudan and the participants made recommendations about the finalisation of the text and how to move forward with its publication. Accordingly, SIHA is particularly thankful to: Ms. Anyieth D’Awol, activist and Director of the Roots Project in Juba; Dr. Jok Madut Jok, the Under Secretary to the South Sudanese Minister of Culture, Youth and Sports; and Dr Biong Deng, the Director of IDEA in South Sudan. Additionally, this report would not have been possible without the cooperation of the SIHA Network member organisations in the Republic of South Sudan, namely: Ms Kuer
Gideon of the New Sudan Women’s Federation; Ms. Linda Ferdinand of WOTAP; Soumia Alshmbaty from the Paralegal Association in Wau; Ms. Karak Mayik Nyok, the Director of DIAR; and Ms. Dolly Anek, SIHA Chairperson.

SIHA is also appreciative of the assistance provided by the United Nations Mission to Sudan (UNMIS) Rule of Law and Gender Units and the Traditional Authority Chiefs in both Juba and Wau cities. SIHA Network is especially grateful for the collaboration of the Ministry of Legal and Constitutional Affairs and the Gender and Social Welfare Ministry. Above all, our gratitude goes to the Republic of South Sudan Prison authorities in Juba, Wau and Rumbek for giving SIHA and our researchers access to women detainees and those on remand, as well as to those who assisted with interpretation and translation.

Joanne Crouch and Caroline Magambo of SIHA Programme team have spent days revising this document. Katie Flannery and Fauzia Sewa, interns at the International Refugee Rights Initiative in Kampala, and Louise Hogan, intern at SIHA in Kampala, who provided research assistance and helped in the editing process. Furthermore, we would also like to extend thanks to Pete Jones and Alicia Luedke for their added contributions in revising the paper.

Hala Al Karib

SIHA Network Director
Summary and Key Findings

Context

The signing of the 2005 CPA (Comprehensive Peace Agreement) and the transition phase that followed revealed the pressing need to establish the norms, procedures and sources of authority that would guide the 2005 Interim Constitution and ultimately, the Transitional Constitution of Southern Sudan that came into force in July 2011. As the new state grappled with the interaction between different legal norms and different visions of how the state should evolve, the Transitional Constitution expressed allegiance to custom and tradition as well as legislative democracy, as influenced by international human rights law.

As a result, the current Transitional Constitution identifies both “the customs and traditions of the people” and “the Constitution” (containing an extensive Bill of Rights) as sources of law. In addition, it recognizes the role of traditional authorities in the structures that are responsible for the administration of justice. The elevation of these two inherently distinct systems as equal sources of law creates a natural tension, which must be negotiated at both the theoretical and the practical level.

The fact that both custom and the role of traditional authorities has been entrenched in the new South Sudan legal system reflects the demands facing the emerging state, as well as its future aspirations. As a matter of political practicality, the creation of allegiances and forms of devolved governance at a local level are essential to ensuring order in a context in which the central government is expected to remain fragile, at least in the short term. Engagement with customary law and traditional authorities is therefore a strategic and pragmatic response to the need to expand (or ensure) state control. However, there is an ideological dimension to this approach that must be noted: the place given to custom in the constitutional order also reflects a desire to promote the unique characteristics of the peoples of South Sudan as the inspiration for, and basis of, the new state.

At the outset, it must be recognized that Customary Law continues to be the primary system of conflict resolution in the state and despite the increasing reach of the statutory system, customary law is expected to retain a strong influence in Southern Sudanese society. In negotiating the co-existence of both forms of law into a coherent whole, it is anticipated that customary law and practices will be subject to codification. With marriage, family and a particular conception of the role of women in society so integral to the application of customary law, an analysis of how custom operates is essential, as the engagement of Southern Sudanese women with “the law” is permeated by this reality.
However, as this process occurs, the mechanisms utilized by the new state (police, custody, prison, etc.) will continue to enforce different versions of customary law. This is happening in a rapidly changing socio-economic context, which is forcing contradictory principles into disconsolate confusion. Women and children, who are frequently on the front line of this encounter between custom and prevailing authority, are finding it difficult to negotiate the fault lines. They are falling through the cracks. Any strategy for change must take into account both short term and long term objectives.

This piece of research intends to explore the manner in which women are impacted by the existence of parallel legal systems, the application of customary law and the gaps between legislative theory and practice. The effects of these factors on women are told through the stories and the experiences of the women SIHA encountered in some of South Sudan’s detention centres. These stories give life to the reality of women’s experience, while also interrogating key themes and issues that their experiences raise with a view to creating an agenda for change.

**Key Findings**

When conducting the research for this paper several key issues became apparent that relate to the application of both customary and statutory law. These issues are linked to the social norms that govern relations, how customary law addresses these norms, as well as the procedures and processes that customary court systems follow and their subsequent impact upon women. Although the statutory and customary systems are structurally dissimilar, the interaction between the two simply reinforces the ensuing vulnerability of women and their subjection to the law.

**Dowry:**

Dowry, also known as bride-price, is a transaction of either money or items of high monetary value, such as cattle, which are passed from the husband’s family to the bride’s family. With escalating bride-prices in a post-conflict environment, characterized by high inflation and limited economic capacity, women are increasingly being seen as a source of wealth. Where divorce entails return of the dowry, even in instances where violence being committed against the woman is at the heart of the problem, resistance to divorce is high. This is true even among the woman’s own family, as they fear having to repay the dowry. Similarly, the pursuit of the greatest amount for a daughter impacts upon the choice of husband a family may elect for a daughter/sibling. The result is often that women are compelled to marry men against their will or with whom they would not like to be married, leading to the resultant violation of their bodily integrity as they perform the intimate components of a marriage that are expected and obliged of a wife.

Where rupturing the marriage bond is seen as a harm against not just the immediate family, but the broader family/community, and with dowry being a central component of the marriage bond, customary law courts and the broader family network of a couple, frequently orientate their position in respect of dowry with scant regard for the implications for women’s human rights.

Similarly, responses to sexual violence against women and girls are determined in part by their bride wealth value. Consequently, a mature woman who is raped may be deemed
unworthy of compensation or pursuit of justice, while the rape of an unmarried young woman is considered to be a greater crime – not necessarily with regards to the harm done to the woman in question, but rather to the family as a result of her diminished bride wealth.

**Divorce:**

Although divorce is possible within both the customary and statutory systems, the actualization of this provision is far from straightforward, with maintenance of the marriage bond heavily favoured by both customary and statutory authorities. In addition, divorce is not only hard to obtain, but furthermore, places women in an increasingly vulnerable position both economically and socially and can often result in the loss of child custody.

All of the imprisoned women SIHA encountered who were seeking divorce told stories that suggested *prima facie* grounds for divorce, such as domestic violence or lack of child maintenance on the part of the husband, yet they had all failed in their petitions.

What's more, it is not just external barriers like customary law and family pressure that prevent divorce; it is also the acute awareness of the social and family costs associated with seeking separation that dissuades many women from even initiating a request. Conscious of the impact upon their children or other family members whose financial stability may be disrupted by the return of dowry, a sense of obligation is often what keeps women in an unhappy and/or violent marriage.

Consequently, women often saw an admission of adultery as the only solution to their problems. The husband would then take them to court and the woman would often be imprisoned. Women in such circumstances would regularly spend around six to nine months in incarceration and pay a fine with the objective of attaining their longer term freedom, i.e. freedom from their unwanted marriage. Women are therefore finding themselves being forced to compromise both their freedom and their bodily integrity in the pursuit of gaining divorce often, as in the accounts told, from violent and unhappy marriages, which were detrimental to both the women and their children.

**Perception and Normalization of Domestic Violence:**

Interrogating the mechanisms of customary and statutory law and how it impacts women needs to be seen alongside broader social understandings of gender based violence. For many, such violence is so commonplace and normalized; they do not believe it to be an issue, seeing it as a standard part of life. As one official commented during the research, “my mother was beaten, what's wrong with that?” Moreover, women face being seen as “trouble-makers” should they raise issues of domestic violence, despite the fact that in theory, it qualifies as grounds for divorce in most customary systems.

This perception of domestic violence as acceptable results in a lack of acknowledgement of the violence and abuse that often acts as a driving force behind the actions taken by the women who end up in prison for using self-defence. The domestic violence that many women experience is so severe that it should be considered by the court as a mitigating circumstance and should furthermore, have an influence on the sentences that women receive.
In certain cases that SIHA encountered, the domestic violence that the women faced should have had a significant bearing on the assessment of criminal responsibility itself.

With customary courts acting as agents that both impose and entrench norms and codes of conduct, the negligence towards considering domestic violence during court cases brought against women, tacitly gives consent and validation for domestic violence, reinforcing it as conventional practice.

**Rape:**

Rape, like many of the other issues facing women in South Sudan, is seen in terms of the collective as opposed to the individual. The way that rape is addressed, and the protection and justice provided to rape survivors, is not only influenced by the age of the victim, but also by their social standing and value, often in relation to bride price. Furthermore, when dealt with by the customary courts, rape tends to be an issue that demands social reparation, rather than justice for harm done to the individual. Finally, marital rape is barely looked upon as a violation of women’s human rights and is normalized by both the husbands, as well as the customary courts that fail to offer redress to women.

**Use of Imprisonment:**

The use of imprisonment as a form of punishment is new to South Sudan and hence, its application is still in need of clarification in terms of its scope and deployment. The practice of imprisonment for criminal and civil acts has consequently infused both the statutory and customary systems, and given that the legal frameworks run in parallel, has created confused jurisdiction in relation to incarceration.

In some of the cases encountered, imprisonment was found to be used as a tool to coerce women to change their mind and deter them from seeking a divorce. In other cases, imprisonment was used alongside fines, which naturally compromised the capacity of the imprisoned to pay their way out of remand. Similarly, there was confusion that existed with respect to whether fines were required for release and indeed; there were many instances where detention was applied to women who were unaware of the nature of their sentence or crime.

What’s more, the meshing of customary and statutory means of punishment and reparation has resulted in harsh combinations of punishment by way of imprisonment and punishment by way of providing compensation to a family or a community, all of which is occurring without clear guidance on how exactly the prison system can be best used.

**Partiality and Influence:**

The decisions made by customary courts are often subject to the influence of the “complainer” and their family, which when combined with the existing bias in favour of the plaintiff (“complainer”), can heavily sway the eventual verdict. Coupled with the fact that when women are brought before a court they are normally given limited opportunity to set out the case and establish the events that may be relevant to it, this partiality towards the plaintiff often results in women being given a lengthy imprisonment, a hefty fine, or both and in some cases, results in women having to return to their marriages.
This is compounded by the problem that the “complainer” generally has the power to choose the type and location of the court that best suits their interests. This existence of multiple avenues of redress can sometimes provide steadfast litigants with a greater possibility of finding a solution that they desire. Furthermore, the decision of one court may not prove binding, with litigants finding ways to deploy a second court if the first did not apply a judgement that the litigant found agreeable. For that reason, the very plurality of courts and their associated hierarchies makes negotiating the system incredibly complicated for women who usually have limited or no legal support.

**Malleability of Customary Courts:**

Customary courts are seen as more flexible in the manner in which they conduct themselves. Less subject to rigorous legal proceedings, customary judges are able to obtain information from multiple sources regarding a specific case and its context. Based on this information, customary judges form an opinion and make a judgement in a way that they deem fit. As discussed above, however, because of the partiality towards the plaintiff or “complainer,” the accused is placed in a vulnerable position regarding the way the account of the case is heard, the facts that come to light during the hearing and how blame is eventually determined.

On top of that, all forms of domestic violence should be seen as *prima facie* grounds for defence and be considered as crimes in-and-of-themselves. Where courts ignore or fail to acknowledge such circumstances women become twice as victimized in terms of both the punishment they receive and justice for the crimes committed against them.

**Displacement and Migration:**

In light of the 39 years of conflict that plagued the Sudan, the South Sudanese population has been engaged in both forced and voluntary migration. This migration and displacement that accompanied years of civil strife is now being followed by an inflow of internally displaced peoples (IDPs), refugees residing in neighbouring countries and foreigners coming to earn a living in the newly independent state. These demographic shifts mean that one persons understanding and conception of legality and customary law can differ vastly from that in the location where they are brought to court, resulting in uncertainty for many on the ground.

**Lack of Systematization between and across Customary and Statutory Authorities:**

The confusion that arises as a result of poorly systematized legal authorities creates loopholes and lack of clarity in judgments. Women frequently found themselves subject to multiple courts and authorities deployed at the will of the plaintiff or “complainer.” In some cases, where divorce had been granted by one court, it had not been recognized by a second court to which the husband/family member had appealed, often filing a complaint of adultery to invalidate the original approval for divorce. When this occurred, women who believed they were embarking upon new, legitimate relationships were suddenly subject to trials for adultery.
In addition, the lack of documentation enables plaintiffs to continually bring a person to trial for the same offence or even new ones following an acquittal or dismissal by previous courts and judges. As a consequence, women accused of adultery or other crimes are unable to contest the charges, either due to lack of information, lack of financial capacity or imprisonment.

The lack of documentation, poor administration, absent capacity of courts staff, movements of judges and chiefs between court forums and lack of resources, both human and material have proven to be a major difficulty in properly applying justice and processing cases. Deficient documentation, in particular, has often meant that women are unaware of the charges being brought against them and, in many cases, papers had never been prepared, meaning quite literally that women in prison were lost within the system. This makes the task of building a case hugely complicated, even for those lawyers and legal aid clinics that advocate for these women. The confusion and lack of clear process in both the customary and statutory systems has made engaging with, and negotiating their situation, a perplexing task for the women who seem to be in internment without end.

**Access to Legal Support:**

Access to legal support is a fundamental problem that prolongs women's detainment and perpetuates the uncertainty that comes with many of their prison sentences. In the words of one guard, "in Sudan one defends oneself as there is no money for lawyers." And despite the provision of paralegal support and the creation of legal aid clinics by local NGOs, INGO's and larger bodies like the UNDP and government of South Sudan, access to justice for women in prison is limited, impeding women's ability to surmount the complex legal system.

**Torture and Harassment During Internment and Interrogation:**

Torture, sexual violence and harassment were commonplace for many of the imprisoned women interviewed during the research and were a problem acknowledged by many of the prison officials. In fact, many of the prison officials that were spoken to noted that, when moving out of police custody into the prison system, women were frail, weak, badly beaten and afraid.

**Prison Conditions:**

The conditions in which women prisoners were kept were often destitute, with restricted access to health services both for themselves and their children. The children, who are often interned with their mothers, were therefore forced to endure the same desperate conditions associated with imprisonment. Medical attention and support was severely lacking, especially for those considered to be mentally ill, with psychosocial support identified as a key area of need for many women. Additionally, female inmates were expected to conduct the same domestic and pain-staking duties that were expected of them in Southern Sudanese society. For instance, women were required to prepare meals and drinking water for the male inmates; a process that usually began at 5am.

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1 Interview conducted by SIHA Network: Juba, October 16th 2010.
**Interrelationship of Norms and Authorities:**

The intertwined nature of the customary and statutory systems has resulted in an enmeshed set of principles and authorities that shape understandings of legality. Customary chiefs, for instance, often act as advisors to statutory judges and engagement and/or consultation with customary norms and perspectives was commonplace in the application of statute law. This practice has meant that the statutory system is infused with customary and traditional social norms and values, rather than with statutory and constitutional standards.

However, there are inherent tensions between the principles of customary law, statutory and constitutional law, as well as international human rights standards, which is particularly accurate with respect to how each of these systems regulates the role of women in society. With the independence of South Sudan in July 2011 and the opening of a constitutional review process, there is a space to examine the reality of these legal complexities.

Human rights are not inimical to evolving customs and traditions. For instance, the conception of human rights as enshrined in the African human rights system, explicitly takes into account recognition of customary and community values. Similarly, the right to self-determination is a basic human right laid out in the international human rights instruments. Finally, as the foundation of the new state’s constitution, human rights are part of the new legal and social environment with which the customary system must now engage.

**An Agenda for Action**

This report considers multiple steps that could be taken to address the conditions of the thousands of women who are being adversely affected through their engagement with the parallel legal systems of customary and statutory law. Rather than establish a set of recommendations, the objective is to set out possible avenues of action and progress, acknowledging that, while there is no fixed solution to the problems faced by the women in South Sudan, different actors and stakeholders can exert influence on the system through a variety of approaches discussed here.

**Encouraging the Evolution of the Customary System:**

Given that customary law is fluid and responsive to changing realities, it therefore has the capacity to incorporate new customs and processes that reflect new understandings of human and women’s rights. Customary law itself is an amalgamation of different strains of legal thought and hence has the malleability to be infused with new approaches that recognise the changing role of women in South Sudanese society. Accordingly, increased education and awareness around women’s human rights and the benefit that this can provide to the community at large, can result in positive and grass-roots changes to the customary law system.
Opposing Violent Practices:

Current practices that are clearly detrimental to women's development and their contribution to their community's well-being should be opposed and reformed, for example, the practice of holding women captive to dowry. Strong stances by the central government can be taken on matters that are considered to be expressions of custom and culture. For example, during the interim CPA period, female genital mutilation (FGM) was categorically resisted by the then, South Sudanese legislature. While abolishing bride-price and the practice of dowry in its entirety may not be entirely possible, adjustments to the current system could be made to better the plight of women by disassociating them from the livelihoods of their families and communities and decommodifying female brides.

Promoting the Implementation of Current Legislation that tends to Protect Women’s Rights:

Where legislation already exists, such as the Child Act, the Bill of Rights and those aspects of the Penal Code that protect, for example, women’s bodily integrity, it should be endorsed and adhered to as a tool to enhance the welfare of South Sudanese women. Furthermore, advocacy strategies can be developed to encourage the Republic of South Sudan to sign and ratify international human rights instruments, such as CEDAW (The Convention Against all Forms of Discrimination Against Women) and the Convention on the Rights of the Child, as well as regional human rights mechanisms, such as The Additional Protocol to the African Charter on Human People's Rights on the Rights of Women.

Exploring the Roots of Custom and Tradition and Reflecting on Human Rights in the Context of Custom:

Questions relating to the extent that current practices can be considered “traditional” is unambiguously controversial. As mentioned above, customary law itself is a combination of multiple cultural, legal, and imposed norms that dictate how a society regulates itself. Consequently, customary law is receptive to change. As such, dialogue should be created with the traditional authorities that both establish and enforce social and legal standards. As one of SIHA’s partners noted, “we need to reform the customary system, sit together, join, and talk to the jurisdiction.” Furthermore, “women internalize the tools that are oppressing them,” and as such, need to have their own understandings challenged in order to foster significant social change.

Creatively Engaging with Traditional Authorities:

Correspondingly, the chiefs themselves are principle actors in entrenching and conserving customary norms and values. At the same time, they are also responsible for meeting the high demand for traditional forms of dispute resolution and justice. When combined with the statutory system's limited capacity for administration and restricted reach into communities, the predominant role of the chiefs means there is a vital need to engage with traditional authorities over the type and quality of justice they are providing to infuse their application of customary law with human rights principles.

2 Interview conducted by SIHA Network: Juba, November 2011.
3 Ibid.
Getting Involved in the Constitutional and Legislative Reform Process:

Active involvement of various participants in the constitutional review process is essential to developing legislation that protects women’s human rights. With no existing family law and family matters being deferred to the customary courts, it is crucial that different actors, specifically women, push for a family law that recognizes their vital role in South Sudanese society and safeguards their rights and dignity as human beings. The potential codification of customary law in its current state also demands rigorous engagement with the constitutional review process, as harmful traditional practices may become solidified in the legal structure of the new state.

Use of Regional and International Human Rights Mechanisms:

The Government of South Sudan is currently reviewing which international and regional treaties it will decide to sign and ratify. Activists should consider urging ratification of not just the core UN human rights treaties and their treaty monitoring bodies, but also regional treaties such as the African Charter on Human and People’s Rights; the African Charter on the Rights and Welfare of the Child; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003; and the International Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact). Membership of the East African Community would also create a set of additional frameworks—and a Court accessible to South Sudanese women—which could be used to promote and secure women’s rights.

Reforming the Law on Adultery:

The 2008 Penal Code makes clear that, the guilt or otherwise of a married woman accused of adultery is not a key priority of the state. And despite the pervasive use of detention to punish women for adultery, in practice it appears, at least for the time being, that the use of legislature on issues relating to adultery is being phased out. Whether or not this reflects the impact of the above stated policy is not known, but the development is certainly something upon which a strong campaign for reforming the law on adultery can be built.

Bringing the Practice of Imprisonment in line with Statutory Requirement:

Prison officials and police authorities were frequently unaware of, or regularly neglected, the statutory requirements surrounding the use of detention during investigation, post-arrest and the handing down of charges. As such, increased training and awareness raising sessions for prison officials and police authorities, as well as possible sanctions for those violating human rights through the inappropriate application of punishments, especially with respect to the rights of the child, should be deployed. Furthermore, advocacy and campaign strategies could be developed to demand respect for policy guidelines relating

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4 These include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture.

5 East African Community Secretariat, EAC Strategic Plan on Gender, Youth, Children, Social Protection and Community Development, March 2010.
to the use of imprisonment and the payment of fines. Finally, to eliminate the uncertainty discussed previously, the right of traditional authorities to remand persons in custody should be clearly spelt out to avoid arbitrary or unlawful detainment.

_Tackling the Violence and Suffering Created by the Institution of Bride Price:_

The question of dowry, its meaning, its value and its future in South Sudanese society, is contentious. However, given its current pivotal role in economic and social life, its resolution will be critical to the development of South Sudan, and in particular South Sudan’s women. The constitutional review process currently underway could provide a space for civil society to start resolving this question, looking at the impact of some of the practices surrounding the implementation and experience of customary law. Exploration around how the practice of bride price, specifically results in women being forced to remain in violent marriages and how it sits in contradiction to a host of human rights guaranteed in the Transitional Constitution, would be a good starting point and a beneficial way for people to begin engaging with an otherwise controversial issue.

Correspondingly, polygamy and its oftentimes-negative impact upon women in society, is something that needs to be addressed, if not challenged. Given its prevalence in South Sudanese society, like dowry, it may not be entirely possible to try and uproot the practice altogether, however, implementing the already existing ban on forced marriage in the Transitional Constitution would be a place to start opposing its more harmful elements.

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Overall, there is a definite need for action against some of the mechanisms and ways in which customary law is applied in the current legal and constitutional environment. Without such action, women’s human rights will be gravely compromised in the pursuit of societal peace, which itself elevates men’s position of power and further entrenches women’s subordinate role in society. Customary law is a vital source of justice for the vast majority of South Sudanese and it is important that it is preserved, both as an expression of culture and identity and as means to deal with the limited capacity of the statutory system. Customary law should therefore be strengthened and enabled to evolve and integrate human rights, especially women’s human rights, not just as an obligation to the present Bill of Rights, but also as an obligation to social peace in a country wracked by decades of civil war.
Section I

Introduction

This Report confronts the narratives that underlie the impact of customary law on women and children in South Sudan. For government officials struggling to create a coherent system of laws that both recognises the legacy of the territory’s unique history and embraces a modern system of governance, on-going compromise is required. For South Sudanese women activists intent on positively transforming lives, it is about constant negotiation at both the individual and the systematic level. And finally, for the women who find themselves falling through the cracks of an overwhelmed and ambiguous system of law in a fragile new state, it is a daily battle relating to both their suffering and their survival.

In short, as a result of the operation of core aspects of customary law and its associated mechanisms, South Sudanese women face significant challenges in both their private and public life, most particularly in dealing with questions relating to the safety and security of themselves and their children within the context of marriage and family. The way in which these norms and processes are currently being exercised in communities emerging from decades of conflict is resulting in cycles of imprisonment, exclusion and suffering. Cycles, which seem to serve the interests of no-one; not the women themselves, their families or their communities.

As a constitutional review process gets underway in South Sudan, there is a vital opportunity to ask questions about the role that customary law plays in protecting women’s rights and development in South Sudan. Crucial questions include:

- What are the women of South Sudan experiencing day-to-day in terms of exercising their human rights in their marriage and family life? What are they saying about what is fair and just?

- What part do customary laws and mechanisms play in this experience?

- Most importantly, how can the experiences and aspirations of South Sudanese women be reflected in how these questions and their answers are formulated?

This paper is a starting point for engaging with some of these questions. Based on research carried out with partners of SIHA in South Sudan in 2009 and 2010, and, in particular, on
in-depth interviews with women in prison in Juba, Rumbek and Wau, the report attempts to reflect on the meaning and effects of customary norms and practices in South Sudan by recounting the experiences of a specific group of South Sudanese women. The report uses the snapshot of these experiences as a basis for exploring some of the challenges facing women in South Sudan in negotiating the enforcement of customary law norms relating to marriage, divorce, motherhood and violence against women.  

**Background to the Situation in South Sudan**

The question of what role customary law should play in women and children’s wellbeing in the new South Sudan is set against the backdrop of immense social, economic, development and security challenges. During the second phase of civil war that took place between 1983 and 2005, it is estimated that over two million people died, more than four million people were internally displaced and more than half a million people became refugees in neighbouring states. The destruction and underdevelopment created by the conflict was therefore harrowing. By the time the war had officially ended in 2005, there was not a mile of paved road anywhere in South Sudan, there was no electricity service, and 51% of the population was living below the poverty line. Notwithstanding the major achievements by the people of South Sudan and their government since the CPA was signed in 2005, in 2010, 1.2 million people still faced food insecurity and 8% of all children were severely malnourished.

As the new state came into being in mid-2011 with the secession of South Sudan, its people were having to grapple with the multiple challenges of building a new economy; ensuring a proper transition from military to civilian governance amidst ongoing insecurity; establishing governance and service infrastructure from the ground up; and, as hundreds of thousands returned from the diasporas, managing the expectations of those demanding to feel the benefits of freedom now, from both within and without. And related to this is the ever present threat of a return to all-out conflict. Indeed, as this report was being finalised, conflict in Southern Kordofan and Blue Nile state on South Sudan’s northern border had erupted and South Sudan and Sudan were engaged in cross border attacks and insurrections, leading to massive displacement along the borders of the two Sudan’s and Ethiopia and across the southern borders into Kenya and Uganda. Meanwhile, a fragile ceasefire was also holding tenuously in Abyei where the final status of that territory had and has still not been agreed.

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6 While there are a number of other crucial areas of the customary system that have a significant impact on the rights and development of the women of South Sudan - including land rights, inheritance and the “giving” of women and children as compensation for killing or accidental death, these issues went beyond the constraints of the research. See, Chief Dennis of Katur Court: Interview, Juba, June 23rd, 2009.
7 Internal Displacement Monitoring Centre, Briefing paper on Southern Sudan: IDPs return to face slow land allocation, and no shelter, basic services or livelihoods, 30 May 2011; ONE, Education is vital for South Sudan’s survival, June 14th 2011.
8 By October 2011 it was reported that there were less than 68 miles of road. See, Krista Mahr, The Great, slow road of Juba: South Sudan’s crucial artery, Time Magazine.
9 IMF, South Sudan Faces Hurdles as World’s Newest Country, July 18, 2011
11 “[A]s a country that is coming into existence after long wars of liberation, inheriting poor infrastructure, volatile political climate, limited capacity for governance, weak state institutions, financial crises, violent ethnic divisions, and uncertain regional and international political atmosphere, the new state of South Sudan will practically be an artificial state for quite some time.” See, Professor Jok Madut Jok’s, Justice Africa lecture in Juba, presented on 25 March 2011,
Within this tumultuous context, the day-to-day experience of the women of South Sudan is one of both turmoil and expectation. Just prior to the termination of civil war and the signing of the 2005 CPA, in 2004 a baseline study on the status of women in Western Equatoria noted that:

“The roles and responsibilities of women in their homes and communities have been in a state of flux and adaptation during the period of civil war, ensuring prospects for peace in the South requires broad transformations in society at large, with undeniable attention paid to the contributions and activism that women will provide to the development of their communities.”

Seven years later, there are certainly signs of hope: the 25% representation rule enshrined in the Interim Constitution has resulted in women being present at all levels of state life; female literacy is up with literacy among women ages 15-24 currently at about 28%; and South Sudanese police officers have begun to receive special training on how to assist victims of gender-based violence.

While many of the findings of the 2004 baseline study retain their currency, women and children continue to be especially vulnerable within a generally struggling population. Problems of poverty, marginalisation, violence, poor healthcare, lack of family support and community fragmentation were evident in all of the women’s stories collected by SIHA. In 2010, for example, it was found that, infant, child and maternal mortality rates were all high; family planning remained unavailable to most women and young women continued to be susceptible to early and forced marriages, with decades of war and poverty increasing the pressure on families to leverage their daughters for bride price. In fact, in July 2011, UNICEF reported that the country had one of the worst rates of maternal mortality in the world with an average of 16 female deaths per day as a result of pregnancy and childbirth. The shocking truth is that a young girl in South Sudan is three times more likely to die in pregnancy or childbirth than to begin secondary school.

With the pressing need for women’s contributions to the development process in South Sudan, the transition that is taking place presents not only an opportunity, but an obligation, to ask questions about the extent that customary law and practices are helping or further hindering the women of South Sudan from realizing their rights and advancing the development of their country.

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13 Southern Sudan Centre for Census, Statistics and Evaluation (SSCSC), Key Indicators for Southern Sudan, 2011.
14 UNFPA, Working with Police in South Sudan to Assist Survivors of Gender-Based Violence, 20 January 2011, Before the CPA it was estimated that about 343,000 children were enrolled in school. In 2010 the number was over 1.6 million. See, UNICEF in South Sudan, July 2011 factsheet.
15 Infant mortality: 102 per 1,000 live births; Under 5 mortality rate: 135 per 1,000 live births; Maternal mortality rate: 2,054 per 100,000 live births. See, Southern Sudan Centre for Census, Statistics and Evaluation (SSCSC), Annual Needs and Livelihoods Assessment, 2009-2010.
16 United States of America, Department of State, 2010 Human Rights Report: Sudan.
17 UNICEF in South Sudan, July 2011 factsheet. 2011
18 UNESCO, Building a Better Future: Education for an independent South Sudan, June 2011,
The new state is actively trying to cope with the interaction between different legal norms and different visions about how the state should evolve. During the interim period, the standards, procedures and sources of authority that were intended to guide the emerging state were encapsulated in the 2005 Interim Constitution of Southern Sudan, key legislation, and, most recently, the Transitional Constitution of South Sudan, which came into force on 9th July 2011. These instruments attempted to simultaneously express allegiance to two different types of legal norms and authority: South Sudanese "custom and traditions" (as embedded in what is referred to as the customary law system) and modern constitutional legislative democracy (as influenced by Western legal tradition and international human rights law).

As a result, the current Transitional Constitution identifies both “the customs and traditions of the people” and “the Constitution” (containing an extensive Bill of Rights) as sources of law. It also specifically recognises the role of traditional authorities in the structures of the administration of justice. Although the two systems (hereafter referred to as the customary and statutory systems) are increasingly intertwined and share common understandings, to a great extent, they are rooted in a number of fundamentally different approaches to concepts like justice, authority, and issues surrounding the governance of private/public realms of behaviour. Most critically, they reflect different conceptions of the role of the individual and, in particular, women and girls in the community. The elevation of these two apparently separate systems as equal sources of law in the Transitional Constitution therefore creates a natural tension, which must be constantly negotiated at both a theoretical and a practical level. To date, however, women have borne the brunt of the friction that emerges in this interaction.

**Customary Law and the Construction of the New Republic of South Sudan**

The fact that both custom and the role of traditional authorities has been entrenched in the new South Sudan legal system reflects the demands facing the emerging state, as well as its future aspirations. As a matter of political practicality, the creation of allegiances and forms of devolved governance at a local level are essential to ensuring order in a context in which the central government is expected to remain fragile, at least in the short-term. Engagement with customary law and traditional authorities is therefore, a strategic and pragmatic response to the need to expand (or ensure) state control. However, there is an ideological dimension to this approach that must be noted: the place given to custom in the constitutional order also reflects a desire to promote the unique characteristics of the peoples of South Sudan as the inspiration for, and basis of, the new state.

The North/South war which gave birth to South Sudan was, in many ways, a war about identity. Khartoum's rallying philosophy of exclusionist Jihad was one of the bases upon which resistance to the central state and its homogenising project was galvanised. In opposition to this divisionist and supremacist world view, John Dimabior Garang and the Sudan People's Liberation Movement/Army (SPLM/A) created a vision of the “New Sudan,” which emphasised counter values such as equality and diversity.

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19 It should also be noted that a new set of state level constitutions are also being currently drafted and adopted.

20 Transitional Constitution of the Republic of South Sudan, 2011, article 5(b) and article 165(6)(l).
The Transitional Constitution confirms this vision declaring that the Republic of South Sudan “a multi-ethnic, multi-cultural, multi-lingual, multi-religious and multi-racial entity, where such diversities peacefully co-exist.”

Now that the main phase of the war is over, however, and there is no longer a clearly defined common enemy, the challenge of how to create an inclusive and cohesive national vision for South Sudan, that is not just constituted in opposition to the ideological North, needs to be addressed. In what kind of South Sudan can over 70 different ethnic and tribal communities live and evolve within the new nation-state at the same time as expressing their particular histories, cultures and ideas for the future? As Prof. Jok Madut Jok has pointed out,

“[n]ation-building is not just about physical reconstruction, provision of services, or material wealth. It is, in equal measure, about using our shared customs to prevent further escalation of conflict. It is also about upholding values, customs, and traditional practices that can be enshrined in national identity.”

In this context, community customs and traditions as sources of rule-making can become a tool for forging a coherent national identity built on diversity. However, it is also a tool that should neither be over-idealised nor used in isolation from other mechanisms: the diversity of custom is not only its strength, but also its potential weakness, and a number of caveats need to be applied.

First, despite many similarities across cultural boundaries within South Sudan, customary law is neither a homogenous nor static body of law. Each ethnic group has its own specific set of customary laws, which by their very nature, are constantly in flux both in terms of norms and procedure. This flux is ever more pronounced as a result of the massive social changes underway in South Sudan.

Second, what is currently understood as “custom” contains much that does not have its origins in what might be understood as purely “South Sudanese”. In fact, systems of customary governance in South Sudan have been impacted so profoundly by decades of colonialism and war, that only some of their elements can be very loosely called ‘traditional.’

The current structure of the customary courts system, for example, is itself a creation of the Anglo-Egyptian Condominium, imposed by statute as a method of reinforcing the means of colonial governance. It is interesting that when SIHA shared some of the harsh experiences documented by this report with women activists, some of the first responses elicited were “that is not our custom”, “that should never have happened”, “that is not our tradition”. As a recent Rift Valley Institute study on customary law in South Sudan pointed out (with respect to customary law systems throughout Africa, but in particular with respect to South Sudan),

21 Transitional Constitution of the Republic of South Sudan, 2011, part I(1)(4)
22 Professor Jok Madut Jok’s, Justice Africa lecture in Juba, presented on 25 March 2011.
23 Dr Francis M Deng, World Vision Report, A Study of Customary Law in Contemporary South Sudan, 2004: 30
24 Interview conducted by SIHA Network: Rumbek, November 10th 2010
“[t]here is no such thing as “unadulterated” customary law, if this implies an isolated and untouched indigenous body of law. Some aspects of today’s local laws were the product of British colonial ideas of what African tradition was; many other aspects have evolved and emerged from changing societies since then, as well as from continuing government interpretation of custom.”

**Methodology**

The research for this report was carried out with partners of SIHA in South Sudan in 2009 and 2010. In particular, it is based on in-depth interviews conducted with women in prison in Juba, Rumbek and Wau in mid 2010, augmented by focus group discussions with South Sudanese women’s rights activists and women engaged in cases before the customary courts, as well as interviews with key interlocutors (judges, prison and government officials), followed by desk-based research.

It is acknowledged that the majority of the in-depth interviews conducted during the research reflect perspectives from a very particular point of view of women in prison. Discussions conducted with persons in detention, by their very nature, tend to reveal only one side of the story. In particular, the hope that something might be done about their plight is likely to have strongly influenced the women’s responses. Interviews with activists and governmental officials were also undertaken and a number of hearings before courts in Juba and Rumbek audited. The report, however, is deliberately anecdotal and intentionally privileges the perspectives of women caught, or working, within the system through the interviews with prison victims and focus groups in three specific sites. The report therefore cannot claim to offer an objective analysis in terms of the individual cases themselves and specifically with regard to the accounts of the events, which led to the women’s imprisonment. However, the consistency of themes and views that have emerged suggest that the findings have resonance and importance beyond the data.

It should also be noted that interviews were carried out with women who were in prison for murder or other offences that did not directly relate to questions surrounding personal rights. Not only did these interviews provide insights into the process of the administration of justice for women within the system more generally, but in many cases, the situation in which the women found themselves appeared to be directly linked to an environment in which their rights had been violated in relation to aspects of the operation of customary law and practices, whether through forced or early marriage or the practice of physical and sexual violence.

Finally, it should be pointed out that although the researchers noted the particular legal tradition within which the women and the cases were associated, this is not emphasised in the analysis. The objective of the research was to identify the common challenges faced by women interacting with the system as a whole rather than to ascertain the content of particular customary systems.

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25 Cherry Leonardi et al Rift Valley Institute, Local Justice in Southern Sudan, October 2010,
The Research Sites

The three sites selected for interviews and focus group discussions with women who were engaged with the legal system – Rumbek, Wau and Juba – reflect the socio-cultural diversity of South Sudan. Juba is both the capital of South Sudan and the capital of Central Equatorial State and was a key garrison town for the Government of Sudan during the conflict. It has a diverse population, including increasing numbers of foreigners, as was reflected in the prison population survey, and serves as a major political centre in South Sudan for advocacy work. Several customary courts operate in Juba, with Katur B Court being the main court receiving cases from multiple ethnic groups from across Juba, including the Bari and Mundari, amongst others. When the researchers visited Juba prison in November 2010, there were 53 female prisoners of which 20 were on remand and seven were non-nationals. There were also many female prison staff members assisting.

Rumbek is the capital of Lakes State and was the interim administrative centre for the SPLM/A during the conflict. The city is the home to three Dinka tribes: Aliab, Chic and Agar where the customary system tends to dominate, as was reflected in the stories of women in prison during the research. Non-Dinka peoples, such as Atout and Jurbel, also live in Rumbek with a small minority of other ethnicities. There were 20 women detained in Rumbek prison in November 2010, when the last prison visit was conducted by SIHA.

Wau, the capital of West Bahr Al Ghazal and the second largest city, and is culturally, ethnically, and linguistically diverse, with its residents including peoples of Fertit, Dinka, Luo, and Arab origin. It therefore hosts a variety of customary courts. Like Juba, it was one of the main garrison towns of the Government of Sudan during the conflict, and as such, the judiciary remains connected ideologically to the North, with the 1991 Penal Code and Sharia continuing to strongly influence customary court rulings. There are several legal practices now in existence but the costs are generally too high for women to access their assistance. During the 2010 researchers’ visit to Wau prison, there were 17 women and two children present in the facility. Four women were attending court hearings and six of the women were in pre-trial detention.

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26 One expatriate noted to the author that, South Sudan had the highest staff/prison ratio in the world; however, the high number of staff has not, it seemed, translated into better conditions, information flow or access to assistance for prisoners.

27 Interview conducted by SIHA Network: Juba, June 25th 2009.

28 All had been remanded by the formal system, although some had been remanded further to the application of customary law rules or principles. It should be noted that during a previous visit by the researcher there were women present following remand on the decision of the customary court, but they had been released by the time of the second visit.
Section II

Background to the South Sudan Legal System

South Sudan has a complex and fluid plural legal system, which over decades of conflict, has adopted, and adapted to a variety of legal traditions in order to promote social cohesion, maintain power, or engineer change. As a result, the principles, laws and mechanisms that make up the current system, formally constructed on the twin pillars of South Sudanese custom and statute, contain elements of law and practice borrowed from a host of sources, which in turn, have been subject to various influences throughout the territory’s complex history. These sources include the customary law systems of South Sudan’s 70 interlinked ethnic groups; the hierarchies and sites of local governance imposed by successive colonial powers, which re-fashioned the “native” as tools of control; Sharia laws absorbed from the “Islamic North”; the system of legislation and military control developed by the SPLA during the pre-CPA period; and the legislation of the post-CPA emergent state. Interacting with all these historical influences are new phenomena, such as returning refugees who bring back ideas and experiences (and indeed whole systems of governance and law) from exile. What is administered as “custom” in many areas of South Sudan may therefore bear little resemblance to what was considered “custom” in the past.

As a result of all these influences, discerning where custom begins and ends, and therefore where reform might be necessary, presents a considerable challenge. Furthermore, any understanding and analysis needs to be done in a holistic way that encompasses a review of both custom and statute and their inter-relationship at the federal, state and local level.

In this report the ‘statutory system’ refers to the key principles and elements of the legal system that have been adopted in writing in the Transitional Constitution and related legislation of South Sudan. This system builds upon the written systems of law established during previous years by different governing authorities. During the North-South conflict,

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29 Legal pluralism is the term generally used to describe legal systems in which a variety of authorities and sources of law co-exist with the state or statutory system. It is “an approach which accepts the possibility that, within any given polity, there can be more than one ‘legal order’ and that the state is not the exclusive source of legal regulation”. Franz von Benda-Beckman, “Legal Pluralism and Social Justice in Economic and Political Development”, IDS Bulletin 32 (January 2001): 46-56.

30 In some places, for example, SPLA commanders actually acted as judges in the customary courts.

31 It is interesting, for example, that in some areas that have seen large-scale return, litigants before the customary courts are given the choice between applications of ‘local’ customary law (e.g. Kakwa) or “Ugandan” customary law.
and beginning in the 1980s, the SPLM/A developed a set of laws covering issues from military discipline to prison regulation and criminal procedure, which it enforced in areas under its control (the SPLM/A laws). Throughout the CPA period (2005-2011), the parliament of South Sudan adopted new statutes, in some cases replacing previous SPLM/A legislation, and in others, dealing with new legal issues, for example, company law and the Central Bank. Since its foundation, the South Sudan Legislative Assembly has passed a host of new bills necessary for the functioning of an independent state. For instance, in late November 2011, the Higher Education Bill was tabled for consideration. Not unsurprisingly, however, at the federal level, no legislation has yet been tabled to address directly some of the core issues at the heart of this report, i.e. family law matters and matters relating to sexual and gender-based violence. These are currently either dealt with by reference to customary law or under the Penal Code. It should be noted however that, as discussed below, at the state level, there has been much less reluctance to engage with these issues and state legislation has dealt with questions relating to marriage and family.

Distinguishing the scope and reach of customary law is a complex task. Customary law mechanisms are usually described as being focused on the re-establishment of peaceful community relations. Thus, they are generally viewed as rooted in consensual and restorative concepts of justice, which are distinct from the more adversarial and punitive concepts that are characteristic of modern statutory systems. Accordingly, customary systems are usually less about deciding who “wins” and more about how to restore the social harmony that has been ruptured. And it is this core difference that is often identified as setting customary legal systems apart from what would be considered the modern Western legal tradition.

However, it was clear from the research that the customary system as experienced in South Sudan cannot be so easily compartmentalised, whether normatively or structurally. First, it is clear that the system encompasses not just restorative and consensual approaches but also punitive and adversarial ones. As a recent Rift Valley study found,

> There is no simple dichotomy between consensual and restorative judicial practices and adversarial, retributive, and punitive ones. Nor is there a separation of rule-based and negotiated justice […]. The social relations of litigants and their individual goals, together with the priorities of the mediators or judges, shape how and which rules are upheld.32

It is important to remember that the statutory system does not operate in a separate sphere from custom: customary law concepts and methods have themselves been imported into South Sudan’s statutory law and vice versa, particularly at the state level. Consequently, as customary norms are imported into the statutory system, the contradictions related to conventions of family and marriage become part of the statutory system itself.

It is not just formal or structural incorporation of custom into statute law, however, which makes for an intermeshed system. Actors in the statutory system regularly take refuge in the norms and practices of customary law, and vice versa, when making decisions.

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32 Cherry Leonardi et al Rift Valley Institute, Local Justice in Southern Sudan, October 2010,
In addition, throughout the system there is not just a co-mingling of sources of law and concepts, but also of decision-making authorities. For example, the customary court system at various levels permits cross-appeals and cross-referral of cases between the systems. In some places the interlinking of authority between the systems is difficult to determine, and as a result, litigants simply search for the forum that is most likely to give them their desired outcome. As the authors of the recent Rift Valley study state,

“[r]ather than the coexistence of two distinct statutory and customary legal systems in Southern Sudan, the reality is more like a loosely governed unitary system that incorporates legal principles and practices from different sources and applies them with varying degrees of consistency, at varying levels of the judicial hierarchy.”

33  Ibid

Within this backdrop of ambiguity that characterizes the parallel legal systems in South Sudan, the reality today is that, in the absence of a strong central state, a comprehensive set of legislation and functioning structures, it is customary law that continues to be the primary instrument for delivering justice. In fact, just previous to the signing of the CPA, in 2004 it was estimated that over 90% of all civil and criminal cases were dealt with by decision-makers in the customary system.34

Women’s Rights and the Approach of the Customary System

The centrality of this point cannot be overemphasised: customary law in South Sudan is not just an ancillary system of laws used for resolution of particular types of social conflicts (e.g. family matters) in certain circumstances. It continues to be the primary system of conflict resolution in the state. As the operation of customs is heavily focused on marriage, family and a particular conception of the role of women in society, any engagement of South Sudanese women with “the law” is penetrated by the influence of customary systems.

A detailed examination of the customary laws of South Sudan in all their aspects and variance is beyond the scope of this report. Instead, the following section presents a brief overview of the key variables and interests, which in general terms, differentiate the approach of the customary legal system from that of statute law, in particular those that may provide a clearer lens for understanding the stories of the women as recounted in the report. One important point must preface this discussion: despite the existence of a range of systems (by one calculation there are over 70 systems of customary law operating in South Sudan) the commonality of women's experiences and of philosophical or ideological approaches to the role and function of women in society found during SIHA’s research was overwhelming.

Customary Law Systems as Flexible Response

Customary law systems are generally intended to provide flexible responses to individual circumstance, which reflect local community understandings of what is just or necessary for the flourishing of that community.

33  Ibid
34  Dr Francis M. Deng  World Vision Report, A Study of Customary Law in Contemporary South Sudan, 2004: 56. (Note that, this percentage is likely to have reduced over the last six years as the new statutory system has taken root, although not significantly.)
As such, when viewed at the surface level, consistency and predictability would not be expected to be the hallmarks of the system. Conduct which in one community would be acceptable or attract only mild vilification, for example, might be dealt with very differently in another. A set of facts which in a previous case in the same locality might have been dealt with in a particular way can even result in a completely different outcome at a later date. As a result, the principle of legality, – that a prohibition must be clear and not enforced retroactively – which is fundamental to the statutory system, is routinely violated. This unpredictability is only likely to increase as communities are no longer closed systems of populations, norms and authorities where traditions are “known” and absorbed from birth. Women, often the less powerful party in a dispute, may not be in a position to choose or even assess the potential of a particular place to hear their case and can be disadvantaged. At the same time, this flexibility creates potential for the system to respond imaginatively to particular circumstances, especially where the statutory system is in such a fragile state. In the case studies that follow, it will be seen that the customary system was able, in a number of instances, to produce a more personalised and compassionate understanding of the complexities of women’s lives and contexts in South Sudan.

**Individual versus Collective Understandings of Harm Done**

The concept of injury in the customary system is often conceived not in individual terms, but, in terms of the harm done to the victim’s status and/or his or her capacity to play a particular role in their community. For example, in cases of rape, the penalty imposed will generally be related to the social status of the woman and her function in the community, whether she is married, unmarried, or beyond child-bearing years. In the same vein, fines in connection with sexual transgression or violence will usually be paid to the family of the victim and not to the victim herself (although some South Sudanese customary law systems do provide compensation to a woman for sexual assault.) Moreover, adultery is viewed not just as an offence against the marriage and the interest of the other married partner, but also as an offence against the community. As one woman put it, “the whole family gets involved in any couple’s dispute.”

**Identification of Responsibility over Culpability**

Whereas the focus of the customary system tends to be on loss, in the statutory system criminal guilt is an either/or question that revolves around questions of the intent and mental capacity of the individual perpetrator. Thus self-defence is an absolute defence to murder and the person is free, despite the fact that s/he may have in fact landed the blow which killed the victim. In the customary system, however, it is less an issue of guilt, and more so one of responsibly and the need to make up for losses. In the case of a killing, for instance, the loss of the person in terms of his or her place in the family and community must be repaired, even if the loss has been accidental. As one of the senior customary judges who was interviewed during the research noted, if two children were playing in the river and one drowned, the family of the surviving child would give their child to the grieving family.

36 Interview conducted by SIHA Network: Juba, June 23rd 2009.
Distinction between Civil and Criminal Matters

In this regard, the customary system does not maintain the same clear division between civil and criminal law as exists in most formal statutory system. Some key offences in customary law are therefore perceived to have both a civil and criminal nature. Adultery and unlawful killing, for example, are both civil and criminal infractions and both penalties must be paid and loss compensated. The Transitional Constitution has imported this philosophy into the statutory system, combining statutory and customary approaches in how it provides for the exercise of judicial power. For example, among the five basic principles that the Constitution supplies that are to be applied across both civil and criminal cases is the principle that, “voluntary reconciliation agreements between parties shall be recognised and enforced”\(^{37}\). This is an approach that would be viewed as completely unusual in the criminal law of most statutory systems.

Accessibility, Simplicity and Ease in the Customary System

Procedures before the customary courts are generally supposed to be more accessible and simplified, led by the judge, and with matters swiftly disposed of. As a result, during customary hearings pleadings are made orally and there are generally no statutes of limitation (barriers in time to taking a case) once a right of action exists.\(^{38}\) The customary judge acts not as a referee between opposing parties who are supported by lawyers, as would be the hallmark of the common law statutory system, but as an investigator or arbitrator. He/she takes an active role in determination of the facts and the drawing out of evidence from the witnesses. The right to representation by a lawyer is therefore not generally viewed as relevant in the customary system: it is the judge who is responsible for making sure that the information needed to make a decision is uncovered. Accordingly, the judge is extremely critical in the customary system: litigants do not have assistance and may not know the law. They will not necessarily know what might be important to emphasise in the telling of their stories.

The Relevance of the Plaintiff in Customary Court Cases

In customary law, even in criminal cases, the role of the civil complainant is vital, both in terms of defining the scope of responsibility that may exist, and as an active participant in the process. As was confirmed during the research, both the status and level of engagement of the “complainer” and “victim” can be key to the outcome of a case in a way that would be unusual in a modern statutory system, where the role of “complainee” or defendant is usually taken up by the police or prosecutor. It is therefore the state that is charged with pursing the injury done to the community through the commission of the crime. The state can even proceed with a prosecution against the wishes of the victim.\(^{39}\) In the customary system, however, it is generally the victim or the complainer who is empowered to push forward the case.

\(^{37}\) Transitional Constitution of the Republic of South Sudan, 2011, article 123.
\(^{38}\) It should be noted that, increasingly aspects of proceedings are documented in writing.
\(^{39}\) In many Western legal traditions, the privileging of victim wishes and victim impact assessments is a recent development.
**Imprisonment: A New Convention in Customary Law**

The idea that punishment of individuals by removing them from the community and putting them in prison expiates a crime and acts as a deterrent is a new concept within the customary law of South Sudan. The central pillar of western criminal legal enforcement – the imprisonment of individual guilty persons, was a new approach to responsibility and reparation that spread rapidly with the arrival of European colonisers in Africa.40 In the customary system, crimes are viewed as injuries to the collective, and similarly, guilt is shared by the community of the perpetrator. Fines and other forms of amends generally owed by the family or community as a whole are therefore seen as the most appropriate mechanism of redress and restraint. Today, however, remand to prison is a frequent tool of the customary system, operating alongside the payment of fines, and reflecting the intertwining of the systems. The linkage between fines and imprisonment is particularly critical for those who are vulnerable socially or economically, which is especially relevant when considering that terms of imprisonment are not only additional to a fine, but that their length can be impacted by the ability to pay. Hence, in practice, not only can remission of sentence be achieved through payment of fines, but fine payment is rendered more difficult by the fact of imprisonment, which can result in the addition of prison time.

**Bride Price/ Dowry as a Livelihood and Women’s Human Rights**

The marriage contract and the exchange of bride price/dowry41 are at the heart of the economic and social life of South Sudanese communities and is the point around which the exercise of women’s rights in the private sphere revolves. The centrality of the anchor of the marriage bond is described clearly in a 2004 study by World Vision:

> All southern Sudanese customary law systems have a common recognition of the scope and purpose of marriage. It is recognised as a union between a man and a woman (though polygamy is a legally accepted practice for all tribes) for life, with the purpose of producing children and in doing so both strengthening and ensuring the continuity of the family. In this respect marriage is considered to be between two family groups rather than two individuals. The laws surrounding appropriate behaviour and the regulation of marriage reflect this basic understanding.

Thus, the value of an unmarried woman must be preserved lest bride wealth be impaired. Conversely, if a woman no longer has value in this context (such as, for example, if she is beyond childbearing years) rape is considered less grave. Adultery, which injures a marriage, is also viewed as a very serious matter and is conceived as “both civil misdemeanour incurring a fine in reparation to the husband and also a crime punishable

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41 Bride wealth/price/dowry is an amount of wealth or property (usually cows) paid by the man or his family to the family of a woman upon marriage. The women with whom SIHA works have indicated that bride price is the more accepted term.
by a jail sentence.\textsuperscript{42} Divorce, although permitted, is generally socially unacceptable and difficult to obtain, both in terms of the kind of circumstances which would be acceptable and the consequences which ensue. As will be clear in the stories that follow, the institution of bride price represents the aspect of customary law that looms largest in the experience of those women who are unable to adhere to community and family expectations.

Further to this brief overview of the customary system of South Sudan, the report now turns to presenting the key findings of the research both in terms of the rules which govern behaviour and the practices, procedures and mechanisms which are used to enforce these rules.

\textsuperscript{42} Dr Francis Deng. World Vision Report, A Study of Customary Law in Contemporary South Sudan, 2004: 21.
Section III:

Women's Personal Rights and the Content of Customary Rules:
“our families do not want to return back the cows; they always stand against our will”

The following section considers how some of the customary law norms or rules relating to the inter-connected issues of marriage, divorce, motherhood and violence against women, operate in practice and can result in the imprisonment of women. In presenting the experiences of women in their own words, it reflects on the crimes for which women have been arrested, the circumstances surrounding those alleged criminal acts from the perspective of the women themselves, and the consequences of the women’s engagement with the customary system for their families and communities.

Bride price: “[m]y father is standing with the second husband and not with me.”

As described in the previous section, the issue of bride price is pivotal to many of the tensions between the conceptions of community and individual “good” that are central to the struggle for women’s rights in South Sudan. Dowry touches on issues that lie at the heart of social and cultural dynamics, as well as livelihoods and basic survival. It is the cornerstone of the marriage bond and the creation of new social relationships aimed at increasing the wealth of the community and reducing the possibility of conflict. The very word for marriage [in Dinka] “ruai”, for example, means “to become related”. The complexities surrounding the process of returning dowry, including, in some traditions, requiring the painstaking tracing of the offspring of the particular animals provided at the time of the marriage, reflects the strength of the intention that social bonds, once created, must be maintained. Relatedly, children are viewed as a form of wealth emanating from the marriage/dowry relationship and remain the “property” of their fathers and the community if dowry has been paid.

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43 Interview conducted by SIHA Network: Rumbek, November 10th 2010.
Girl children, in turn, generate dowry to facilitate marriage for in the next generation. As the research shows, certain levels of physical and sexual violence against women appear to be permitted (more or less explicitly) as a tool of control, when weighed against the “greater gravity” of rupturing the marriage bond. Echoing the struggle in many countries around the world about how to respond to the infliction of violence in the “domestic” sphere, the perception that a woman can be “bought” appears to increase the potential for ill-treatment of a woman since the behaviour can be viewed as an exercise of prerogative, rather than an offence. As one official commented during the research, “my mother was beaten, what’s wrong with that?” An increase in violence against young girls, therefore, has been directly linked to an escalating emphasis on dowry payment in post-conflict South Sudan. (It should be noted, however, that although in theory abuse of a spouse is a ground for divorce in most customary systems, it did not seem to be part of the reality of any of the women encountered.)

The dowry system was a major issue in the lives of the women interviewed during the research, and a direct cause of imprisonment in many cases. Dowry acted as a barrier to divorce, prevented families from acknowledging marital violence and abuse, and was the basis upon which a woman’s own family might seek the end of a marriage, even where the woman herself was content to stay. The huge impact that the payment of dowry has on all aspects of their lives and survival (in as much as it represents wealth provided by the wider family) often means that women find it very difficult to negotiate the consequences of decisions taken around dowry and marriage. The case of CK, who was on remand in Juba prison when interviewed, demonstrates the extent to which dowry size and the pursuit of dowry can be the drivers of a woman’s fate.

After CK’s father decided that the seven cows her husband had given for her dowry were not enough, he insisted that CK return home and marry another man who had promised 13 cows for her hand. Although CK was content in her marriage, her father threatened to kill her if she did not acquiesce in a divorce. CK ultimately agreed to return home and marry the second man. After delivering a child at the home of her second husband, however, CK returned to her first husband. The second husband then opened a case against both CK and her first husband under the statutory system and an officer from Juba came and took them both into custody.

When asked about her feelings on the case, CK accepted that the second husband had a right to complain. Although the divorce from her first husband had been forced upon CK by her family, she had viewed it as a legal divorce, albeit one “without evidence” and

44 “[L]aws dealing with the custody of children are very similar and reflect the ethos of a patrilineal society. Children remain with their mother until they are seven years of age. Thereafter they will go to their father if he has paid dowry and to the maternal uncle if he [the father] has paid nothing.” Dr. Francis M. Deng World Vision Report, A Study of Customary Law in Contemporary South Sudan, 2004. A number of stories were told during the research of fathers abandoning their families but then returning when their girl children were of marriageable age to claim dowry.

45 Marc Sommers and Stephanie Schwartz, “Dowry and Division: Youth and State Building in South Sudan,” United States Institute for Peace, Special Report 295 (November 2011).

46 Interview conducted by SIHA Network: Juba, October 16th 2010.

47 The second husband then tried to return the case to the customary system, but the Attorney General refused and it remained before Juba Town Court.
“with the relatives”. At the same time, CK was clear about where her allegiance lay: “I don’t need the second husband because I have two children with the first and I want to go back to him, not the second one. My father took the cows and now the second husband is the one who opened the case.” The human suffering and family discord created by the need for CK’s father to obtain a relatively small (and possibly temporary, pending the court decision) gain of six cows is striking. As a result of a decision to seek a better dowry “deal,” CK and her first husband had found themselves in prison awaiting trial; the second husband had been pushed to the court system to seek redress for his loss; and CK had been abandoned by her family, despite all her initial efforts to obey their dictates: “[m]y father is standing with the second husband and not with me.”

Likewise, AQ’s story is an example of how a woman’s relationship with the bride wealth that was given at the time of her marriage can deeply complicate not just her own physical safety and security, but also the lives of others. This time it involves families from both “sides” coming together to insist on the maintenance of the marriage, as opposed to its dissolution.

After the death of her father, AQ was married by her brother for a dowry of 50 cows to a man who already had eight wives. As part of the arrangement, her brother agreed to maintain AQ at his home, and initially her husband would visit her from time to time and her brother and his wife supported her as agreed. After having three children, however, “my brother and his wife’s treatment changed. The husband ignored me, leaving me and the children without any money, food. My brother and his wife hit my children, insulting and humiliating me.” As a result of the violence and neglect, AQ left the house and met another man with whom she had a baby. When she gave birth, however, her own brother had her arrested for adultery and taken to the police station. (It is understood that in the past within this tradition the involvement of the brother in pursuing adultery would not have been permitted.) AQ told researchers that her brother and husband subsequently killed her new partner.

These stories provide stark reflections on how the dowry system remains critically linked to issues of livelihoods in a rapidly changing social and economic context. It provides a small window into a much larger social problem that only seems to be getting worse, and it is not only young women like CK who are caught in the middle. Indeed, the escalating price of dowries has been identified as a major contextual factor in the escalation of violence and conflict in some states. In the first half of 2010 it was reported that 700 people had been killed and over 152,000 displaced as a result of cattle rustling throughout South Sudan. As a recent study found, “[u]nable to meet these demands [for dowries], many male youth enlist in militias, join cattle raids, or seek wives from different ethnic groups or countries.” Whether driven by diaspora expectations and remittances, or

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48 Interview conducted by SIHA Network in Rumbek May, 2010
49 Professor Regina-Naynkir Akok: Comments to Initial Draft, University of Regina.
50 It does not seem that anyone had been charged with the killing of her partner at the time of the interview.
51 Manyang Mayom, “Girl 13, tortured to death in Rumbek over pregnancy allegations,” Sudan Tribune, January 4th 2011,
52 Marc Sommers and Stephanie Schwartz, “Dowry and Division: Youth and State Building in South Sudan,”
exacerbated by the struggle for survival in a post-conflict state with some of the worst poverty indicators in the world, the size of dowry is no longer set by local exigencies. As a result, in 2010 and early 2011, young men in Lakes State came together in a campaign around issues relating to bride wealth and sexual behavior, calling for the intervention of both the state legislature and the traditional authorities. In launching a petition to parliament, they used arguments surrounding the impact on both genders urging that, “prices be reduced so that ordinary men would be able to pay and discourage families from seeing their girls as potential profit.” It was not surprising, therefore, that the issue of bride price was mentioned as a source of problems by many of the women interviewed.

No Place for Divorce? “I wanted to be free, all the people in the village were aware about the bad treatment and torture and bad things I face within my marriage daily.”

The way in which dowry operates as a payment that is made and shared with the wider family is intended to create community interest in the maintenance of the marriage, which can be an asset in cementing social ties. It can act as a positive influence, encouraging the community to assist in the resolution of marital disputes and offering protection to the woman to the extent that she can be seen as a valuable resource. As Chief Dennis in Juba said, “When a marriage takes place all the relatives release some of their cows. Then the man can’t attack or treat his wife badly. Men are responsible for looking after their wives, especially basic things such as food and clothes.”

Too often, however, this is not the reality, especially where the checks and balances that were traditionally intended to contextualise how dowry works within a community, have been eroded by changing social and economic circumstances. For this reason, when dowry is on the line, even where the continuance of a marriage seems to be against the interests of a woman’s basic health or wellbeing, her own family may object to a divorce.

The difficulty of securing divorce despite repeated efforts was a common story among the women with whom SIHA met. The story of NM unfolded in the context of another practice common across some South Sudanese (and indeed African) traditions, namely that of “continuation of life” or levirate marriage (sometimes called ghost marriage). This practice is one in which the brother or family member of a deceased male spouse is obliged to “marry”/have sexual relations with the widow and any resulting children are considered children of the deceased spouse. Levirate marriage is particularly practiced in the Nuer and Dinka traditions.

After NM was married in the name of a dead man, her “husband’s” father wanted to sleep with her. Believing that Dinka law forbids a father from marrying his son’s wife, NM refused his advances and looked for a man from her husband’s relatives to conceive a child. As the relationship with the man she identified developed the family decided that she had become

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54 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
55 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
“too eager” to engage with him and they began to abuse her: “One day after a severe punishment and torture, my whole body was bleeding. I went to my own family’s house asking for relief, medical treatment and food.” When NM told her own family that she wanted a divorce, her brother beat her severely. “[He] tortured me a lot and didn’t allow me to stay in my family house”. NM then left her family home and tried to run away with her partner from her ghost husband’s family. Eventually, however, the couple was discovered and taken to police custody by representatives of both families. In the customary court, NM was not supported by either her own or her “husband’s” family. The judge did not allow her to present her case, imposed a fine of seven cows (which was paid by her brother) and ordered her to return to the home of her “husband”. NM’s efforts to follow the direction of the court and establish herself with her husband’s family once again failed: upon her return she was beaten and starved and her health deteriorated. NM once again fled to her own family’s home and went to the customary court to seek a divorce. Once again, neither her family, nor that of her husband, would agree to the divorce. Instead she was sentenced to six months imprisonment for adultery, a measure that was understood as intended to “change her mind” about seeking divorce.

AA’s case mirrors that of NM and shows how families in the community can sometimes come together to uphold particular interests, despite clear injury to the woman, and even where the woman herself may have had established independent rights. It also demonstrates, as will be discussed later, how manipulation of the type and location of court in which a matter is heard can have a massive impact upon the outcome of the hearing and how choice of venue is rarely something that a woman can control.

AA, from Rumbek, described a marriage of great suffering: “During the past years I suffered a lot, the husband always beat […], injured and tortured me, he didn’t care about me or the children, and there was no food, no money, and no medicine.” Five years prior to her detention, AA had saved enough money to approach the Chiefs Court in her village and seek permission to divorce:

“I wanted to be free, all the people in the village were aware about the bad treatment and torture and bad things I face within my marriage daily.” During the hearing, AA’s brother (perhaps intent on avoiding having to return the dowry portion) urged the court to reject the petition. Despite the pressure the chief granted the divorce but AA’s brother said he would refuse to accept the ruling. On the basis of the ruling, AA considered that she was permitted to leave her husband’s home. She eventually met another man with whom she had a child. Subsequently both her own brother and her first husband came together to accuse her of adultery. She was arrested by the police and taken to Rumbek prison. She was kept for six days in

56 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
custody before appearing briefly before a customary court where she was sentenced to nine months imprisonment and a fine of 450 Sudanese pounds for adultery.

Imprisonment for Adultery: A Necessary Price for Freedom or Survival

Women needing to escape a violent marriage, therefore, were being forced to take desperate measures, often finding themselves imprisoned as a result. South Sudan customary laws permit divorce on a variety of grounds, including "repeated infidelity; neglect of family duties by either party; gross misconduct by the wife; impotence of the husband; physical cruelty; general breakdown of the marriage."\(^57\) Although divorce is permitted in theory, in practice, maintenance of the marriage bond is heavily favoured by both statutory and customary authorities. As noted above, the promotion of social cohesion and unwillingness to return bride wealth underpins this stance. Even if divorce is granted, women may face new problems. In fact a 2005 study found that divorce in South Sudan is not only difficult to obtain but "puts women at greater risk due to economic and social vulnerability, and can result in the loss of child custody, especially if the child is over the age of seven years."\(^58\) The loss of children is a major impediment to consideration of divorce: it is generally only in extremely difficult situations that women will contemplate making a petition.

All of the women SIHA met in the prisons who were seeking divorce told stories that suggested prima facie grounds for divorce. All, however, had failed in their petitions. (One woman thought she had been granted a divorce but subsequently discovered it was not recognised as valid when she found herself charged with adultery in a different court). Many of the women, therefore, saw an act of adultery as the only solution to their predicament. In Wau, for example, focus group discussions showed that a striking number of women agreed with the statement that "to get a divorce, your best option is to commit adultery [despite the fact that it] carries a six month prison sentence."\(^59\) Similar sentiments were expressed throughout the research, not just from women in prison but also from women lawyers, activists and others with whom SIHA interacted:

"Our families do not want to return back the cows; they always stand against our will. There is no way to get rid of the husband without returning the dowry, as is our tradition. So we look for a man to live with him, we are sure the husband will take us to the prison, but after that we can divorce."\(^60\)

Although the matter did not arise in discussions with the women, a number of reports on the justice system in South Sudan, as well as consultations with experts during the research, indicate an increasing number of allegations that husbands are encouraging


\(^{58}\) Jeanne Ward, “Because now men are really sitting on our heads and pressing us down...,” Report of a Preliminary Assessment of Gender-based Violence in Rumbek, Aweil (East and West), and Rashad County, Nuba Mountains, 2005.

\(^{59}\) Interview conducted by SIHA Network: Rumbek, November 2010.

\(^{60}\) Interview conducted by SIHA Network: Rumbek, November 2010.
their wives to commit adultery in order to benefit from the fines awarded. In the widely reported case of Magot Kok v Dongrin the customary court took note of the fact that Mr Kok's wife had already been found guilty of committing adultery on a previous occasion with another man and dismissed the case. "The case set a precedent that allows the courts, under customary law, to award compensation for only one [and the first] case of adultery presented by a particular husband to the court. Any subsequent case presented by that husband will only allow the husband to plead for and obtain a divorce, which does not provide compensation." 61

Whether a marriage had become impossible due to violence or neglect, a divorce had been refused, or there seemed to be no other way to obtain basic support and protection for themselves and their children, many of the women interviewed felt they had exhausted all of their options. The extraordinarily high price they appeared to be willing to pay for being able to escape the marriage bond compromised both their dignity and bodily integrity (by being forced to look for another man with whom to have sexual relations) and their freedom (by risking the penalty of imprisonment).

The story of AM 62 vividly illustrates the dilemma of women who are forced to commit adultery as a way of breaking free from extremely difficult situations including situations which, in theory, under customary law would have provided a basis for divorce. Married at 10 years old to an abusive husband, AM's testimony tells of a horrific marriage of regular violence and no material support. Ultimately she was forced to leave her children with her mother and move from place to place to find work in order to support her children. Eventually, AM asked for a divorce but it was refused. She then decided to look for another man from whom she became pregnant. Her husband then accused her of adultery and the police took her into custody. Two weeks later she found herself sentenced to one year and two months imprisonment by the customary court.

In the context of levirate marriage, women appeared to be particularly isolated and vulnerable.

CBA was "married" to a man who had died and bore two children from one of the men in her husband's household. She encountered many difficulties during the marriage: "I suffered a lot within my stay in the dead husband's

61 Dr Francis M Deng, World Vision Report, A Study of Customary Law in Contemporary South Sudan, 2004: 51 (it is not clear, however, that the ruling in this case is being followed consistently: a number of the women encountered by SIHA were apparently pursued for fines more than once. There is generally also no requirement to follow precedent in the customary system although some courts are considered to have appeal authority).

62 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
house, I was asked to do a lot of hard work, cultivating the dead husband's wives' farms, bringing firewood, cooking food and cleaning their houses. Adding to that, the man who they brought to sleep with me hit and injured me." Eventually, CBA moved home to her own family and asked for a divorce. This was refused by the court. After waiting for four years, she met another man and moved away to live with him in another village and had two children with him. One day, police came and took her and her new partner to the police station. Both were sentenced to terms of imprisonment after a hearing in the customary court where she was not allowed to present her side of the story.

As these examples show, in many cases committing adultery is less a choice or a route to divorce than a simple matter of survival. The fragility of life in South Sudan is such that finding someone to take care of you and paying with the only currency you have available – your body – can be necessary for survival. The case of AM from Rumbek is a particularly poignant example of how women can get caught within the system and are literally unable to survive without committing the crime of adultery, compounding their misery when cases are pursued against them.

After the birth of her fourth child, AM was weak and unable to harvest the family farms. Her husband and the other three wives refused to accept that she was physically debilitated: "they beat and injured me, and my husband asked me to leave the house without the children." AM begged to be allowed to stay with her children and went to four different courts to try to get access to them, but all of them refused her petition. When she tried to go back and stay at her family home she was also rejected by her brother. AM was then forced to find shelter with the son of her husband's brother and eventually became pregnant by him. Her husband took her to the customary court where, after a month in custody, she was sentenced to seven months imprisonment for adultery.

Protecting the Family and Community: “I can't leave. If I do I will have to ruin five other homes with me... I can't do that to my family.”

In many of the accounts above women's own family members were centrally involved in making allegations of adultery and in the divorce process. While the family is often key in leading to the arrest of these women, it is also something that a number of commentators suggested was a new phenomenon. In addition, in some cases, Family members were responsible for bringing adultery charges in the absence of a complaint by the spouse.

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63 Ibid.
64 Interview conducted by SIHA Network: Rumbek, March 2009.
AM\textsuperscript{65} in Rumbek told how she was beaten severely by her own brother and taken to the police after she had left her home and returned to a previous boyfriend after three years of waiting for the man to whom she had been promised in marriage by her brother to complete the dowry payment. After giving birth, it was her own brother who lodged the complaint of adultery against her. She was ultimately sentenced to one and a half years in prison. AM did not mention that her husband had any role in the bringing of charges.

It is not only external barriers and direct family pressure that prevent women from successfully seeking a divorce. An acute awareness of the social and family costs of seeking to separate from their husbands dissuades many women from even initiating a request, despite extremely difficult circumstances. As one woman in Rumbek said, “I can’t leave. If I do, I will have to ruin five other homes with me. The cows paid for my dowry were used for other family members to get married. I can’t do that to my family.”\textsuperscript{66} In South Sudanese society, family ties and support are essential to social and community life. The isolation experienced by women who defied families on both sides of the marriage by seeking divorce or leaving their husbands was significant. In many of the adultery cases encountered by SIHA, for example, the women noted that no one had visited them in prison. This abandonment by the women’s families impacts their psychosocial health and their potential to pursue appeals and challenge their detention. Furthermore, due to the difficult conditions in prison, the support of family and friends by bringing food and other items can be essential for maintaining the women’s own physical health and that of their children. If in the name of the “family” and “community” the rights of women, who make up more than 50% of the society, are fundamentally undermined, the question that therefore needs to be asked is: “what community and what family is benefitting from these practices?”

It is also important to note, however, that family can also be a source of support. EO\textsuperscript{67} was married when she was only 16 years old and had 11 children with her husband. After repeated infidelity by her husband and lack of any assistance, EO tried to ask for a divorce: “Things had got bad, he had so many affairs and the marriage worsened. I wanted to get a divorce, but he didn’t want that and complained to my family so that they put pressure on me to stay.” Eventually, however, her husband did agree, but asked her to leave her house so he could give it to his new wife. EO’s children stepped in and ensured that she was able to keep her home.

**Caught Within the System: The Fragmentation of Social and Marital Relationships**

AA’s case\textsuperscript{68} from Rumbek is an example of how both women and men can find themselves caught in situations where there seems to be no way out of a marriage that neither wants.

\textsuperscript{65} Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
\textsuperscript{66} Interview conducted by SIHA Network: Rumbek, April 2009.
\textsuperscript{67} Interview conducted by SIHA Network: Wau, June 25th 2009.
\textsuperscript{68} Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
AA was married to a university student but he refused to live with her. Instead, her husband's brother approached her for sexual relations. AA rejected his advances and asked to be returned to her family. This request was refused by her husband's family and AA stayed with them while her student husband was at university. When he returned for holidays he asked her to take her things and go. AA was fearful of doing this alone as she was convinced her family would reject her if she returned home. The husband's family then left the house and abandoned her there. After a few months, she met a man who came to live with her and they conceived a child. When she was eight months pregnant, her husband came with the police and arrested the couple. AA was not permitted to speak in court and she and her partner were sentenced to nine and six months imprisonment respectively.

Women are often caught between two men, or two families, who feel they have been “hard done by” as a result of dowry and other payment decisions in the customary court. RA’s case is a particularly poignant example of this. Due to daily physical violence, RA decided to leave her husband and marriage in Rumbek and come to Juba: her dowry of 60 cows was not returned. After a year of living alone, she found a new partner. Subsequently, her husband moved to Juba and opened a case in the Dinka customary court seeking redress for adultery. The judge decided on a fine of six cows and ordered RA to return to her husband: “according to Dinka Rumbek, the husband [second partner] has to pay the six cows and I was never allowed to speak out.” In particular, RA did not have an opportunity to explain what had driven her from her original home: “I had explained the beating to my father but he said that he has paid a lot of cows and that I had to be patient with this man.” The six cows were paid and RA returned to her first husband, now resident in Juba.

However, RA’s story did not end there. It appears that her second partner was extremely angry about what had unfolded at the court and went to the police and accused RA of stealing 5000 Sudanese pounds. He told RA when they left the court: “You never gave me children and now these people gave you to your first husband! The things go from worse to worse. Kasara kasara [wasted, wasted, I don’t care], I will teach you a lesson.” RA found herself arrested immediately afterwards. When she asked the policeman why she was in custody he explained, “You are here because this man said that first, he paid the six cows, secondly you have not given birth and left him to go to the first husband and lastly you have stolen his money.” RA completely denied stealing the money and refused her husband’s offer to pay the amount to dispense of the matter, insisting that the case be heard. The theft case was ultimately heard by a judge at Juba Town Court who was “from the North.” He ordered that the money be paid or she would stay in prison. RA had been in prison for one year at the time of the research and was of the belief that she would be forced to stay in prison until the amount was paid. She stated that if she was released, she would start a case against her former partner who had accused her: “I would rather die than give in my right because I believe I never took this money [...] if the president comes and pays, I will go out but I will open a case against this husband.” (The mention

69 Interview conducted by SIHA Network: Juba, October 16th 2010.
70 “Dinka Rumbek” refers to Dinka Rumbek customary law.
of the “President” was a reference to the fact that prisoners are often freed by decree on public holidays).

**Domestic Violence: “My mother was beaten, what’s wrong with that?”**

Domestic violence was a pervasive feature of the lives described by the women, whether meted out by the woman’s own family, the family of her husband or by her own children. As a study conducted in 2005 found,

> [w]ith rare exception, key informants agreed that domestic violence is ubiquitous in South Sudan. Wife beating is normative, considered by men and many women as an appropriate form of discipline.

Domestic violence has been subject to increasing attention by the state authorities, with a major campaign in 2012 based around 16 days of activism fighting violence against women. What’s more, as will be discussed below, domestic violence is also criminalised in South Sudan’s new penal code; however, as SIHA noticed when conducting this research, there are culturally ingrained assumptions that no law can shift. For instance, as one senior government official noted: “My mother was beaten, what’s wrong with that?”

Even women themselves have different perspectives on the issue. In focus group discussions carried out by SIHA with women in Wau, for example, it was clear that not all of them recognised domestic violence as a criminal act, but as something that “is part of everyday life.” At the same time, “there was almost universal agreement among women that they suffered disproportionately and unjustly in relation to men.” In interviews and group discussions, many women highlighted that they were viewed as “trouble makers” if they took their husband to court in cases of domestic violence. Thus, although in statutory law domestic violence is considered unlawful; many women believed that their community would not consider their complaints legitimate if they did try to pursue the matter. The reality is that, the use of certain types of violence against a woman are still considered acceptable within customary systems.

The lack of opportunities for redress, abuse and violence within marriage became the environment in which other offences occurred: abuse in intimate or family relationships was clearly an enabling or exacerbating factor in the imprisonment of almost all of the women, whether for those imprisoned for adultery or for those accused of murder. The severity of the abuse alleged in some of the accounts of those who were in prison for unlawful killing, for example, was such that it should have impacted the assessment of criminal responsibility itself, or, at a minimum, acted as a major mitigating factor in the consideration of penalty. In others, the litany of neglect, violence and violations of rights seemed almost inevitably to have led to imprisonment.

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71 Interview conducted by SIHA Network: Juba, March 2009.
72 Interview conducted by SIHA Network: Wau, June 25th 2009.
73 Jeanne Ward, “Because now men are really sitting on our heads and pressing us down...” 2005.
74 Interview conducted by SIHA Network: Juba, March 2009.
75 Interview conducted by SIHA Network: Wau, June 25th, 2009.
76 Jeanne Ward, “Because now men are really sitting on our heads and pressing us down...,” 2005
77 Interview conducted by SIHA Network: Wau, June 25th, 2009.
When HA\textsuperscript{78} was interviewed, she had already served six months of a sentence for the unlawful killing of her husband and was just seventeen years old. Telling her story, HA described how her “relatives brought me to the husband’s house. I did not know he had other wives beforehand. I was already pregnant when I was still in school. The baby passed away the day it was born.” She recounted a history of physical abuse and lack of support in the marriage resulting in an incident in which her husband attacked her, she threw petrol on him in response, and he caught fire and subsequently died from his burns\textsuperscript{79} HA sought help for her husband when he caught fire: she showed the researcher, crying, the burns on her body sustained when she attempted to quench the flames. As she said, “I have a trauma when I think about what happened. I had no intention of killing my husband, it was an accident. I even tried to help him.” She immediately went to the police to make a statement after the incident and was taken into custody, apparently for her own protection. Ten days later her husband passed away at the hospital. Further to a series of meetings between the families and six court hearings, HA was sentenced to 10 years imprisonment and a fine of 30,000 SDP. On a positive note, HA’s mother and family clearly seemed to be supporting her and visiting her at the prison: her mother is also funding HA’s study for her Sudan certificate.

In many of the cases the level of suffering, or indeed dereliction of duty shown by the husbands and families of the women into whose care they had married, did not seem to be taken into account in assessing the woman’s behaviour. In none of the cases did the women mention that the judge had suggested that the unlawful behaviour of the husband or family be pursued, whether in terms of customary requirements (all systems of customary law prescribe the duties or obligations of a husband towards a wife) or the statutory criminal law (crimes of violence or rape).

After NA’s\textsuperscript{80} husband was killed in tribal conflict in Yambio she was “inherited” by his brother who took her to his home as his wife. Her new husband immediately began mistreating her, beating her, injuring her and threatening to kill her. When she eventually had a baby she “was so ill as there was not enough food.” Needing someone to take care of her, NA went to stay at her own family’s home to recuperate for a period of eight months. During this time her husband neither came to visit her nor provided any support. When she returned back to his home she was accused by him of having had sexual relations with another man and was mistreated by him as a result. The abuse reached its peak one day when he tried to kill her, so NA once more escaped, this time with the help of her husband’s first wife and returned to her own family. When she went home she asked her

\textsuperscript{78} Interview conducted by SIHA Network: Juba, October 16th 2010.

\textsuperscript{79} Among the ways HA described supporting herself: “I am participating in vaccinations and make henna for the people and am involved in hair braiding”, the first occupation being of course, worrying.

\textsuperscript{80} Interview conducted by SIHA Network: Rumbek, November 2nd, 2010.
family for help in accessing her children: “I missed my children a lot and my father asked him to give them to me.” The husband, however, refused all requests for access. When NA eventually married another man, a relative, her previous husband came to her home with a police officer and took her to the customary court. According to NA the judge refused to give her any chance to speak or to defend herself and she was found guilty of adultery.

A particularly adverse form of abuse was the widespread sexual violence that was reported during the research. Another case in Rumbek demonstrates how little recourse to justice women actually have for sexual and gender-based violence and how women are often the ones who suffer when they attempt to challenge such abuses.

NLA discovered that her husband’s brother had raped both of her young sisters (14 and 10 years) and that one had become pregnant as a result of the attack. When NLA “raised the alarm,” it was her husband and his brother who fled the home, leaving her and the children in her care, “in a bad time.” Two and a half years after her husband abandoned her NLA met another man who started to support her and her family: “I met a man and loved him; he helped me a lot to overcome all these difficulties.” After having a child with her new partner, her husband and his brother suddenly came back to the area. In the middle of the night they arrived at NLA’s home with the police and took her and her partner into custody. She was sentenced by a customary court to six months imprisonment and a 150 Sudanese Pound fine for adultery and her partner sentenced to two months with no fine.

It did not appear that NLA herself or her family were able to pursue redress for the rape of the two child sisters: neither does it seem that the matter was able to be raised during the customary court hearing. It is difficult to see where the collective good was served in this case, which ended with the imprisonment of NLA, a woman who had taken steps to protect children in her care from rape and the impunity of the rapist.

The Impact of Conflict on Societal Fragmentation

Although tense and sometimes violent social relations illustrated by these different stories are at some level universal, a common background in all the accounts was the impact of decades of war and conflict that had profoundly influenced the relationships between the sexes in a variety of ways. The affect of displacement, loss of family members amidst the years of violence and altered traditional gender roles have all played a role in defining the

81 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.  
82 NLA had been told that if her fine remains unpaid, she will endure another three months in prison.  
83 Researcher notes on file with SIHA Network: October-November 2010.
contours of disputes. Now the onset of “peace” itself poses its own set of adjustments, whether in terms of economic and financial decisions, dealing with ruptured relationships or re-negotiating changed power dynamics.

Angelina from Wau, for example, married in 1997, graduated from university and had her first child the following year. In 1999, her husband joined the SPLM and, having not heard from him for a very long time, Angelina presumed he had died. She started a new relationship but understood that she would be unable to formalise a divorce until he returned or had been officially recognised as having passed away. She had two children with her boyfriend. Eventually, however, Angelia’s husband returned home but with a second wife. He ordered Angelina to return home and promised to provide a house and support her financially. She returned home but he ultimately failed to fulfil his promise of support. Angelina sought a divorce, which was granted, but she was later imprisoned when she opposed custody and circumcision of her children.

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Section IV:

Procedure and Process: “Kasara kasara”

The previous section reflected on some of the legal norms and principles that have led women to be found guilty of a number of different crimes. It demonstrated how the high stakes related to dowry payment, the difficulties of obtaining a divorce, the multitude of problems related to domestic abuse and violence and the context of conflict and insecurity have combined to create a situation in which women in South Sudan continue to be highly vulnerable, particularly with respect to how custom construes the role of women in family and society. This next section looks at the procedures and processes through which the rules of customary law are enforced, the mechanisms used by both the customary and statutory systems and the corresponding imposition of penalties, imprisonment and fines.

One of the key characteristics of the current legal system in South Sudan that complicates attempts to imagine reform is the deeply intertwined nature of statutory and customary law procedures when put into practice. From the perspective of the written law, the mechanisms of the statutory and customary systems have separate identities and should operate along separate lines, at least at lower levels. The current statutory court system was established by the Judiciary Act of 2008. The Act created a structure of payam courts, county courts, High Courts (in each of the ten states), Appeal courts and a Supreme Court, with constitutional, civil and criminal panels. The customary court system was recognised by statute for the first time during the Anglo/Egyptian Condominium in the Chiefs Court Ordinance of 1931. It was later reaffirmed in the People’s Local Courts Act of that same year and most recently by the Local Government Act 2009. Thus in order to be considered lawful, the customary courts must be established or recognised by an act of the Chief Justice, whether at boma, payam or county levels.

In practice, however, not only are the inter-relationships and hierarchies between the courts of the two recognised systems unclear, there is often a proliferation of other customary courts that purport to dispense justice for different specialised contexts. In 2010, for example, the Governor of Lakes State attempted to shut down those customary courts operating around Rumbek that had not been recognised by the Chief Justice.

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86  An Arabic language lament, equivalent to “ alas” in English and meaning loss or waste or effort.
87  Sub-country district in South Sudan are known as payams.
89  The smallest local government office in South Sudan are known as boma.
Among those courts subject to his order were, for example, the fisheries court and the cattle thief court, both of which had emerged out of litigant need on the ground, rather than any systematic decision to create new jurisdictions. The weakness of the statutory system’s presence on the ground, therefore, is one of the key factors in creating confusion. For instance, most payam courts, in reality, constitute a merged hybrid of the payam statutory court and the payam customary court envisaged by the legislation. But quite simply, there are not enough staff and resources to operate the two systems and judges are often required to sit across the different systems as required. In Rumbek, for example, SIHA found that customary judges often took part in the statutory system where a decision by a panel of judges was needed. A recent report by the Rift Valley Institute exhibits this point:

Southern Sudan’s complex and turbulent colonial and postcolonial history, including long periods of civil war, coupled with a very young new government, have resulted in a patchwork of courts run by chiefs, laypersons, and judges with varying degrees of legitimacy, qualifications, and legal status.90

Thus, locating and isolating those sections of the system that are not working or need reform is a major challenge.

Interrelationship of Norms and Authorities

The unequivocal involvement of, and consultation with, the traditional authorities is an important part of the formal legal system in South Sudan. In fact, direct engagement of chiefs from a specific tribal tradition in helping a statutory judge come to a decision on their case was explicitly stated by a number of respondents interviewed by SIHA. In Wau, for instance, one of the paralegals interviewed described how the customary chief would often come as a witness to the formal court to advise the judge on the customary law relating to a particular matter.

AW91 was on remand in Wau awaiting sentence for more than two years, accused of causing the death of her husband. Although AW admitted she had hit her husband during a quarrel, there appeared to have been questions about the connection between the blow and his death. After the altercation AW’s husband had fallen “sick with diarrhoea for four days,” was then taken to the hospital and discharged and then passed away two days later.92 The judge had asked for the chiefs of the families to come from Northern Bar El Ghazal “so they would sit together to solve the case,” but no one came. According to the interpreter who had assisted with the case, it appeared that the judge wanted to solve the matter according to custom and have her freed, but this had proved impossible. As the researcher noted, “[s]he wants to appeal to the chiefs for them to come to the court for follow-up. Until

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90 Cherry Leonardi et al Rift Valley Institute, Local Justice in Southern Sudan, October 2010.
91 Interview conducted by SIHA Network Wau, November 2010
92 AW’s husband was an SPLA soldier who had a drinking problem, which was the cause of frequent fights, during one of which AW hit him with a stick. It was an SPLA soldier who took AW to the police and initiated the case, later joined by the father of the deceased.
now she has not because she has no money for it.  

As AW’s case in Wau demonstrates, the engagement of traditional authorities can provide greater flexibility in terms of remedies; however, there are often concrete barriers to their involvement. The movement of people far from their home may limit the availability of the local justice they need, which may be more familiar with their personal and community circumstances, for reasons of distance and resources. At the same time, it should be noted that, in theory, the statutory judge in AW’s case should have been able to apply the particular legal traditions and customs that pertained to the case in order to arrive at a decision that took into account the desires of the parties without physical relocation of the chiefs. Certainly these aspects of the relevant customary law could have been applied, although the negotiated settlement aspects of the system might have been more difficult to handle in the absences of members of the families involved and the broader community.

Some statute law explicitly requires the application of customary law and traditions. The provisions surrounding the crime of adultery and the question of penalty in the case of murder as defined in statute, for example, require reference to custom. One of the challenges, however, is that many in the senior ranks of the new post-CPA judiciary within the statutory system (but sometimes in the customary) are Khartoum-trained judges who have been trained in a totally different system, and they feel ill-equipped to make decisions that refer to custom as a source of adjudication. In response, a number of studies have identified the need to codify and make available the norms and law of the different customary traditions in order to assist judges who may need to apply the laws of different traditions in the formal system, and where customary courts serve more than one customary community. The drive to codify custom has been taken up in a number of high profile projects, particularly supported by the United Nations Development Program (UNDP). The policy of codification, however, is a subject of considerable debate.

Reducing customary law to a written set of rules and sanctions runs a variety of risks, which have been compellingly described in a recent study by the Rift Valley Institute.

The study identified three potential problems associated with systemizing customary law, which involve: the subversion of the customary law system’s capacity for flexible negotiation; the politicization of ethnic identities and the elevation of certain stakeholder’s notions of what constitutes “custom.”

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93 One of the critical questions, which did not seem to be addressed in this case was the causal relationship between the blow struck and the subsequent death. It does not appear for example that medical experts were called to address the matter.

94 “undermining the essence and perceived fairness of customary justice by curtailing its flexible negotiation of laws and principles in the context of individual cases, which is a constitutive feature of the existing system and has kept customary law apace with Southern Sudan’s rapidly changing social and economic environment; politicizing ethnic difference by encouraging the idea that each ethnic group should have its own legal system and defend it against others; Privileging certain informants and elites in the process of ascertaining a community’s laws; their version of the law is then enshrined and perpetuated, diminishing the voice of women and youth, who can at present more effectively contest customary law in court than in formal community meetings.” Cheery Leonardi et al Rift Valley Institute, Local Justice in Southern Sudan, October 2010: 6.

95 Cherry Leonardi et al Rift Valley Institute, Local Justice in Southern Sudan, October 2010: 6.
**Multiplicity and Choice of Fora**

The choice of venue for a case is usually driven by the "complainer", even in criminal cases where, in theory, it is the state/prosecutor on behalf of the people who has the primary interest in the criminal act. The judge can, however, decide to refer a case to another system and, should he do so, the litigant has little choice but to acquiesce. For example, in the case of CK, discussed above, it was noted that the Attorney General refused to allow an adultery case that had been opened in the formal system to be returned to the customary courts, despite the fact that the "complainer" had requested the transfer.96

A profusion of legal fora makes the choice of where to seek justice more complex than simply opting for the customary or statutory system, ultimately disadvantaging the vulnerable who may not know how to assess the relative likelihood of a favourable outcome. In Rumbek, for example, there were more than 10 customary law courts available at the time of the research, and it seems that this number is increasing. In Juba there were also several courts in operation that predominantly ran along ethnic lines, such as the Linya Court B for Bari speakers or the MTC Court for Mundari (although other groups did have hearings there). Katur Court B was the largest customary court and a court of both appellate and first instance resort. In Wau, there were also a number of customary courts constructed along ethnic lines. Anecdotal evidence suggested that not only was there a variation in approaches to similar cases between these courts, but that fees and penalties also varied.97

These multiple avenues of redress can sometimes provide unwavering litigants with the possibility of finding a solution that they themselves desire. For vulnerable women, however, the uncertainty in the hierarchy is of little comfort. The question of where it would be optimal to seek justice where women had a choice, therefore, was extremely problematic in many cases. AM98 from Rumbek, for example, described how she had tried four different courts to try to get access to her children after she had been banished both from her husband’s home and that of her own family, but has still failed in her quest.

During the research there were clearly mixed views among the women on whether customary courts or statutory courts offered better solutions. On the one hand, there seemed to be an understanding that the use of formal courts might have resulted in a more favourable outcome for the women involved. For instance, legal aid officers assisting women in Rumbek prison had promised that they would try to get NLAs case transferred for treatment under the “the new Sudan law.”99 At the same time, however, some of the women said that they preferred the customary court as it is the court they “know and trust”100 and that approaching the statutory system was not approved of in their communities. There seemed to be general consensus that the customary system delivered

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96 Interview conducted by SIHA Network: Juba, October 16th 2010.
97 It should also be noted that the multiplicity of fora for resolving disputes in South Sudan is not just the preserve of the legal system. JL told SIHA of her efforts over a number of years to achieve a divorce and maintain custody of her children after four years of separation which had involved not just the statutory courts and the customary courts but also the Catholic Church: all appeared to take different approaches to the question of divorce itself, compensation, access to children and maintenance of property. See, Interview conducted by SIHA Network: Wau, June 25th, 2009.
98 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
99 Interview conducted by SIHA Network: Rumbek, November 2nd, 2010.
100 Interview conducted by SIHA Network: Rumbek, April 2009.
faster and, sometimes, more “understanding” results. AN, on remand for three years in Wau prison for a charge related to a killing, noted: “when they would have taken it to local court, it would have been ok, it would have been solved.” During the research, Jeremiah Sawaka, the then-General Counsellor, Ministry of Legal and Constitutional Affairs, confirmed this view when he explained that there is often a sense that justice is more easily achieved at local level: “people are more comfortable to talk in their own language and in their community.” Many litigants believe that ultimately “[i]n the customary courts there is more protection, because people can tell if they are telling the truth or not.”

Even so, there may not always be consistency of approach or understanding at all levels of the customary system, especially when the hierarchy of adjudication moves from the local to the B or C court level. One of the guards SIHA spoke to in Wau explained, for example, that some of the women’s cases had been taken by the police straight to the “regional court”, by-passing courts of first instance. There was some suggestion that these may have been cases where it might have been easier for the more powerful litigant to manipulate the situation. One illustration of this relates to the case of AA discussed previously. After suffering a marriage of abuse and neglect, AA was finally granted a divorce by her local chief’s court, despite the tireless objections of her family. When her former husband subsequently accused her of adultery using the venue of the higher level customary court in Rumbek, however, she was found guilty and sentenced to nine months imprisonment and a fine of 450 Sudanese pounds.

It was generally understood by both prison officials and the NGOs in Wau interviewed that, those cases which are referred to the local or chiefs courts are the “easy” cases and those sent to the regional courts are more complex. All were of the view, however, that in the rural areas “everything is solved by customary court,” although of course, these decisions (at least in theory) could be appealed. For litigants from outside the area it can be extremely tricky when the matter is something that is considered the domain of custom. SAK, a Darfurian living in Wau, struggled to work out how best to seek a divorce as a foreigner with no local customary tradition to engage. When interviewed, she was awaiting a court date in the statutory system.

**Appeals**

In theory, customary courts can be asked to review their decision to correct errors of law, fact or where new issues come to light. The Chiefs Courts Ordinance of 1931 introduced a hierarchy into the system, and today appeals may be made, for example, from a B Chiefs Court to an A regional court and then beyond to the Courts of Appeal. The statutory system has a clear hierarchy of review set out in the 2008 Judiciary Act, which connects to the customary system of review. As a matter of practice, however, the possibility of appealing a conviction or sentence was rarely mentioned as an option by the women, and when it was, there did not seem to be a clear sense of how the system operated or where and how the appeal might be lodged or followed. AP, who was in prison for unlawful...
killing, understood that she had submitted an appeal but there had been “no follow up.” She indicated that she intended to “try to appeal again.” Likewise, when SIHA carried out focus group discussions with women in Wau, many of the women were “not sure which courts or bodies had the higher authority in cases of divorce and other family related matters.”

**Combining the Systems**

Thus, the idea that, by meshing the principles and mechanisms of both customary and formal systems a preferred form of unique “South Sudanese” justice can be delivered, is not always accurate. The experience of YY is an example of how the two system structure, with its out-of-step elements, rarely means the best of both worlds.

YY was the fourth of six wives and the mother of four children. She left her home because her husband would not support her in building her own home. She sought out the company of another man and fell pregnant. Her husband took her to the regional statutory court but the judge refused to make any judgement (“this is no case”) and simply ordered her to return home. When YY left the court her husband immediately had her arrested by the police,

held for eight days in police custody, and then returned again to the same court to face another charge of adultery. After the opening of the a new case against her she was found guilty and a fine of seven cows and 250 SDP was ordered, and YY and her new partner were sentenced to one year’s imprisonment.

The assessment by the NGO expert who accompanied the researcher during the interview with YY indicated that the husband was intent on pursuing a tactic of making sure YY was kept in prison, as he was afraid that she would countersue for his own dereliction of duty. Not only had he apparently refused to support YY as required but he “never paid the dowry, and now he is using her to get seven cows. It is his way of making money.” The only way for YY to escape the cycle of imprisonment in which she was trapped was to seek a divorce. In her view, the venue in which the case was allowed to proceed had been “a mistake.” The case had been taken to the statutory court by the police further to the husband's request, but it should, she said, have been heard at the customary level. She noted that “[e]ven the chief came and said that the case should be taken back to the village, but the husband [insisted on taking] it to the formal court as [he knew that] the customary court would consider it a[n] illegal marriage [because the dowry was not paid].” It was also interesting that the guards who were present noted that, although customary law was applied by the statutory judge, he did not “dig into it enough” and did not ensure that the relatives were there to assist with understanding the background to the case. Moreover, it should be noted that in the customary system, it is now increasingly understood that there should be only one judgment for adultery against a wife in favor of her husband and to order a divorce after a second infraction has been committed. This is

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108 Interview conducted by SIHA Network: Wau November 2010
intended to reduce the likelihood of husbands forcing their wives into adultery to benefit from the fine payments, a situation that is now recognized by the customary courts.

Lack of Information, Isolation and Vulnerability: “I talk strong but I feel bad in my heart”

The legitimacy of customary law systems rests on the recognition given to them by the community. Litigants understand their workings in terms of community values and priorities and therefore are more likely to accept, implement and be guided by the decisions made. If those who are the “beneficiaries” of customary law do not understand its processes and underlying principals, then its legitimacy has to be called into question. Consequently, it was a matter of concern that a feature of many of the encounters with women in prison during SIHA’s 2010 research, was confusion and bewilderment in terms of how matters had unfolded before the court, whether customary or statutory (although more frequently with respect to the latter). The isolation of some of the women seemed acute. For instance, some did not understand what charges were before the court and some had received no visits from family members. Many had no idea how long their trial would take, when it would commence, how it would operate, whether the finding of guilt or sentence could be challenged or appealed or what the relationship between the payment of penalty and reduction or augmentation in their sentence was. And at times, it literally seemed that cases were lost in the system. In Wau, an NGO official told SIHA: “There are many cases like this. We have an example of someone accused of murder, she did not do it and was kept for four years and four months in prison. There was no record at the police. We went to the general attorney and the court until the case [woman] was released.”

It was striking how many of the women in custody noted that they had never been shown any written documentation about their case, even where the charges were extremely serious (although certainly some of the women might have been understood to be illiterate). In one case in Rumbek, for example, a young woman who had given birth in prison while on remand for unlawful killing had seen “no paper” in her case, despite having been four months in custody. It is generally assumed that documentation was on file with the prison authorities in these situations, but the fact that the women themselves had nothing to “show” or use in preparing their own support in the face of accusations and imprisonment, was likely to be hugely disempowering. In addition, a number of women noted that they could not read the statement that was prepared on their behalf at the police station: this was the case both with foreign nationals whom the researchers met and did not read the language but also for South Sudanese women who were illiterate. In Juba, for instance, a Gabonese woman charged with counterfeiting had signed a statement in Arabic, a language she neither reads nor speaks. This was common in a number of other cases where the women were not even sure on the basis of what charge,

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109 Interview conducted by SIHA Network: Juba, October 19th, 2010.
110 Researcher notes on file with SIHA Network: Juba November 2010
111 Interview conducted by SIHA Network: Wau, November 2010
112 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
113 Interview conducted by SIHA Network: Juba, October 16th, 2010.
or alleged behaviour, they were being held. AD\textsuperscript{114} was shocked, for example, when she found herself taken into custody immediately upon arrival to a hearing of her petition for divorce at the customary court in Rumbek. She was not told on what grounds she was being detained and she could only assume that it was in connection with allegations of adultery that had been made the previous day at the hearing by her husband, despite the fact that he had been unable to name a co-accused or give details.

One fifteen year old girl, AP,\textsuperscript{115} had been in prison for seven months when SIHA encountered her. Despite the fact that the case involved a detained minor no-one seemed to know exactly what charge had been brought against her.\textsuperscript{116} She had been unmarried and attending school when she fell pregnant. Her family could not accept the pregnancy and sent her to Wau to stay with her grandmother. Eventually she either gave birth or miscarried; she told SIHA how she, “went to the (latrine pit) and the baby fell out.” It was her grandmother who took her to the police station, but the guard present at the interview told SIHA that he understood that it was the uncle who had formally opened the case (although no one knew of what nature). She spent nine days there before being transferred to the prison. When asked “from where” she had found the baby and whether she had wanted it, she said, “I did not want to do it. I want to go back to school.” There had been no hearing of the case at the time of the research and no one had visited her in detention. Abandoned by her family, the community and the state system, the researcher’s poignant comment notes that AP was difficult to speak to as she was “very emotional and shy.”

Even where women are not in prison, the confusion, weakness and lack of capacity in the legal system combined with the women’s own vulnerability, can make dealing with both customary and statutory law difficult and confounding. CA\textsuperscript{117} told of how, after a long and abusive relationship, she finally tried to seek a divorce. However, it became clear that the process of pursuing a divorce was then marred by continued violence and procedural barriers.

“I was married at 16 and cows were paid for my dowry. My husband drank a lot, and got to the stage where he stole money which he used to marry another woman.” At one point, CA’s husband took the children away from her. At another time, he did not provide any assistance for a whole year. During one period CA became ill and was unable to “afford the cost of the treatment for me and my children, so I went back to him.” Later, CA’s husband married another woman and again failed to properly support her. CA’s health then began to deteriorate: “[b]ecause of all the pressure, I became

\textsuperscript{114} Interview conducted by SIHA Network: Rumbek, November 3rd 2010.
\textsuperscript{115} Interview conducted by SIHA Network: Wau, October 12th, 2010.
\textsuperscript{116} It is possible on the facts that she had been charged under section 261 of the Penal Code (causing of miscarriage, injuries to unborn children, exposure of infants, cruelty to children and concealment of birth causing miscarriage).
\textsuperscript{117} Interview conducted by SIHA Network: Wau, June 25th, 2009.
mentally unstable and moved away from the house about 10 month ago.” CA finally went to the customary court to seek divorce and maintenance, but the process has proved extremely difficult: “papers keep disappearing and in my new place, he keeps harassing me and the children and in one occasion he tried to rape me.”

HA\textsuperscript{119} was a seventeen year-old minor who had already served six months for killing her husband when SIHA encountered her. Considering the time taken for a judgement to be rendered in such cases, it is likely that she was under sixteen at the time the incident occurred. Despite being a minor, it did not seem that she had any assistance, not even with respect to formally presenting a defence or any mitigating circumstances that might have been relevant to her case.\textsuperscript{120} HA’s account of the process is one in which she followed the instructions of others and was either not present or not permitted to engage in most of the discussions of her fate, whether at the family consultations or before the court.\textsuperscript{121} She was even initially kept in the dark about the fact that her husband had died: “[f]rom the beginning, they never told me anything, but when I was on the way to the court meeting, the police officers said, “We have news for you, did you know that this husband of yours passed away?” For HA, six court meetings were held, however, she was only allowed to speak at the third. At the fourth and fifth, the result of the family deliberations was presented, and at the sixth “my judgment was 10 years and the penalty of 30 000 Sudanese Pounds. The judge told me to go and write an appeal, but I had no one to assist me in this.” It is interesting in this regard that HA noted that her husband’s mother “wanted to let me go” but that others were demanding a death sentence. HA was also unclear about her sentence and its implications: she did not know, for example, whether payment of the fine would result in her freedom.

The lack of clarity about the scope of the law and the roles and responsibilities of the various actors engaged in deciding the fate of the women and their children was a pervasive feature of women’s imprisonment throughout the system. Even in cases where serious charges were at issue, such as murder or “causing murder,” the confusion and isolation of women faced with an uncertain and often mixed set of systems, was clear. AP\textsuperscript{122} was in prison in Juba for the unlawful killing of her sister and did not seem to be aware of her sentence: she attended court seven times and at the end she recounts how the judge simply said, “I cannot judge you as a person but you will be in prison your whole life, only if there is a release you will have a chance.” From the facts as presented it appears that there may have been possible defences or mitigating factors which could have been taken into account and the judge indicated that he should appeal. AP understood that an appeal was lodged but that there was “no follow up” and had no details about the process. She told SIHA simply, “I will try to appeal again.”

\begin{itemize}
\item \textsuperscript{118} It was not clear from the account to what extent CA understood her husband might have been trying to influence the process.
\item \textsuperscript{119} Interview conducted by SIHA Network: Juba, October 16th 2010.
\item \textsuperscript{120} At the second court hearing it appears that the case was adjourned, as her birth certificate was unavailable, which indicates that her age may have been the subject of some discussion. In addition it does seem, however, that the existence of some mitigating circumstances was accepted by the court as she was sentenced to ten years
\item \textsuperscript{121} Sudan’s Penal Code provides however that there should be no presumption of criminal incapacity for children over 14 years of age. See, The Penal Code Act, 2008, section 32.
\item \textsuperscript{122} Interview conducted by SIHA Network: Wau, October 12th, 2010.
\item \textsuperscript{123} Release referred to the occasional amnesties, which are issued by the executive at times of celebration.
\end{itemize}
As a result, the uncertainty and isolation of those in detention can be extreme. When interviewed by SIHA, EI from Kenya had been in pre-trial detention for ten months for “causing [the] murder” of her sister: “I have not seen any lawyer or paralegal and do not know when the trial is. I have no relatives here. I have just stayed here.” 124 Although she asserted that she expected to be released in the end, as she said she was not even present when her sister was shot dead, the researcher noted that, “[i]t is clear that she has no idea what exactly is going on” and that she is desperate to return home. 125

Lack of Legal Assistance

Lack of legal assistance and access to information about solutions to the women’s problems were consistent features of each of the interviews. As one of the guards present during interviews in Juba prison noted, “in Sudan one defends oneself as there is no money for lawyers.” 126 YM127 in Rumbek, the mother of eight children, was found guilty of killing her husband’s second wife in circumstances where the defence of self-defence or necessity might have been available. It appears that as a result of a quarrel, YM was beaten by her husband’s second wife and her sisters and brothers. YM tried to defend herself against them: “I was so afraid they might have killed me. I put the knife inside the woman’s heart and killed her.” She was sentenced to seven years imprisonment and the payment of 31 cows, and was abandoned by her family. YM’s imprisonment impacts her two children who are seven and five years old and who are currently imprisoned with her and who receive no additional food or medical services. “My family and my husband no one takes care of me, they all rejected me and do not want me to be released.” According to prison officials, the health of all three has deteriorated markedly since they came to the prison. YM did not have a lawyer; neither does it appear that the defence of self-defence was suggested to her.

In Rumbek there is a paralegal service that assisted women in following up on their cases, as well as composing their appeals. However, its impact was limited by the fact that the paralegals were insufficiently trained in the legal steps that might be taken to challenge detention and remand and that it tended to focus on mediation and negotiation. As one of the prison officers explained: “There is a legal aid office in the prison, they help women to follow up their cases, they accept to write a petition after the women stay two or three weeks in the prison, [but] they need more training in trial procedures and legal rights.” 128 In Juba, a number of interlocutors spoke of a programme run by the South Sudan Law Society and of visits by women lawyers to the prison. The Minister of Legal affairs of Central Equatoria, who was interviewed for the research, noted, for example, that “women lawyers take the more difficult cases.” 129 Yet, none of the women interviewed in prison mentioned having received sustained assistance, although that should not be conclusive. In Juba, one woman in prison for theft stated that the “Human Rights Office” (assumed to mean the Human Rights Commission) had visited her to speak about her

124 Interview conducted by SIHA Network: Juba, October 19th 2010.
125 Researcher notes on file with SIHA Network: October-November 2010.
126 Interview conducted by SIHA Network: Juba, October 16th, 2010.
127 Interview conducted by SIHA Network: Rumbek, November 2nd, 2010.
128 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
129 Researcher notes on file with SIHA Network: March, April, June 2009.
case, but there had been no follow up.130 It was only in the murder case of AW131 in Wau that a woman had indicated having seen a lawyer and then only once, despite at least four hearings of the case having occurred.132 However, just like in Wau, many of the women SIHA encountered mentioned, never having received assistance with their cases, even though paralegals from the Peoples Legal Aid Centre visited the prisons regularly.133

The obscurity of the customary system is in clear contradiction with the formalities and clarity required by statutory law. A key finding of the research was the reluctance on the part of both the women and those assisting them to challenge the appropriateness of decisions made by those in authority, even where the results were destructive and seemed contrary to common sense and basic fairness. In Rumbek prison, for example, researchers found AA, a 14-year-old girl, awaiting trial for an unspecified offence.134 It appeared that she had been remanded in custody from the customary system even after her uncle had confessed to the killing of her “friend,” but neither herself nor anyone in the prison, including the female prison officials seemed to understand why she was there.135 The officers felt they had no authority to question her presence in the jail.136 As the researcher noted, “the female officers in the prison knew well that this girl was a victim and there is no crime that could be held against her; however, on some level they also respected customary law.”137

Silencing of Voices: “the judge didn’t allow me to defend myself or to tell my story; he didn’t allow me to speak.”138

A frequent complaint from the women interviewed was that they were not allowed to present the details or context for their actions in court. Of course, it is impossible to know from the accounts to what extent the information that the women felt they had not been able to enter into the record was already known to the judge as a result of other testimony. But the bottom line is that they felt they had not been properly heard, even in the customary courts which are, in theory, founded on an investigative approach that should permit the giving of extensive testimony, unfettered by the kind of restrictions that exist in the formal adversarial system.

Often it seemed that the information not put before the court included details that might have contributed to a better understanding of the woman’s criminal responsibility or otherwise, or would have at least suggested mitigating circumstances that could have

130 Interview conducted by SIHA Network: Juba, November 2010
131 Interview conducted by SIHA Network: Wau, November 2010
132 The interpreter’s articulated that the lawyer only appeared once, as there was likely no money to pay him.
133 Peoples Legal Aid Centre (PLACE) is a not for profit organization of lawyers serving the legal needs of displaced people in South Sudan.
134 “One day while I was sitting with my friend near the farm my uncle saw us, he became so angry and quarreled with my friend. My uncle brought [an] axe and killed the man. At that time I was so afraid and didn’t know what to do and I ran to the house. My uncle went to the police station [and] admitted his crime. My other uncle then came to the house and took me to the police station.” See, Interview conducted by SIHA Network: Rumbek, November 2nd 2010
135 See discussion below on, The Child Act, 2008). The Penal Code however says the opposite: children between 12 and 14 are to be presumed criminally liable unless the contrary is proven (see, Penal Code, 2008, article 31). Both Acts do however confirm that no child under the age of 12 may be prosecuted.
136 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
137 Researcher notes on file with SIHA Network: November 2010.
138 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
influenced the nature of the penalty imposed. For instance, AM\textsuperscript{139} was sentenced to one year and six months imprisonment for adultery, despite the fact that the husband who had been wronged had never completed dowry payment. But the customary law judge “refused to give her any chance to speak” to explain this. In another case, NA\textsuperscript{140} had tried to explain why she married another man after fleeing the man who had “inherited her” after the death of her first husband. The man who had assumed the role of her husband had persistently abused her, accused her of killing his brother (her first husband) and eventually tried to kill her: “I was about to explain to the Judge why I did that [married the second man] but he stopped me and said no more word, you are guilty.” In another instance, AA\textsuperscript{141} was forbidden to speak in court to explain herself and her actions when she was sentenced to nine months imprisonment for adultery. She had found a new partner after her husband had rejected her, his family de facto abandoned her and she felt she had nowhere to go.

There was also acknowledgement by others, however, that they had been given the opportunity to sufficiently explain their situation. For example AM,\textsuperscript{142} who had been sentenced to seven months imprisonment for adultery, noted in her account that the judge had allowed her to tell her story. Nonetheless, the summary nature of the hearing that the women were given, in some instances appeared to undermine its usefulness. In the case of AA, in response to a direct question from the judge, she “admitted” that she had “committed adultery” and was immediately found guilty of the crime. What AA\textsuperscript{143} had meant to confirm was that while she had had sexual intercourse with her partner she did not in fact believe that she had committed adultery, but her answer was considered a sufficient confession to the charge. In this case AA had sought and had been granted a divorce at the chief’s court level from her previous husband and had therefore believed that had been free to enter into a new sexual relationship. AA was sentenced to nine months of imprisonment and a 450 Sudanese Pound fine.

Hence, even if they had been allowed to speak, it is clear from the examples above that the majority of the women did not generally wish to dispute the facts relating to their case, but rather the context. For those charged with adultery, the main clarification they wished to make generally related to their marital status. For instance, their belief that they had been divorced at the time of the alleged adultery, or that they had not been properly married in the first place as a result of non-payment of dowry, was a key factor in what had transpired.

There are a number of general defences set out in the Penal Code Act which, if proven, provide for acquittal in criminal trials. These include defences such as unsoundness of mind (temporary or permanent) (section 34) and private defense (article 40).\textsuperscript{144}

\begin{footnotesize}
\begin{enumerate}
\item Interview conducted by SIHA Network: Rumbek, November 3rd 2010.
\item Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
\item Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
\item Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
\item Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
\item Interview conducted by SIHA Network: Rumbek, November 3rd 2010.
\item Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
\item Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
\item The right of private defense permits someone to defend his or her body or the body of another person or property as long as it does not inflict “more harm than it is necessary to inflict for the purpose of defence.” Where death results from the act of defence, the defence must have been against “an attack, which causes reasonable apprehension of death or grievous hurt.” Penal Code Act, 2008, section 45 or rape, abduction or kidnapping.
\end{enumerate}
\end{footnotesize}
The lack of opportunity for women to articulate legal defences, whether as a result of lack of knowledge or lack of legal assistance was particularly stark in the few situations where unlawful killing was the charge at issue. It was clear from the accounts provided in some of the cases that a variety of defences might have been available. At a minimum, circumstances that might have led to a finding of diminished responsibility or non-criminal forms of responsibility were certainly present. None of these options appeared to have been pursued in the cases reviewed. What seemed to have happened was that the women had not attempted to mount defences to the charge in a strict sense, but had rather tried to explain what they felt had driven their action. At the same time, it should be noted that none of the women who had received sentences for unlawful killing had been sentenced to the maximum penalty. Although not officially stated, it appears that the complexities of the contexts in which the crimes were committed may have been taken into account to some extent in terms of mitigating circumstances when it came to sentencing.

Tensions between Collective and Individual Responsibilities

One of the fundamental tensions between the customary and the statutory systems is its conception of responsibility. Article 7 of the African Charter on Human and Peoples Rights, for example, provides that “punishment is personal and can be imposed only on the offender”. In the customary system where a case is lodged against an individual, it is also lodged against his or her family or other community groupings. Thus, persons not present at the hearing may find themselves subject to a decision by the court. This is not just the situation in civil cases but also in criminal matters. With respect to killing, for example, while an individual might be tried alone in terms of ascertaining guilt, the burden of paying the penalty can be imposed on the collective. Thus, a customary court could divide responsibility for paying the penalty across families and tribes or sub-tribes. This approach reflects the reality that the killing itself may have been carried out as part of a collective dispute or engagement that did not stem from individual choice. Furthermore, it reinforces the responsibility of the family or community for the action of its members and the notion of social control.

The idea that guilt can be shared has now infused the practice of imprisonment with persons often held in custody in lieu of family members. The case of MCC in Wau, on remand for two years with other members of her family in connection with a killing, is an example of how the principle of collective guilt/responsibility, embedded in customary law, permeates the operation of the formal system. In addition to allegations of the attempted rape of MCC’s granddaughter by her neighbour’s son, a series of altercations between the two families resulted in the killing of the neighbour’s wife: “four [of our family] are now in prison: me, the wife of my son and two sons.” After 14 days in police custody the family were transferred to jail: “Unless you have the right person, they will imprison all the family.” Now, the family members have been in prison for two years, there has been no court hearing and no decision appears to have been taken in the case.

A second case illustrates how collective guilt and punishment can be linked to fine payment, which reflects the broader issue that the customary system tends to enquire not into guilt (in strict terms of intention and casualty), but into responsibility. A young

145 Interview conducted by SIHA Network: Wau, October 12th 2010.
woman, AP; her grandmother and a young man of the family were all arrested and imprisoned for the killing of an elderly woman in 2008. It was not clear whether it was the alleged conduct of those imprisoned that had resulted in the deceased's death or the cranial incision she had received from a local healer more than a week after the incident. It appears there was at least one hearing of the case, but AP was never asked any questions: "The judge looked only at the papers from the prison and did not ask me anything." The family of the deceased woman requested 15 cows for compensation (12 had been paid at the time of the research), as well as 5 years imprisonment. Although a guard had indicated that an appeal to the court in Rumbek had been suggested, AP seemed to be unaware that this was the case.

It is clear from the account above that the issue for the judge was less about who was "guilty" of the crime and more about whether or not compensation would be paid to redress the loss suffered by the family of the deceased, with imprisonment of the three family members as a concomitant effect.

Imprisonment as a Tool of Obedience or Punishment

The development of the statutory system and formalisation of the institutions of police and prison within the new state are also impacting the range of tools available for enforcing customary law. Imprisonment is increasingly being used as a penalty and tool of compliance with customary norms in a way which was not common in the past. In particular, it was clear from the accounts given to SIHA that imprisonment was being used not simply as punishment for an offence, but also to force women to comply with the orders of their families, and frequently to make them return back to husbands and marriages, even when they fiercely resisted.

What's more, imprisonment was also used to punish women where they were unable to return dowry in situations of divorce. When asked about divorce and imprisonment in Juba in 2009, Chief Dennis of Katur court described the system in stark terms: while he noted that the punishment for adultery was generally three months imprisonment, in cases of divorce, in the past, women would spend about 18 months in prison sometimes longer "largely as punishment for being unable to return their dowry."

In a number of cases encountered by SIHA, imprisonment appeared to be used without much difficulty as a tool to pressure women to abandon their desire to seek a divorce. NM’s case is a clear example of this. Initially fined for committing adultery with a man who was a relative of her "ghost husband", NM subsequently approached the customary court again herself, this time to seek a divorce. The request was met with an even harsher response and resulted in her imprisonment for six months. Although the sentence was

146 Interview conducted by SIHA Network: Wau June 2009
147 "It is not clear from the account given by AP of the case who in fact struck the blow that allegedly killed the woman during an altercation which erupted around the distribution of the spoils of a hunt. The elderly woman who died had initially spent six days in hospital after the incident in which she was injured. Further to her release from hospital she was then taken to the village where a "circumcision in her skull" was made by a local healer. Two days later she died. AP's grandmother was first arrested by the police, but later AP "and a boy" were arrested by the chiefs.
148 This was noted by the guard who was present at the interview but not mentioned by AP herself.
149 Interview conducted by SIHA Network: Juba, June 23rd 2009.
150 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
formally for adultery, NM interpreted the decision of the court as a way of “bringing her to her senses” and forcing her ultimately to return “home” to the family of her ghost husband. Finally, neither her family nor that of her “ghost husband” had supported her petition for divorce. RA’s case is another extreme manifestation of this use of imprisonment as a tool of forcing a woman to abandon her desire to divorce.

RA’s husband beat her regularly and on one occasion actually attacked her with an axe. RA first went to the customary court to seek a divorce, but was sent to prison for seven days to change her mind. When she was brought back to the court, however, she continued to urge the judge that she be granted a divorce. She was then beaten by a relative within the premises of the court and sent back to jail for another seven days. When she was finally released, RA felt she had no other option but to go back to her husband. After a while, still finding no change in the circumstances that had driven her to seek a divorce in the first place, RA decided that the only way out of the marriage was to commit adultery. She thus found herself once more in prison. RA told SIHA she was only released when she informed the judge that there was no one who was able to look after her baby.

The penal systems, both statutory and customary, appear to be easily manipulated as mechanisms to break a woman’s resistance to complying with family dictates. The case of DA, a 45-year-old widow, involved the custom of widow inheritance or ghost marriage. After she was widowed, DA refused to have sexual relations with her late husband’s brother, as she believed that Dinka custom forbade a woman of her age from being intimate with any man. Having been burned by her relatives as a punishment for her refusal to accede to the practice, DA left the family home and went to work at the restaurant of a female friend. The man whom she had refused to have sexual relations with (her late husband’s brother) then filed a case at the customary court alleging that she had committed adultery with someone at the restaurant. DA spent a month in police custody while the matter was investigated to no avail. Eventually, her late husband’s brother was asked to produce the co-accused and he brought someone whom DA said she had “never seen” before the customary law judge. DA offered to “swear on the holy book” that she had not committed any crime, but was not permitted to do so and she was simply ordered to go home with her “husband.” DA again refused to return to the house of her husband’s brother on the ground that she could not have “any sexual relation with any man at her age, according to Dinka tradition.” She was then sentenced to six months imprisonment by the court, although as the researcher noted, “she didn’t know what her crime was.”

AD’s case shows how pre-trial detention has been seemingly used as a pretext for imprisonment and as a punishment for women who bring forth charges to the customary courts.  

151 Interview conducted by SIHA Network: Rumbek, April 13th 2009.  
152 Interview conducted by SIHA Network: Rumbek May 2010  
153 Interview conducted by SIHA Network: Rumbek, November 3rd 2010
AD was married to a man whom she described as a drunkard who beat her regularly: “One day he injured me by knife in different places on my body; he insulted me and pulled me outside the house.” AD decided to seek a divorce and went to the customary court. Prior to the hearing, AD’s husband came to her house and took all her belongings. When the judge sent for him to be heard in the matter and to explain himself, AD’s husband alleged that he had found her with another man. When asked to produce the man or provide his name, he could not. Told to return to the court in the morning to resume the hearing, AD did and was immediately taken into custody. She was not told on what basis she was being held.

**Imprisonment and its Interaction with Other Penalties**

Almost all of the sentences handed down included a combination of both imprisonment and payment of fines, although there was some suggestion that if the fine was paid release might follow. Even so, there was immense confusion over how exactly this system was supposed to work.

Indeed, women were aware that if they did not pay the fines demanded, their imprisonment might be extended, or if they had been released in the interim, their imprisonment might be resumed. As one of the NGO staff members interviewed in Wau noted: “Last time when I visited, there was a case of a woman that was in prison and had to pay cows. When I asked about her, the guards told me that she was released but was still looking for money to pay for the cows. The guards fear she will be brought back.”

NLA, in prison for adultery, expected to suffer another three months imprisonment if she could not pay the fine of 150 Sudanese Pounds imposed by the customary court. Naturally, however, the imprisonment of women makes it much more difficult for them to pay and therefore necessarily prolongs their detention. This seemed to be the case particularly in instances of divorce and adultery, where it was more likely that her family had deserted the woman and her partner might have been in jail.

While imprisonment for failing to pay fines is permitted by statute law, there are restrictions on the length of the terms of imprisonment that can be imposed by different judicial ranks. Even though it is not clear whether separate judicial decisions need to be made to extend periods of imprisonment where fines are unpaid, it is assumed that this would be required. By way of illustration, the Penal Code sets out limits to imprisonment for non-payment of fines: section 14, for example, stipulates that where imprisonment and a fine are both meted out as punishment, non-payment of the fine may only be punished by imprisonment of a quarter of the maximum length of imprisonment for the

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155 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
offence.\textsuperscript{156} These limits set appear to have been followed in the cases examined\textsuperscript{157} and in a number of instances it appeared that women were aware that payments might be able to shorten their terms of imprisonment.

However, despite the fact that this process seems to be followed, there is no condition for this provided in the legislation. For example, in Wau the researcher noted that a number of women understood that remission of time could be bought: one month could, she reported, be removed from the sentence for a payment of 50 Sudanese Pounds.\textsuperscript{158} Yet, if such a policy or practice does exist, it raises serious questions of legality as a whole and also of direct and harmful double discrimination against a poor woman, who may be in the same position as another woman, facing the exact same sentence, but not have the financial capacity needed to diminish her period of remand.

### Pervasive Problems with the Administration of Justice: Capacity and Independence

Unsurprisingly, SIHA’s research exposed a serious problem with the more broad administration of justice in South Sudan. The lack of capacity and resources of the police, prison and judicial services, both human and material has created major challenges\textsuperscript{159} and the women interviewed for SIHA’s research were unable to escape the impact of these fundamental weaknesses. A paralegal from the Paralegal Aid Centre in Wau, for example, explained that judicial absences, police processing delays and transfer/movement of judges were the main factors impeding rapid trials. It was noted that where a case was transferred from one judge to another, the case often “starts from zero.”\textsuperscript{160} Lost files and abandoned processes prompted many to make similar comments during the research: “[c]ases take a long time and sometimes they are even forgotten […]. There is a problem with the judiciary system here.”\textsuperscript{161} One statistic given by a government official during the research was that there were less than 140 judges in place within the statutory system to administer justice across the whole of South Sudan\textsuperscript{162}.

The “civil” nature of some criminal trials is a factor that can add significantly to the length of the trial process and of remand, as state authorities are not the sole drivers of the case. If the case is not actively pushed by the “complainer” or if he or she does not show up to a hearing, for example, the case will be adjourned, often repeatedly. There may also be practical barriers that delay the process, including transport costs and access to information about hearings.\textsuperscript{163} As the interpreter who assisted with interviews

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  \item[156] The Penal Code Act, 2008, section 15 stipulates that, imprisonment for non-payment of a fine must be to scale with the amount of the fine; for a fine of less than 120 Sudanese Pounds, imprisonment for two months; for a fine of less than 300 Sudanese Pounds, imprisonment for four months, and no more than six months for any other fine
  \item[157] For example, LA in Rumbek was sentenced to 6 months in prison and a 150 Sudanese Pound fine, with an additional 3 months if she cannot pay the fine. 3 months is in fact less than one-fourth the maximum sentence for adultery, which would be 6 months. The same additional prison time was given to AS when she could not pay her fine.
  \item[158] Researchers notes on file with SIHA Network: October-November 2010.
  \item[160] Interview conducted by SIHA Network: Wau, November 2010
  \item[161] Interview conducted by SIHA Network: Wau, November 12th 2010.
  \item[162] Interview conducted by SIHA Network: Juba, November 2010.
  \item[163] Researchers notes on file with SIHA Network: November 2010
\end{itemize}
in Wau noted, “[o]ften cases remain many months before someone looks at them. You cannot send the papers to the one who opened the case because they do not have mail addresses.”164 Sometimes witnesses or litigants simply do not have the means to travel to the place of the hearing.

Furthermore, in a number of cases it was indicated by either the woman herself or the civil society representative who accompanied the researcher that they believed that the judge who heard the case had a conflict of interests. In YA’s case in Rumbek it was noted by monitors that the chief was a relative of one of the parties in the case.165 SF166 in Juba received a sentence of five years for theft. She claimed to be completely innocent: “[in] the office where I was working were almost all Dinkas and the complainers were Dinka and so was the judge.” Bribery of judges or investigators in order to achieve certain outcomes or to achieve delay in the hearings was also perceived to occur frequently. During the research the belief that there was widespread corruption within the legal system and that, in general, “men had more influence in the customary court”167 was commonly expressed.

The lack of capacity of the police service was also an underlying theme apparent throughout the research. Building a police service out of a rebel army is always going to be a huge challenge: police officers are poorly trained and do not generally have the appropriate investigative or evidence collection skills. They are not knowledgeable on the rights of the accused in a formal criminal justice system and often tend to simply follow the orders of the chiefs or other authorities without question. Conditions in police custody, where the women interviewed by SIHA were sometimes held for up to two months,168 were extremely poor. RA, who was held in Juba, noted that “[t]here is no place for bathing, no feeding. […] [T]here is no place where you can sleep. I stayed there for 5 days without eating.”169

Similarly, torture and harassment in police custody appeared to be a pattern of experience for the women interviewed and was acknowledged by officials: “when [women arrive in] prison after being kept days in police custody they are so weak, injured and some of them mentioned that they have been subjected to torture, sexual harassment and violence.”170 The women are more often than not “afraid and rarely talk.”171 FG172 in Wau told of the severe torture she suffered during interrogation by the security police while being held for theft of money “belonging to a well-known businessman in the state.”173 Five other persons were also in custody for the same matter. She said that “they used electric power [and] pulled my nails two hours every day.” And when FG showed the researcher the marks on her feet and her nails, they appeared to be consistent with this account. In Juba,

164 Interview conducted by SIHA Network: Wau, October 12th 2010.
165 Interview conducted by SIHA Network: Rumbek, May 2010
166 Interview conducted by SIHA Network: Juba, November 2010
168 Interview conducted by SIHA Network: Wau, November 2nd 2010.
169 Interview conducted by SIHA Network: Juba, October 16th 2010.
170 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
171 Ibid.
172 Interview conducted by SIHA Network: Wau, November 2010
173 Although irrelevant to the unlawfulness of her torture, FG was vehement that she had nothing to do with the theft and it appeared that at the previous hearing, even the lawyer of the businessman who had been the victim of the theft had indicated that she should or would be released.
allegations of torture and ill-treatment by the security police were also made. None of the women interviewed indicated that they were aware that they might be able to seek compensation for imprisonment or ill-treatment. An NGO paralegal expert did express that her organisation had successfully sued on behalf of someone in Khartoum but noted that, “here in Wau it is more complicated because...[women] are not aware of the legal system.”

Prison officials were clearly aware of the time limits that exist for the use of police custody. As the administrator of Juba prison noted, “According to law, someone under the authority of the police can only stay there 24 hours. After that he can be taken to the public prosecutor. It is the Attorney General who can give [an] order to keep the accused 15 days in custody.” In reality, however, police custody is frequently used as an enforcement tool for the customary courts with little oversight by the Attorney General. A number of the women SIHA encountered had been held in either police or pre-trial custody for an extended period. AN, for example, was held for one month in police custody in Wau despite the fact that local paralegals stated that even the local understanding was that the legal limit was seven days: “[n]ormally someone can be kept seven days, only the Attorney General can renew it.”

Prison Conditions

Conditions in the three women’s prisons visited were poor, although it was understood they were better than those experienced by male prisoners, particularly in terms of quality of accommodation. For example, the capacity of the men’s prison in Juba was 500, but more than 1000 were serving their sentence there at the time of the research in late 2010. In Juba, women were reported to have beds, while men were not and prisoners in Rumbek slept together in one large room. Access to clean water was a general problem, but explicitly noted in the case of Rumbek prison and in both Rumbek and Juba, the women were forced to fetch water, clean and cook food for the male prisoners and for prisoners in other places of detention, like police custody. In Juba one of the guards acknowledged that the women are “suffering, they are cooking for the whole prison, breakfast, lunch and dinner. The quantity is big, 8 bags of posho 3 times per day. Then they also make gorasha (chapatti) and mulah. The cooking is done in shifts and it begins at 5am every morning.”

Access to health services was also a considerable problem for the women on remand in South Sudan. In Wau, for example, there was a woman who had delivered a dead baby the day before she was interviewed, and she was only admitted to hospital for a period of 24 hours.

174 Interview conducted by SIHA Network: Wau, November 2010
175 For example, AM in Rumbek was held in police custody for 21 days; in Wau, AN was held by the police for one month before being transferred to the prison.
176 Interview conducted by SIHA Network: Wau, October 12th, 2010.
177 Interview conducted by SIHA Network: Wau, November 2010
178 In contrast, during SIHA’s June 2009 visit there were 367 detainees awaiting trial and only 166 inmates, women and men.
179 Researcher notes on file with SIHA Network: October-November 2010.
180 Interview conducted by SIHA Network: Wau November 2010
It was clear she was weak and aside from any psychological trauma, she was no doubt suffering. In Juba it was noted by the researcher that although a doctor visits, he or she only brings pain killers and “medicines” for the mentally ill. In case of high fever, women can be taken to the hospital, but if the cost is too high they will be sent back to the prison. Thus, lack of medical attention is acute. For example, one woman in Juba prison had suffered from bleeding as a result of beatings in police custody but was unable to access treatment. In Rumbek it was reported that NGOs, churches and UN agencies did occasionally provide donations of clothes, food and medicines, although such provision was clearly insufficient.

Also of great concern is the fact that care of the mentally ill, which is already a major challenge in South Sudan in general, was clearly inadequate inside the prisons. When SIHA visited Juba prison in June 2009, for instance, among the women being held, were women who were mentally ill and being kept indefinitely, as there were no available treatment facilities. In 2010 it was recorded that sufferers of mental illness were tied to the trees or locked up.

In addition, both prison guards and women in custody mentioned the need for education and literacy classes for the women. In Juba it was noted that, at one point there were adult literacy classes but the classroom was no longer available and the teacher was having difficulty providing the service. Comparably, psychosocial support was generally unavailable. For many of the women, particularly those who were in prison for prolonged periods, being separated from and unable to support their children was a huge burden and took a psychological toll, which also clearly had a negative impact upon the health and wellbeing of their kids. It was interesting to note that in Juba, perhaps as a function of the greater diversity of prison profiles, there was a sense that “the need for social workers or psychosocial support” was critical. The fact that non-nationals are increasingly being arrested and held in Juba also complicates the range of responses that may be required from the prison authorities, such as arrangement for consular access. “For some of the women it was the first time to tell their story and they felt relieved. Many of them started crying, or were visibly upset.”\(^{181}\) In contrast, in Wau there appeared to be “high solidarity” among the women prisoners.\(^{182}\)

A further feature of all the prisons surveyed was the presence of children alongside their mothers in detention.\(^{183}\) During the research there was no evidence of special measures taken to reflect this reality, despite the clear obligations that exist, constitutionally and at the statute level, to ensure the protection and assistance of these vulnerable minors. As one NGO worker in Rumbek noted: “[t]he food in the prison is enough, but there is no food for the children, they share the food with their mothers. There is no sugar, no milk.”\(^{184}\)

\(^{181}\) Researcher notes on file with SIHA Network: October-November 2010.
\(^{182}\) Ibid.
\(^{183}\) In Rumbek there were seven children staying with their mothers at the time of the research visit. In Juba, there were six children with their mothers. In Wau, there do not appear to be any children living at the prison with the women interviewed.
\(^{184}\) Interview conducted by SIHA Network: May 2010
At the time of the research in Rumbek, for example, YM’s two children, then 7 and 5 years old, were serving her seven year sentence for killing her husband’s second wife alongside her. The children received no additional food or medical services and it appeared that YM and her two children had been abandoned by their family. According to prison officials, the health of the mother and children had deteriorated markedly since they had been detained. Others who had support from family and friends were able to maintain their children in better conditions: FA, a woman from Kenya and also serving a sentence for murder in Juba, was accompanied by her two children (five and three years old). Her husband and sister, unlike that of YM, visited on a weekly basis, bringing her and her kids food and money. It was noted that once children are over one year old, judicial approval is required to permit them to remain in the prison with their mothers, and once they are three or four they can be taken to school if that is arranged: “if there is somebody to take care of the child, the child can go out.” In Rumbek during SIHAs first visit in 2009, one woman had her one-year-old stay with her during the day but at night with her family. Although technically they are allowed to leave the prison to go to school, for instance, children were, in effect, themselves prisoners.

185  Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
186  Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
Section V

The South Sudan Statutory Framework: Reflections on National and International Law Obligations

It is clear from the stories told by the women that there are huge questions surrounding the lawfulness of what occurs throughout the various practices that result in women’s imprisonment. This is the case not just in terms of adherence to South Sudanese statute and customary law, but also with respect to constitutional and international human rights protections. While it is impossible to survey the full span of legislation relevant to understanding the experiences of the women interviewed, the following section is a discussion of selected aspects of the principal South Sudan statutory instruments; the Transitional Constitution; and the relevant regional and international human rights instruments that might be valuable to those advocating to reform the current laws and policies.

Reflections on South Sudanese Statutory Law

Adultery

The criminalisation of adultery is a highly controversial and context-specific issue. In South Sudan, adultery is not only prohibited across all customary law systems, but is also considered a crime in the Penal Code Act, 2008. Section 266 stipulates that

“[w]hoever, has consensual sexual intercourse with a man or woman who is and whom he or she has reason to believe to be the spouse of another person, commits the offence of adultery, and shall be addressed in accordance with the customs and traditions of the aggrieved party and in lieu of that and upon conviction, shall be sentenced to imprisonment for a term not exceeding two years or with a fine or with both.”

In light of the experience of SIHA’s partners, it is striking that the definition of the offence of adultery in the statute provides that it is only the unmarried partner who can be found guilty of the crime of adultery. Of course, this is not currently the approach taken in most of South Sudan’s customary law systems or day-to-day practice. When one examines the history of previous legislation on the matter, however, it does seem that there was a
deliberate decision in the 2008 Act to alter the scope of who can be held guilty for the crime of adultery and to urge the exploration of non-custodial options. The 2003 Penal Code adopted as part of the SPLM/A laws\textsuperscript{187} had defined two types of adultery offences: “adultery with a married woman” (section 427\textsuperscript{188}) and “adultery by a married woman” (section 428\textsuperscript{189}). The 2003 law thus focussed only on situations where a married woman engaged in a sexual act with a man who was not her spouse and penalised both parties for the infraction. In the Penal Code Act 2008, however, a single definition of adultery was adopted which mirrors the language of section 427 but makes it gender neutral. Thus although men and woman can now both be held guilty if they have sexual relations with a married person, the married person is not considered to have committed any offence.

Although the 2008 Penal Code and Code of Criminal Procedure did explicitly state that adultery was to be considered a crime from the perspective of statute, at the same time it tried both to soften how the prohibition would operate and transfer some of the responsibility for regulating the matter to the customary system. First, the new legislation confirmed that the state cannot on its own initiative “take cognisance” of adultery unless a complaint is made by “the spouse or the aggrieved.”\textsuperscript{191} Thus the prosecutor has no independent right of action without a complaint, an approach that reflects the civil and criminal elements of how the offence is conceived in customary law. Second, the law also stipulates that when the issue arises customary law and tradition should be used first to “address” the offence: “[the offence] shall be addressed in accordance with the customs and traditions of the aggrieved party.” The issue only defaults for consideration under statute “[i]n lieu of that”. The Penal Code of 2003, in contrast, did not contain any reference to customary law and traditions. However, the law is confusing in a number of respects. First, despite identifying custom and tradition as a source of law for handling the matter, the text of the law clearly provides that it is the scope of the crime of adultery as defined in the statute that must be the threshold, rather than how it might be understood in the customary system. Thus if a married woman cannot be charged or sentenced under the statute, the case cannot come within the jurisdiction of the court and customary law does not arise for consideration. This interpretation of the law of course does not reflect the reality that married women are regularly imprisoned for adultery by the statutory courts, as confirmed by SIHAs research.

Second, once the elements of the crime appear to be present, the first question that arises is which version of the “customs and traditions of the aggrieved party” should be used to address the issue in an era of displacement and inter-marriage? And second, who should be considered the “aggrieved party”? Section 51 of the Code of Criminal Procedure 2008

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\textsuperscript{187} Dong Samuel Luak, An Introduction to the laws of the new Sudan.

\textsuperscript{188} “Adultery with Married Woman”: Whoever has sexual intercourse with a woman who is and whom he has reason to believe to be the wife of another man, such sexual intercourse not amounting to the offence of rape, commits the offence of adultery and shall on conviction, be punished with imprisonment for a term not exceeding two years or with fine or with both.” See, Penal Code, 2003, section 427.

\textsuperscript{189} “Adultery by Married Woman”: Whoever being a married woman has sexual intercourse with another man commits the offence of adultery and shall on conviction, be punished with imprisonment for a term not exceeding two years or with fine or with both. See, Penal Code, 2003, section 428.

\textsuperscript{190} A third related offence of “enticing or taking away or detaining with criminal intent a married woman” was also defined. See, Penal Code, 2003, section 429.

\textsuperscript{191} See, Code of Criminal Procedure, 2008, section 51.
indicates that prosecutions for adultery or “enticing a married woman” can only be made upon a complaint made by the "spouse or the aggrieved.” Neither the Penal Code 2008 nor the Code of Criminal Procedure 2008, however, defines “aggrieved party” in relation to adultery. Previously the 2003 Code of Criminal Procedure had employed the following formulation: “the husband of the woman or, in his absence, by a person who had care of such woman on his behalf at the time when such offence was committed” (section 134). If this definition is used as a guide, and it is not clear if this is the approach which would be taken, cases which were initiated by the woman’s own family members should not be properly seized by the court, unless they could be understood to have been taking care of the woman on the husband’s “behalf”. More than a third of women interviewed by SIHA who were charged or sentenced for adultery, however, had had the case brought “against” them by their own family member (or jointly by their own family members and their husbands acting together).

Finally, what is also not clear in the law are the conditions which would allow the transfer of consideration of the matter from the realm of “customs and tradition” to that of statute. Section 266 simply directs that the matter "shall" be addressed under custom but “in lieu” of that a statutory penalty is prescribed. No indications are given as to what situation might trigger a decision that an “in lieu” decision is merited. Does the matter revert if agreement cannot be arrived at between the judge and the complainant? Does one or other of the parties get to choose the applicable framework?

Notwithstanding these ambiguities, there is a clear disjuncture between what is included in the elements of the crime of adultery set out in the Penal Code 2008, and what would be considered the scope of the offence of adultery in most of South Sudan’s customary law systems. Most critically, under the statutory definition it is clear that the married woman who has been the partner in the commission of the offence of adultery cannot be held criminally liable. This is certainly not the case on the ground. In the cases surveyed, the focus appeared to be primarily on imprisonment of the woman involved: only three of the women in prison for adultery whom we interviewed noted that their partner had also been imprisoned or fined for adultery (although it may be that others had not thought it was not an issue which was necessary to mention.)192 As has been so clearly shown in the stories gathered by SIHA, imprisonment, charging and sentencing of married women for adultery, or indeed on suspicion of having committed adultery, is common whether cases are referred through the customary or the statutory system.193 None of the married

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192 A note from the researcher in Rumbek suggested, however, that “[m]ost of the cases the man will be punished between 1-3 months imprisonment if they find him.” Although it is noted above that the new approach of the 2008 Penal Code was to make the crime of adultery gender neutral, it should be pointed out that a related crime which targets men specifically was retained and which could have been used for the basis of charges laid against the accused male partner. This is the crime of “Enticing, Taking Away or Detaining a Married Woman”. Article 267 of the Penal Code Act provides that “[w]henever, takes away, entices or detains any woman, who is and whom he knows or has reason to believe to be the wife of any other man, from that man or from any person having the care of her on behalf of that man, with intention that she may have illicit intercourse with him or any other person or conceals or detains with that intent any such woman, commits an offence, and upon conviction shall be sentenced to imprisonment for a term not exceeding three years or with a fine or with both.” The crime although similar in its constituent elements to adultery, is different in that it is gender specific and involves an element of additional physical or other form of control of the woman. It carries a higher maximum penalty than simple adultery (three years). It is not clear whether some of the men who had been sentenced alongside side their partners had been convicted under this offence or that of adultery.

193 In Rumbek, the sentences for adultery vary from 6 months and 150 Sudanese pound fine (LA), to 9 months in prison and 100,000 Sudanese pound fine (NA), to a 14 month prison sentence (AM), to 2 years in prison (YM). None of the women in Rumbek had sentences exceeding 2 years. YY charged with adultery in Wau prison
women who were in prison for adultery mentioned that the person with whom they committed adultery had also been married at the time of the alleged crime. Based on a strict application of the South Sudan Penal Code, the women should therefore not have been found guilty, even if the act of sexual intercourse had been proved. Neither the women themselves nor those assisting them seemed to be aware, however, of the argument that they might have been exempt from liability under the 2008 Penal Code on the basis that they were the married partner.\footnote{194}

Under customary law, of course, both parties are generally considered to be guilty where adultery is found to have occurred, although compensation focuses on redress to the aggrieved husband and the family of the married woman. Although relatively rare, it should be acknowledged that in some traditions women are also entitled to compensation when their husbands commit adultery: in a report which canvassed Baka, Mundu and Avukaya customs in 2009, for example, it was noted that a woman whose husband committed adultery was entitled to compensation of two goats. In the Kakwa customary system, by contrast, no such compensation is provided.\footnote{195}

\textbf{Pre-trial Custody and Imprisonment}

Pre-trial custody was frequent in the adultery cases encountered and was viewed as a common practice by the NGO experts interviewed. The US Department of State’s 2009 and 2010 Human Rights Reports on Sudan confirm that women in South Sudan are “routinely held for lengthy pre-trial detention on allegations of adultery.” Although it is acknowledged that adultery is viewed as a very serious infraction across South Sudan’s customary law systems, from the general perspective of modern statutory systems, the detention on remand of persons who are not security or flight risks would be highly unusual. The South Sudan Code of Criminal Procedure 2008 recognises this. Persons who are arrested for a “minor offence” are “entitled to a release on his or her own personal bond only if that release will not compromise public safety and there is reasonable assurance that the arrested person will appear as required.”\footnote{196} For offences punishable with ten years or less into which the category of adultery would fall, a person shall be granted bail unless “by reason of granting of bail, the proper investigation of the offence would be prejudiced or a serious risk of the accused escaping from justice be occasioned.”\footnote{197}

Despite the fact that the majority of the women were in prison for what could be understood as minor offences, none reported having attended a hearing to review their detention. Likewise, not one of the women interviewed referenced even the existence of a received a prison sentence of one year. It should be noted that the maximum sentence stipulated in the Penal Code 2008 for adultery is two years and this appears to have been adhered to in all the cases surveyed.

\footnote{194} None mentioned it, although they were not specifically asked if they knew about the restriction.

\footnote{195} Southern Sudan, Norwegian Peoples Aid /the Institute for the Promotion of Civil Society, The Women’s positive customary rights among the customary laws of the Kakwa, Pajulu, Nyambaro, Baka, Mundu and Avukaya Communities (Central Equatoria), 2009: 47.

\footnote{196} Criminal Procedure Code, 2008, section 123.

\footnote{197} In terms of offences related to unlawful killing it appears that bail cannot be contemplated where a murder charge is at issue but may be granted where, inter alia, that “by reason of the granting of bail the proper investigation of the offence would not be prejudiced nor a serious risk of the accused escaping from justice be occasioned.” See, Criminal Procedure Code, 2008, section 126 and 127.
possibility of asking the judge for release pending trial. Neither did anyone assisting the women in the three research locations in 2010 or during preliminary research in 2009 suggest that review was an option. Even with respect to serious offences, including those related to unlawful killing (at issue in nine of the cases encountered) bail is provided for in law. In Wau, for example, researchers met with AN who had been on remand for three years in Wau prison in relation to an unlawful killing, yet, she had not even been produced before the court: “the case is not taken to the court; it has not reached the judiciary.”

It is likely, therefore, that if an application for release had been made and the issue had been addressed in line with the standards set out in the statute, many of the women SIHA met would not have been detained on remand. The Code of Criminal Procedure provides that in decisions on bail the following matters are to be considered: “the protection of the public, the seriousness of the offence charged, the previous criminal record of the accused, and the probability of his or her appearing at inquiry or trial of the case. Public safety shall be the primary consideration” (section 128). In terms of applying these criteria and assessing the “seriousness” of the offence, the statute stipulates that considerations should involve “alleged injury to the victim, and alleged threats to the victim or a witness to the offence charged, the use of a firearm or any other deadly weapon, in the commission of the offence charged” (section 128). If sureties are required the amount is to be fixed “with due regard to the circumstances of the case, and shall not be excessive.” On a fair application of these criteria, it is hard to imagine that more than a few of the women imprisoned should have been remanded in custody. In other words, the problem facing women in prison, with respect to bail, lies more with the practice of the law than the law itself.

An unspoken but significant question in all the stories SIHA heard of imprisonment of women for adultery was, what interest their detention served. As a deterrent, imprisonment does not seem to be working: most commentators agree that adultery is on the rise and many of the women SIHA spoke to told how desperation to be free of a marriage often spurred them to brave a custodial sentence. In terms of delivering compensation to the aggrieved party, imprisonment clearly impeded women from paying the fines, which had also been imposed alongside their incarceration. And given the circumstances, their own families were also unlikely to be eager to pay. The situation was particularly exacerbated when new partners, who might have assisted with the payment of fine, had also been imprisoned. The fact that non-payment of fines can also result in further penalties of imprisonment, led frequently to prolonged detention, and ultimately further cost to the state and to the families and communities of the women.

For that reason, it was difficult to see what interest was being served by the imprisonment of women for adultery, whether on remand or further to sentence. The broader social cost appeared to be extremely high when set against the nature of the crime and the

198 Although bail cannot be contemplated where the offence charged carries the death penalty, it “may” be granted for offences carrying a lesser penalty, inter alia, where “the proper investigation of the offence would not be prejudiced nor a serious risk of the accused escaping from justice be occasioned.” See, Criminal Procedure Code, 2008, section 127

199 Interview conducted by SIHA Network: Wau, October 12th 2010.

200 Release on bail can be allowed in three circumstances “(a) by the arrested person personally executing a bond to appear, with or without securities or sureties; (b) by another person executing a bail, to bring the arrested person, with or without securities; or (c) by paying a deposit coupled with bond, or bail.” See, Criminal Procedure Code, 2008, section 124.
circumstances in which it seemed to have been committed. The research showed how removal of women from their families resulted in fractured relationships, children sent abroad for care and loss of jobs and livelihoods. It can only be presumed that this had a detrimental long term impact on the capacity of the women to contribute to the wellbeing of their families and communities. The effect on their children must have been particularly harsh. From the snapshot taken by SIHA in November 2011 there were 15 women in the three prisons who had been accused, or been found guilty, of adultery. They had 45 children among them, 15 of whom were living in prison with their mothers, including one child who was born in prison. The South Sudan Child Act specifically recognises the damage that can be generated by the imprisonment of young mothers. It provides that when sentencing, “expectant mothers less than 18 years of age and mothers of infants who have been accused or found guilty of violating the law, non-custodial sentencing shall be considered.” Where that is not possible the Act also provides that a baby born in custody has the right to be cared for by his or her mother for two years.

Rape and Domestic Violence

The approach to rape in statute law and the way in which it is being applied in practice, again reflects this tenuous struggle in which the newly independent state is committed both to what is viewed as South Sudanese customs and traditions and establishing a “modern” criminal justice system. Sexual and gender based violence was a major theme throughout the research and challenges around legislation against this have been a critical part of the broader context within which the struggle to improve women’s lives in South Sudan is unfolding. Encouragingly, in some places it was suggested that incidents of rape had been decreasing and at the same time that it was being dealt with with increasing seriousness. In Wau, for example, it was clear that all rape cases were being transferred to the main court in town rather than being dealt with at a local level.

In terms of custom and tradition, control of sexual intercourse with a woman of marriageable age, both in law and in practice, is a core focus of concern: the existence or otherwise of consent appears to be a lesser preoccupation. The severity of the punishment for rape, for example, in practice tends to be linked to a woman’s marriage value and the resultant injury to the family of the woman, rather than to the nature and consequence of the act and its impact on the female victim. Thus consensual sex with a young married woman is usually considered of greater gravity than the rape of an older woman. As Chief Denis of Katur Court in Juba explained: “[p]unishments for rape are: 1,500 Sudanese Pounds (about $700 US Dollars) is given to the victim’s family by the offender in addition to 150 Sudanese Pounds (about $70 US Dollars) given to court authorities, one year in prison and flogging for the offender. However, if the girls are aged between 12-18, then they are treated as minors and a [more severe] punishment will be issued or if it is a victim 45 years old or above, then there is no compensation.” Generally the women themselves who are victims of rape or assault have no right to compensation: as mentioned above, however, some traditions, such as the Baka, Mundu and Avukaya do provide compensation, alongside family compensation, often in the form of two to three

201 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
203 The Child Act, 2008, section 191(2).
204 Interview conducted by SIHA Network: Wau, June 29th, 2009.
205 Interview conducted by SIHA Network: Juba, June 23rd 2009.
To some extent, the statutory provisions for rape reflect the customary approach. The Penal Code 2008 contains a definition of rape which is gender neutral and encompasses a very broad conception of statutory rape: whoever “has sexual intercourse or carnal intercourse with another person, against his or her will or without his or her consent, commits the offence of rape.” As a matter of law a child (a person under eighteen years) cannot give consent. Thus a young man and woman who are both under eighteen and have sexual relations consensually and are not married to each other, both commit the crime of rape and unfortunately, there is no difference in the range of penalties, which can be applied for either type of crime.

The issue of statutory rape (often called defilement or elopement) has become the centre of a major debate in South Sudan. Statutory rape is deemed to have been committed when sexual intercourse occurs between two people, at least one of who is under the age of consent. Whatever the consensual nature of the act in non-legal terms, the fact that one of the parties was unable as a matter of law to give consent renders the encounter unlawful. This debate around statutory rape embodies the conflicts that have resulted from rapidly shifting social and economic contexts, which have forced a tension between customary and statutory law (and the extent to which custom should be codified in statute), as well as between various sites of power as the new state comes into being. In this instance, it is men, rather than women, who are feeling the brunt of the clash, particularly in Lakes State where young men launched a campaign in late 2010 against the statutory courts’ approaches to statutory rape. The epicentre of the crisis was the Lakes State High Court, where Judge Raimondo was asked to explain how he had been applying the Child Act, the Penal Code and customary law to sentence young men to lengthy prison sentences for impregnating young girls. Youth groups had taken up the issue and petitioned parliament. In April 2010 the crisis reached its pinnacle with over 60 men in prison in Rumbek, with the State Governor finally giving into the pressure to dismiss the Judge. Youth groups had been arguing that Dinka culture and customary law provided that girls were of marrying age when they started menstruating and that the statutory bar was therefore inappropriate. Judge Raimondo had replied that, notwithstanding custom, the statute said it was a crime and that the law had to be implemented. It is interesting to note, of course, that in these cases, strictly according to the law, if the boys had also been less than eighteen years of age, the girls should also have been charged with rape.

Following a deliberation by a chief’s conference intended to address the codification of certain aspects of customary law, Lakes State Assembly passed a new law on elopement in October 2010. Article 33 (1) of the law reportedly provided that, “youth who impregnated goats.”

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206 Godfrey Malamungu, Norwegian Peoples Aid /the Institute for the Promotion of Civil Society, The Women’s positive customary rights among the customary laws of the Kakwa, Pojulu, Nyaagbarra, Baka, Mundu and Avukaya Communities (Central Equatoria), 2009: 47.

207 Penal Code Act, 2008, section 247. The Act takes a very strong position on sexual activity by and with young people. Not only is statutory rape provided for in absolute terms; however, section 257, for example, describes the offence of “Permitting Young Person to Resort to Place for Purpose of Engaging in Unlawful Sexual Conduct.”


girls will be sentenced to jail for 10 years imprisonment and a fine of 1,000 Sudanese Pounds to be paid by their parents as well as 10 female cows. Youth have spoken out against the law suggesting that it reflects the efforts of older men to exert their power over youth in the communities. It was reported that at a meeting organized by youth in Rumbek in December, a youth representative declared that the law reflected “a silent war between young girls and old ladies and young men with old ones”. Questions were also asked as to why the focus was on elopement/impregnation and not on polygamy, early and forced marriage and the marriage of underage girls to old men.

The way in which the matter unfolded sheds light onto how future debates on the interaction of custom and statute might be managed and is a good example of international human rights being called upon to champion a more flexible and culturally specific approach to a particular issue. In response to the protests from the young men in the community, the Governor ultimately stepped in, reportedly explaining his dismissal of Judge Raimondo on the grounds that the rulings from the High Court did not meet “international justice standards.” On the other hand, the speaker of Lakes State parliament, to which the youth also appealed, had reportedly criticized the judge for overlooking customary law, especially the codified version that had been passed by parliament. There were therefore four competing bodies of law being drawn upon by the proponents of different approaches to the matter: statutory law, custom and tradition, codified custom (state legislation) and human rights/”international justice” standards.

Finally, the definition of rape in the Penal Code 2008, provides that rape cannot be committed within the marriage relationship: “[s]exual intercourse by a married couple is not rape, within the meaning of this section.” This provision is an important issue for women who may be ordered to remain within a marriage by a court decision or find it difficult to obtain a divorce, even when they object to having responsibilities in a marriage where there has been a serious breach in the relationship. As outlined above, in a number of case histories heard by SIHA, the women did return to their husbands further to a court order, but had been clearly forced to do so.

Assuredly, the issue of marital rape is highly controversial, especially when considering how it is conceived of by much of customary law. It might be possible to attempt to bring a complaint with respect to the commission of other crimes, such as, for example, the offence of “Coercing or Inducing Persons for Purpose of Engaging in Sexual Conduct” (section 255 of the Penal Code), which carries a sentence of up to 5 years and contains no explicit martial exemption or with respect to sexual harassment (section 395). In addition, violence perpetrated, or restraint applied, in the course of carrying out non-consensual intercourse could be charged under other gender neutral crimes of the statute, involving assault or battery (see discussion on domestic violence below). However, major conceptual, customary and political barriers to such prosecutions would be expected to arise.

211 Ibid.
For the majority of the women who encountered some form of domestic violence, it appeared not to be a one-time event, but a consistent theme in their lives and was furthermore, not something that they viewed as worth pursuing in its own terms. Certainly, severe domestic violence was a basis upon which women felt they were justified in seeking divorce. However none of the women suggested that separate rights of action or remedies lay for the injuries they had suffered. And while under statute law, the tools to seek redress for domestic violence do exist; it is likely that there are significant political and cultural obstacles to engaging them and may even put complainants at further risk. For example, during SIHA’s research in Rumbek in 2009, it was noted that the customary courts generally “ignore[d] any beatings that were induced by misbehaviour on part of the woman and would punish the woman instead with up to 30 lashes.”

There is no explicit reference to domestic violence in the Penal Code Act 2008; however, there are several provisions that could apply to abuse within a relationship or marriage. These provisions range from intimidation, to criminal force, to attempted murder and deliberate transmission of HIV/AIDS. While the definition of rape makes explicit exemptions for marital relations, other sections of the Penal Code concerned with physical violence make no such exception and thus are applicable to cases where one partner uses verbal threats or physical violence against the other. Although the creation of special legislation to deal with sexual and gender based violence may be important in order to establish the enabling measures that are necessary to ensure that such laws are workable in practice, in the interim, women may wish to consider activating the Penal Code to prosecute such crimes. Such an effort may assist in the task of emphasising that sexual and gender based violence, whether committed in a domestic or public setting, are crimes of violence that should be treated as no less serious, simply because the perpetrator is a family member.

Threats of violence between spouses, including the use of words as threats (as opposed to use of physical gestures) can also amount to offences, such as criminal intimidation (article 245) and assault (article 223) under the Penal Code. Where violence actually occurs there are several crimes that may be charged. These include criminal force (article 224), voluntarily causing hurt with and without provocation (articles 231 and 232), and voluntarily causing grievous hurt with and without provocation (articles 236 and 237). Charges of attempted murder (article 208) and attempted culpable homicide (article 212) might also be brought in the most serious cases.

During research in Rumbek, SIHA found that “the courts are generally unresponsive to wife beating cases unless the wife is pregnant. The emphasis on pregnancy cases is that the beating might injure the child.” This is reflected in the Penal Code 2008. The statute provides for a separate category of crimes that specifically deal with assault to a woman

214 Researcher notes on file with SIHA Network: April-June 2009
215 The use of criminal force or assault in response to “grave and sudden provocation” is punishable by up to one month or a fine or both. There is no statutory definition of grave and sudden provocation, and it is unclear whether words alone count as such provocation. If South Sudan adopts the standard for “grave and sudden provocation” that is used in North Sudan, provocation would depend on how the reasonable man in the locality in question would treat the matter, and the gravity of the provocation must be considered in relation to what preceded it. See Sudan Government v. Adam Osman Mohamed, AC-CP-496-1967 (1968).
who is pregnant, especially when the assault causes the woman to miscarry (article 219). If the offender knew that the woman was pregnant when he used force upon her, he may be imprisoned for a term not exceeding five years, liable for a fine, or both (article 219(2)). Furthermore, the deliberate transmission of HIV/AIDS is defined as a crime in article 262 based on a standard of knowledge that there is a real risk of the possibility of infection, “whether or not he or she is married to that other person.”

Girls under eighteen also benefit from special protections, which may provide avenues for pursuing redress for domestic violence. For instance, the Child Act 2008 is very clear about early marriage and female genital mutilation (FGM) as forms of violence: “[e]very child has the right to be protected from early marriage, forced circumcision, scarification, tattooing, piercing, tooth removal or any other cultural rite, custom or traditional practice that is likely to negatively affect the child’s life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development” (article 23 (1)). The girl child in particular is protected from “sexual abuse and exploitation and gender-based violence, including rape, incest, early and forced marriage, female circumcision and female genital mutilation” (article 26(1)). Despite these very lucid provisions, early marriage, as in many impoverished countries, is common and is one of the factors that directly and negatively impacts the achievement of a number of the United Nations Millennium Development Goals.217 Statistics released by UNICEF in July 2011 indicated that, in South Sudan, 45.2% of girls between 14 and 16 are married.218 A number of the women who were interviewed clearly had been subject to early marriage: NM in Rumbek prison was 21 years old with a child aged five; AD was also in Rumbek at 20 with a five-year-old child. At the same time, it should be noted that this is an area that is changing, albeit slowly. Under Kakwa customary law, for example, although there is still no customary law determined minimum marriage age, in 2009 it was reported that the practice was that women should be at least 20 years old when they married.219

Slander and Defamation

The offences of slander or defamation are seen as extremely serious in customary law and detailed penalties are provided for different types of offences. This preoccupation is also reflected in statutory law. Article 289 of the Penal Code contains a comprehensive definition of criminal defamation and provides for imprisonment of up to two years, as well as a fine. There is also a related crime described as “Word, Gesture or Act Intended to Insult the Modesty of a Woman” (article 250), which is punishable by a similar penalty.220 As Frances Deng has noted, “[s]poiling a man’s name by unjustifiable defamatory statement is considered a serious matter in African societies…the maintenance of one’s name is the primary purpose of the family in African thought, and anything that spoils a man’s name threatens to reflect on the family. Protection of the family is therefore an important

219 Southern Sudan, Norwegian Peoples Aid /the Institute for the Promotion of Civil Society, The Women’s positive customary rights among the customary laws of the Kakwa, Pajulu, Nyambaro, Baka, Mundu and Avukaya Communities (Central Equatoria), 2009: 18.
220 The offence is broadly worded: “[w]hoever, intends to insult the modesty of any woman by uttering any word or, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard or that such gesture or object shall be seen by such woman or violates the privacy of such woman, commits an offence, and upon conviction shall be sentenced to imprisonment for a term not exceeding two years or with a fine or with both.”
factor in the law of defamation.”221 The fact that disputes can often escalate to be a cause of conflict between communities is one of the reasons why it is dealt with so fervently by the court system, which at the same time serves the function of maintaining what, is perceived of as “social order” or the balance of power within and across communities. YM,222 for instance, told of how she had been sentenced by the customary court for six months for defamation after a quarrel between her and her neighbour escalated into insults and resulted in the police being called. She was not allowed to tell her story: “The chief refused to listen to me and the woman is one of his relatives.” The fact that a public quarrel resulted in the imposition of a sentence of imprisonment without due process being observed appears extremely harsh. However, even South Sudan statutory law reflects this preoccupation with the custom and tradition surrounding defamation and slander of one’s name.

The Special Status of Children

The almost universally ratified UN Convention on the Rights of the Child provides for three fundamental principles, which must be present in any approach to the protection of children’s rights: the best interests of the child (the best interest of the child shall be, at a minimum, the primary determinant in any decision affecting a child); non-discrimination (the obligation to protect the rights of all children in the territory without discrimination); and participation (children should be involved in decisions that affect them and that the views of the child be given “due weight in accordance with the age and maturity of the child”). The South Sudan Child Act 2008 envisages a regime of strong protection for children, defined as persons under eighteen years old and constitutes a comprehensive legal foundation for change. Yet, the challenges facing its full and proper implementation remain immense. As South Sudan became a new state in July 2011 even the most basic indicators for child health and wellbeing were extremely disconcerting. As UNICEF reported, “malnutrition rates are persistently above the emergency threshold and are as high as 21 percent in children under five in certain areas.”223 It is not possible here to describe the provisions of the Act in full, but the following section explores a number of key aspects that point to ways in which some of the main challenges described by the women SIHA encountered can be tackled.

The question of custody of, and access to, a woman’s children, was a key concern to those encountered by SIHA both in prison and outside, and was a source of great suffering. As the SPLM/A baseline study conducted in 2004 found,

“[m]any young children are victims in custody battles: the children have been removed from their mothers by the courts with the full consent of the male relatives of the woman, and the children were then given to their fathers. Customary law allows for this, as children are seen as belonging to their fathers […] whether or not he is able to care for the child.”224

222 Interview conducted by SIHA Network: Rumbek, November 2nd 2010.
224 Tumushabe Joseph & Dr Ann Itto. Baseline Study on the Status of Women in the New Sudan: Report for Mundri and Yei Counties, Western Equatoria, Southern Sudan, Directed by Anne Itto, Sudan People’s Liberation Movement’s Natural Resources Management and Utilization Committee and USAID’s Strategic Analysis and Capacity Building Activity, Prepared by: Tumushabe Joseph Isis-WICCE, July 2004. (The same report noted
Many women are therefore restricted from leaving a marriage, despite great difficulties, in order to maintain access to their children. Where they do leave their husbands or seek a divorce, the loss of their children is tremendously painful. Describing how women often have to spend a year and a half in prison in order to secure divorce and “pay” for non-return of dowry, Chief Dennis of Katur court B in Juba acknowledged that, even then “[t]he women also will not be able to keep the children. But she will receive compensation for the time spent in the marriage and the number of children she had.”

Indeed, custody of children is an area in which custom and tradition and statute law are on a collision course. The Child Act is very clear on its stance: “[e]very child has the right to live with and be cared for by his or her parents unless it is proven that living with them would (a) lead to significant harm to the child; (b) subject the child to abuse and neglect; or (c) not be in the best interest of the child” (article 13 (1)).

Three of the women in prison interviewed by SIHA in November 2010 were under eighteen and one was only fourteen. However, many of the other women in custody described life stories where hardships and clear violations of their rights had started at a young age, from early and forced marriage to physical and psychological abuse. The situation of the three minors in custody was particularly troubling. For example, the Child Act provides for a series of procedures that must be followed when a child above 12 years old is arrested; children below 12 are not criminally liable. These procedures include referral to a social worker; the right to have a guardian or lawyer present during questioning; the right to have information on their rights and information about the charges facing them provided; and the right to have a legal representative provided in serious cases (section 144 et al). Once a trial or other proceeding commences, section 172(1) (b) of the Child Act provides that, “[e]very child accused of committing an offence or involved in legal proceeding in any manner… (f) shall have access to legal counsel for the preparation and presentation of his or her defence; (g) shall have the right to defend himself or herself in person under conditions of equality.”

Neither of the two youngest girls in prison knew the charges that had been brought against them and none had been allocated lawyers, including HA who had been sentenced to 10 years in prison for unlawful killing six months prior. The judge had allegedly told her to “go and write an appeal;” however, she was unable to do so in the absence of a legal representative. It should be noted that section 182 (1) of the Child Act categorically forbids children under 16 years to be imprisoned: “[n]o child under 16 years of age shall be sentenced to imprisonment.” It is not clear what age HA was when she was sentenced but it is possible that she was under sixteen.

Where minors are involved, the Child Act stipulates that police custody is to be used only as a measure of “last resort” (section 150 (1)) “unless there are substantial reasons not to do so” (section 151(2)). The Act is very clear that “[d]etention of a child pending trial shall take place only in exceptional circumstances, for most serious cases, as a measure of last resort and for the shortest period possible” (section 184(1)). All three of the minor girls SIHA encountered who had been imprisoned pre-trial had been detained well beyond the allowed time limits; seven months in Wau, three weeks in Juba, and two

that “In Yi there was a recent case of a woman who was in police custody because she attempted to commit suicide after she lost all her children to her ex-husband”

225 Interview conducted by SIHA Network: Juba, June 23rd 2009.

226 “[A] child under twelve years of age shall be deemed to lack criminal capacity and shall not be tried for or convicted of any offence, which he or she is alleged to have committed.” See, Penal Code Act, 2008, section 30.

227 See, The Child Act, 2008, section 150(1) and 151(2).
weeks in Rumbek. None had been offered release or bail or told about its availability. The case of AP, aged 15 in Wau prison, was particularly egregious in this regard: she had spent nine days in the police station and had been in prison for seven months at the time of the interview without once appearing in court. The Child Act specifies that children are in need of special care and protection if he or she is or has been, or is likely to be” (d) forced to marry; … (n) pregnant, suicidal or rejected by his or her family…” (Section 126). The three children who were on remand during the November 2010 visits all would fall into this category, however, it appears that no special measures were in place to respond to their plight.

The Child Act puts a significant emphasis on diversion and restorative justice when dealing with children:

“[c]rimes committed by a child shall be dealt with in accordance with the principles of restorative justice which aims to provide an opportunity
to the person(s) or community affected by an offence to express their views regarding the impact of such harm; encourage restitution of a specified object or symbolic restitution; promote reconciliation between a child and the person(s) or community affected by the harm caused; and empower communities to address children at risk of offending without resorting to criminal justice.”228

Here, the Child Act creates an opportunity for creatively using the norms of customary law and practice as a framework for a more flexible and non-custodial response to children who find themselves in conflict with the justice system.

The rights recognised under the Child Act are not without redress. Section 30 of the Act provides that, anyone who “wilfully or as a result of culpable negligence infringes on any right of a child, commits an offence punishable by up to seven years’ imprisonment, a fine or both, as well as liability for compensation to the child.” It should also be noted that, section 243 of the Penal Code Act defines the offence of cruelty to children in a way which might suggest that not only parents and family members who abuse children can be held personally liable, but also those who have control over children such as police or prison officials.229

**Concluding Remarks**

This survey of South Sudanese statute law has raised some of the key issues that must be taken into consideration when attempting to reform customary law in a way that prevents it from violating women’s human rights. It has demonstrated that there are current avenues for redress that exist in statutory law and that can be utilized to further women’s

229 “Whoever having the charge or care or a child under eighteen years of age or being in a position of authority over him or her, wilfully ill treats or neglects the child, in such a way as to cause him or her unnecessary suffering, commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding three years or with a fine or with both. (2) If the ill-treatment or neglect referred to in subsection (1), above, results in serious injury to the health of such a child, the offender, upon conviction, shall be sentenced to imprisonment for a term not exceeding five years or with a fine or with both.” See, Penal Code Act, 2008, section 243(1).
and human rights. At the same time, it has made evident that there are fundamental tensions between customary and statutory law that must be resolved. More specifically, there are elements of legality that must be applied with due regard for the present Bill of Rights, which will inevitably come into conflict with notions of tradition and custom. While these tensions are visible in South Sudan’s Transitional Constitution, there are also paths to avoid them provided for in its structure.

**Human Rights in the New Constitutional Order: A Path to Freedom?**

Human rights form the basis of South Sudan’s new legal system. The Transitional Constitution, like the CPA era Interim Constitution of South Sudan before it, encompasses an extensive Bill of Rights, described as “a covenant among the people of South Sudan and between them and their government at every level” and the “cornerstone of social justice, equality and democracy” from which no derogation can be made.\(^{230}\) At the same time, one of the four sources of legislation described in the Transitional Constitution remains the “customs and traditions of the people”. The role of traditional authorities in governance and the administration of justice “according to customary law” are also recognised. As the supreme law of the land, the Transitional Constitution therefore sets out a vision for the personal lives of the women of South Sudan that is based on universal human rights norms, but also on engagement with customs and traditions. This raises the question of how customary laws and the exercise of traditional authority will interact with the realisation of the human rights of the people of South Sudan. The Constitution clearly expresses a transformational project: customary law must be applied “subject to this Constitution and the law,” which includes a Bill of Rights.\(^ {231}\)

**The Bill of Rights in the Transitional Constitution**

The Transitional Constitution (albeit currently under review) contains a powerful charter of rights, which can be used as a tool in advocacy around women’s experience of their personal rights. A comprehensive analysis is not possible here but a number of the key provisions that could be employed to respond to some of the challenges raised by the women encountered by SIHA, particularly those challenges with their roots in the customary law system, are briefly described below.

- **Imprisonment and Trial:** For many of the women SIHA interviewed in prison, their right to personal liberty and security, as enshrined in article 12 of the Transitional Constitution had been violated in multiple ways, from the imposition of collective punishment to the lack of information about the right to bail. Basic fair trial guarantees were also lacking in how the legal process was conducted. Article 19 of the Transitional Constitution provides, for example, for the presumption of innocence, prompt communication of the nature of the charges under consideration, conduct of a “a fair and public hearing by a competent court of law in accordance with procedures prescribed by law” (article 19 (3)) and trial “without undue delay” (article 19 (5)). It also provides that an accused person has “the right to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him” (article 19 (6)).

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230 Transitional Constitution of the Republic of South Sudan, 2011, article 9 and 10. (Derogation in situations of states of emergency is, however, provided for in article 189).
231 Transitional Constitution of the Republic of South Sudan, 2011, articles 165, 166 and 167
• **Conditions and Treatment in Custody**: The prison conditions experienced by some of the women could be considered as “inhuman or degrading treatment,” which is prohibited by article 18 of the Transitional Constitution, particularly with respect to the lack of provision of food for children, the lack of medical treatment and, arguably, for some of the women, the cumulative effect of indeterminate and un-reviewed detention. The responsibility to protect the vulnerable, including women and children in custody, is also set out in article 11 of the Transitional Constitution, which undertakes to ensure that “the life, dignity and integrity of the person be protected by law.” The provision of “maternity and child care and medical care for pregnant and lactating women” is also a constitutional obligation for all levels of government (article 16 (4) (c)).

• **Marriage Practices**: Although the Transitional Constitution does not stipulate a right to divorce it is clear that the foundation of the family through marriage “according to the [parties’] respective family laws” should only be entered into with the “full and free consent of the man and woman” (article 15). The Transitional Constitution declares clearly that “[w]omen shall be accorded full and equal dignity of the person with men” (article 16) and that all persons are entitled to equal protection of the law “without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status” (article 14). Finally, article 16 mandates the enactment of “laws to combat harmful customs and traditions, which undermine the dignity and status of women” (article 16 (4) (b)): this article could clearly raise issues with regard to certain core assumptions of the institution of bride price.

• **The Rights of Children**: The rights of the child as lay down in the Transitional Constitution in article 17, challenge how girls experience certain traditional practices, such as early and/or forced marriage. This lengthy provision of the Constitution clearly prohibits subjection of children (persons under 18) to “exploitative practices or abuse” or to “negative and harmful cultural practice’s which affect his or her health, welfare or dignity.” The Transitional Constitution also recognises that “[i]n all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the paramount consideration shall be the best interest of the child” (article 17 (2)). This principle, in theory, should govern custody decisions. However, the inability to ensure access to and care of their children in the context of trying to end their marriages was something which many of the women mentioned as a major struggle. Article 39 of the Transitional Constitution recognises the family as the “natural and fundamental unit of society,” but notes that “it is the right and duty of parents to care for and bring up their children” and that children “shall not be separated from their parents or persons legally entitled to care for them against the will of such parents or persons, except in accordance with the law”. Thus, the way in which some customary law practices demand the separation of women from their children in circumstances where they are not a danger to those children might be re-examined under these provisions.

It is clear that there are tensions between the norms and practices of customary law, the South Sudanese Transitional Constitution and international human rights and constitutional law, particularly with respect to those aspects that regulate the role of women in society. Some have raised questions, therefore, about the ideological components of human rights which appear to threaten custom and tradition, and thus the very identity of South Sudan itself. In 2004, for example, a study carried out by World Vision International found
that there was great concern about how South Sudanese “custom and tradition” would interact with human rights obligations in the emerging new polity: “[t]he potential for damaging conflict between customary law and the body of international laws concerning individual and human rights [...] [was] a recurrent theme.” Many of those interviewed for the study believed that “those elements of the international community highly critical of the effects of customary laws upon individuals and certain sections of the community, particularly women and children, ha[d] a superficial understanding of southern Sudanese society.” Indeed, it is understandable that at a time when South Sudan was beginning its transition from a marginalised and excluded region of Sudan to a potential independent state, support for customary law as an expression of the unique characteristics of South Sudanese communities could have been viewed as a part of a strategy of strengthening the legitimacy of the call for self-determination.

In 2012, however, with the recognition of the new state of South Sudan achieved and the opening of a constitutional review process, there is an opportunity to examine the reality of these assertions. Human rights are not necessarily antagonistic to evolving customary norms and practices: the concept of human rights as enshrined in the African human rights system, for example, explicitly takes into account recognition of customary and community values. Furthermore, as the linchpin of the new state’s constitution, human rights are part of the new legal and social environment with which the customary system must engage. It is clear that human rights are no longer ideas that can be dismissed in contemporary South Sudan as impositions from the “outside”. In setting out the five definitional elements of the new state itself the drafters of the Transitional Constitution declared that “South Sudan is founded on justice, equality, respect for human dignity and advancement of human rights and fundamental freedoms.” The rights entrenched in the international human rights treaties ratified or acceded to by South Sudan, are moreover, considered integral to the Transitional Constitution’s Bill of Rights.

The prominence given to the place of human rights in the Transitional Constitution is not unexpected. Human rights ideas underpinned the creation of South Sudan itself and, in many respects, legitimised the call for independence during its half-century long struggle. The right of self determination is considered one of the basic human rights and is also the backbone of the international bill of rights: “[a]ll peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their social, economic and cultural development”. Article 20 of the African Charter on Human and Peoples’ Rights (ACHPR) expresses the scope of that right in particularly strong terms: “[c]olonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community” and that “[a]ll peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.”

One of the enabling ideas that assisted international recognition of the need for self-determination for the people of South Sudan was the concept of diversity, and the

233 Ibid. 31.
234 Transitional Constitution of the Republic of South Sudan, 2011, article 1(5).
235 Transitional Constitution of the Republic of South Sudan, 2011, article 9(3)
expression of diversity as a value, whether in cultures, communities or between individuals. Although human rights are inherent to the individual, some of those rights can only be expressed through the community. They arise as a result of how an individual's identity is defined and enjoyed in relationship with his or her community and how it is protected through the community. The Great Lakes Protocol on Democracy and Governance—a regional human rights protocol ratified by Sudan and to which South Sudan is expected to accede—contains specific provisions reflecting this reality and demanding respect for cultural diversity: “member States hereby recognise the existence of different and diverse communities with distinct cultures and languages in their territories. To this end Member States undertake to protect and promote cultural diversity of those communities” (article 33). The protection of diversity in communities and cultures is thus conceived as essential to preventing exclusion and conflict.

The ACHPR goes further and provides that community values themselves can be an object of state protection: “[t]he promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.” The ACHPR also recognises the concept of individual duties towards family and society, including the duty to “preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society” (article 29, ACHPR). Undertakings relating to culture and community within human rights treaties, however, must be implemented alongside human rights guarantees. The ACHPR states categorically that “[h]uman beings are inviolable” (article 4) and that,

“[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status” (article 2).

Ergo, at the same time as the ACHPR provides that the State “shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community” it also mandates the “elimination of every discrimination against women” and that the “protection of the rights of the woman and the child as stipulated in international declarations and conventions” is ensured (article 18). In fact, the ACHPR has specifically linked the principle of non-discrimination and equality in the enjoyment of equal rights with the national development of a State: the practice of discrimination against particular groups and individuals in a society may cause a country to be “deprived of the leadership and resourcefulness such a person may bring to national life.”

It can be seen from the above, that regional and international human rights law considers the goal of respecting and promoting diversity to be compatible with ending the prejudices that have traditionally undermined the principles of equality and non-discrimination, as well as with ensuring development. The challenge is how to approach the matter holistically. The process of ensuring human rights is a dynamic one and involves the achievement of a series of parallel goals that must take into account the specific meanings and experiences of each community and culture.

237 ACHPR Case, Legal Resources Foundation v. Zambia, Communication No. 211/98.
Section VI

Customary Law and Women’s Personal Rights: An Agenda for Action

“It is possible to engage critically with plural legal systems while simultaneously supporting local cultures, traditions and practices.”

For years to come, it is likely that custom will remain a source of law and that traditional authorities will remain key judicial decision-makers in South Sudan. Increasingly, however, the jurisdiction of the customary system and its actors will need to co-exist within a realm of expanding statute and constitutional law in which custom itself is also going to be subject to codification in statute. If the system is to operate both fairly and effectively, fundamentally different approaches to norms and modes of justice will have to be integrated into a coherent whole. In order to achieve workable reconciliation and robust dialogue between different customs, a compelling state apparatus and accompanying legislature will be needed. Some experts have been optimistic about this possibility: “[t]here is general consensus amongst those interviewed that the natural tension between customary law and statutory law has historically been an essential and creative process, giving dynamism to both systems and a key force for beneficial change.” Nevertheless, as this process takes place in the context of rapid social and economic change, the mechanisms of the emerging state (police, custody, prison, etc) will continue to apply various versions of customary law, which as stated at the start of this paper, is forcing conflicting principles into unhappy confusion. Women and children, who are frequently on the front line of this encounter between custom and prevailing authority, are finding it difficult to negotiate the fault lines. They are falling through the cracks. Any strategy for change must therefore take into account both short term and long term objectives.

One of the fundamental challenges facing South Sudan’s customary law systems and the lives of women caught within them is that, they are no longer operating as relatively closed spaces of norms, mechanisms and subjects. In an ideal customary law environment, women, their families and their communities’ histories would be known intimately to decision makers, in terms of the particular circumstances of the case itself, as well as the overall context. Severe poverty, conflict, displacement, globalisation and destruction of community structures over the last decade, however, have undermined attempts at a holistic approach to norms, governance and community and the cases encountered during

this research illustrate this: women had been subject to both customary and statutory
court hearings for the same offences; hearings were viewed as having been manipulated
by individuals with power and money; it was rare that the chiefs from the communities
where the women grew up were actually engaged in adjudication on their situations; and
many women ended up in prisons far from their families.

It is clear that the indiscriminate interaction of the customary system with the statutory
system, including the use of imprisonment to enforce customs relating to marriage and
divorce, is causing untold harm. One of the senior prison officers interviewed for the
research who was clearly frustrated with the injustice she saw on a daily basis, put it starkly
for SIHA: “there is no justice, no rights, no space to speak, no voice heard. The customary
law should be abolished or reformed [...] there are no standards, no principles.”

Many of the women caught within the system also viewed the customary system and its operation
in the new South Sudanese reality as inherently unfair. “Women’s rights are almost non-
existent” EA told SIHA. Dr Anne Ito, the then Deputy Secretary of the SPLM, identified
four main problems facing women in South Sudan: early marriage, forced marriage, wife
inheritance and compromised education as a result of marriage. All of which have their
roots in the operation of the customary system. The findings of SIHA’s research indicate
that one of the inescapable realities facing reform of the system is that women’s inequality
is, in many respects, embedded in the customary law system.

Hence, as the communities of South Sudan change and develop, fundamental questions
will have to be asked about the appropriateness of accepted approaches to resolving
disputes, including the limits of customary law and procedures as a means to obtain
justice, especially in areas that impact upon basic human rights. Positively, customary
systems are inherently flexible and able to quickly respond to new circumstances and
realities. Certainly SIHAs research shows that in the absence of a fully functioning statutory
system, the customary system was perceived as being able to deliver compassionate
outcomes for women in some situations. At the same time, however, there are a number of
serious obstacles. In its first report in 2011, the new global agency, UN Women, identified
three sets of challenges to women’s rights posed by plural legal systems (systems in which
multiple systems of law with multiple origins e.g., religious, cultural, statutory etc., exist in
parallel): “discriminatory elements of non-state laws and state recognized identity-based
laws; the practical barriers that existing legal pluralism can present for women’s access to
justice; and the challenges of reforming plural legal systems.” The stories of the women
recounted in this report, both of those in prison and of their advocates, confirm that
these challenges are the same in South Sudan. Customary laws in South Sudan present
not just barriers to the realization of women’s rights in terms of exclusionary norms and
practices, but also in terms of being able to start the very process of opening up the debate
on critical issues of how social and community norms should evolve in the future. As one
of SIHA’s partners put it, “what is lacking is balance: the constitution is supreme and yet
customary law seems to prevail.”

240 Interview conducted by SIHA Network: Rumbek October 2009
241 Interview conducted by SIHA Network: Juba, March 16th 2009.
243 Interview conducted by SIHA Network: Juba, November 2011.
Irrefutably, therefore, the way in which customary law operates in South Sudan in areas impacting women’s personal rights, must evolve to meet the requirements of both a new societal context and the demands of the women of South Sudan. “If customary law is to survive these revolutionary forces, it will have to accommodate rapid and fundamental change.” Change, however, is likely to be painful. As World Vision noted in its 2004 study of customary law, “in an ideal world change should come from within and at a pace with which the people can cope. It is improbable that this will happen in Southern Sudan, change is more likely to be rapid, outside the control of individuals or communities and for many, extremely disconcerting.” The consolidation of the state will require the creation of a national vision, the creation of a national identity and a set of national symbols and institutions around which communities from all of South Sudan’s ethnic groups can gather. It may be that there will be a drive to emphasise customary law as a symbol of South Sudan’s separate identity and culture.

How do the women of South Sudan feel about this? To what extent will this be appropriate for the new social, economic and geographic realities in South Sudan?

It is important that the search for expression of what must be revived and honoured as South Sudanese and the reclamation of its heritage does not become a retrogressive project, which mythologizes a previous golden age that never existed. The challenge is how to encourage the evolution of the customary system in response to changing social realities so that it works to enhance, rather than undermine, the rights and the development of the women of South Sudan and their communities.

As Dr Ito put it, achieving women’s rights is about “transforming communities” and “addressing all the issues facing communities holistically.” It is not primarily an issue of law reform but of attitudinal change: “the laws to protect women are there, but attitudes will not change for a very long time”. As a result, “people have to create and utilise opportunities” which arise. There is a real opportunity for the world’s newest state to create a new polity anchored to what is most positive in South Sudanese traditions, history and culture, but which draws on the lessons which have been learned for state-building by democratic- and rights-respecting legal systems elsewhere.

Ideas for an Agenda for Action

Among the Overall Strategies which Might be Considered are:

Encouraging Evolution of the Customary System Based on Recognition of New Social and Economic Context

The factors that are forcing change, whether economic or developmental, can help steer change in a direction that enhances the capacity and rights of the women of South Sudan. Chief Dennis of Katur Court, for example, has explained how the customary courts are taking new approaches to the enforcement of maintenance and support judgments: “[w]hen a man has had a judgement to pay maintenance for his wife, then the court sends a note to his employer so the money is deducted automatically from his salary to go

246 Ibid., 31.
248 Interview conducted by SIHA Network: Juba, March 16th 2009.
to her. The recognition of new realities has already resulted in positive changes in customary rules. In some Bari speaking communities, for example, new understandings about the impact on the community of women's education is changing how the obligation to educate the girl child is perceived. According to a recent study on the Pojulu peoples, approaches to the education of girls have evolved from traditionally being seen as a waste of resources to a requirement. The “boma or payam authority can caution the parents with resources who do not send girls to school.” Protecting women's rights also makes economic and developmental sense. More empirical research which explores linkages between development and changes in practice around customary law might be commissioned to support targeted advocacy.

**Opposing Violent Practices**

Current practices that are clearly harmful to women's development and impede their contribution to their communities must be opposed and forced to evolve. As discussed above, for example, the negative impact that rapid economic and social changes have created for the practice of dowry and the accompanying suffering and increased conflict, must be tackled. Such radical approaches are not without precedent. During the Interim CPA period, for example, a categorical approach was taken by the then South Sudanese legislature to female genital mutilation/cutting and early marriage. This shows that, at a central government level strong stances can be taken on matters, which would be considered expressions of custom and culture. Lessons from the advocacy engaged in during that period around those issues could be usefully analysed. The use of imprisonment as a penalty for adultery could be an immediate focus; such imprisonment would seem to serve little purpose, whether in terms of achieving deterrence of adultery, community cohesion or rehabilitation.

**Promoting the Implementation of Current Legislation that Tends to Protect Women’s Rights**

Implementation of the legislation that has already been adopted by the South Sudanese legislature, such as the Child Act or those aspects of the Penal Code that protect the bodily integrity of women, can provide a context for discussion of those elements of the practice of customary law, which contradict the requirements of these pieces of statute. Once again, the regulation of imprisonment and the jurisdiction of judges in both systems over the imposition of imprisonment would be a critical place to begin to advocate for change.

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249 Interview conducted by SIHA Network: Juba, June 23rd 2009.
251 The Child Act 2008 creates very important standards around which advocacy for a change in practice across a range of rights which attach to the girl child could be conducted. At the same time the sweeping nature of the law is one with the government officials recognise present great challenges in implementation.
Exploring the Roots of Custom and Tradition and Reflecting on Human Rights in the Context of Custom

The question of to what extent current practices are “traditional” is a controversial one. It may be helpful to engage in further reflection on some of the historical/colonial origins of some practices as a contribution to the debate about change. There are some basic conceptual approaches within customary law that challenge some of the basic assumptions of human rights which are now integrated into the South Sudanese statutory system. At the same time there are areas of common ground. Any fundamental change and accommodation will require examination of these aspects and identification and discussion of the sites and dynamics of power that are supported through both systems. A dialogue must be created with traditional authorities: “we need to reform the customary system, sit together, join, and talk to the jurisdiction.”252 It is also important that women themselves are challenged. As a SIHA partner pointed out: “Women internalize the tools that are oppressing them.” 253

Engaging Imaginatively with Traditional Authorities:

The chiefs system is essential to local governance during this fragile transition and project of state building. Therefore, there must be a process of reform to ensure that they are able to respond to the rapidly evolving social, political and economic contexts in which they work. As the Rift Valley study pointed out: “[T]he resilience and apparent self-sufficiency of the chiefs’ courts throughout the wars presents the new government with complications as well as resources. The courts are clearly meeting a popular demand for dispute resolution and justice that the government judiciary’s limited capacity could not possibly handle. Yet limited government capacity has also ensured very little regulation of the courts, raising concerns over what form and quality of justice they are actually providing.”254 It is essential that experiences of good practice in how changes in approach were negotiated with traditional authorities are documented and shared appropriately (and confidentially as required) between women activists.

Getting Involved in the Constitutional and Legislative Reform Process

SIHA’s partners all recognise the need to be at the centre of the discussion around the drafting and adoption of a new constitution. Considerable networking and outreach is going to be required, however, to ensure that women from across South Sudan are appropriately represented in these debates. The key will be to agree on two or three specific issues that would be the focus of a concerted campaign. The Church was identified as a key partner in this work. In terms of statutory reform, a core objective of any future strategy around women’s rights should be a rights respecting and enforceable family law that assists the women of South Sudan to attain their maximum potential for their own development and that of their communities. It remains a highly fraught topic and indeed issues of family and sex and gender based violence are often conflated. As Jeremiah Sawaska, General Counsel,
Ministry of Legal and Constitutional Affairs explained, the system is still in flux. As "family law is not codified yet, customary law is applied. Statutory courts refer cases back to customary courts if they are related to family affairs or violence against women". As a topic of legislation family law is also not regarded as a priority by the authorities, mainly because any discussion is likely to be incendiary. At the same time, discussion must be initiated.

SIHA understands that there has been some discussion of a law on sex and gender based violence. The draft legislation which has been developed for the implementation of the Protocol on Sex and Gender Based Violence within the Great Lakes Pact (see discussion below) might be considered as a starting point.

Throughout the research, the question of codification of customary law, as a way of solidifying those aspects of tradition which were considered "positive", was raised by policy makers and those in authority. There is considerable work being undertaken on ascertainment and codification of customary law as a result, led particularly by the UNDP and by the Ministry for Legal and Constitutional Affairs. It is understood, for example, that a customary law centre is being established in Rumbek as part of the process of codifying the system. It has been suggested, however, by other experts that this approach may result in a dangerous solidification or "sanctification" of the law and therefore tend to undermine efforts to challenge it. For example, the NPA findings on "women's positive rights" include as positive aspects, the fact that there is a prohibition on beating your wife without a reasonable explanation. Although this may be a progression in the right direction, it is hard to see that it is helpful to codify customary law in its current state.

**Use of Regional and International Human Rights Mechanisms**

_The State’s responsibility for ensuring compliance with human rights standards extends to all justice practices, including non-state legal systems that exist without formal state sanction, customary and religious systems that are incorporated into the state system, as well as quasi-state mechanisms such as alternative dispute resolution._

The Government of South Sudan is currently reviewing which international and regional treaties it will decide to sign and ratify. Activists concerned about increasing the tools available to women seeking protection of their human rights should consider urging ratification not just of the core United Nations human rights treaties and their treaty monitoring bodies, but also regional treaties such as the ACHPR (as discussed above), the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003; and the

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255 Interview conducted by SIHA Network: Juba, March 18th 2009.
256 Interview conducted by SIHA Network: Juba March 2009.
257 Interview conducted by SIHA Network: Juba, June 2009.
259 These include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture (Sudan is a ratified party to all of these treaties bar the final two).
International Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact). Membership of the East African Community, which we understand is being sought by South Sudan, would also create a set of additional frameworks and a Court accessible to South Sudanese women, which could be used to promote and secure women’s rights.

- **The African Charter on Human and Peoples’ Rights** has been ratified by all AU member states (except South Sudan) and is the fundamental treaty of the African human rights system and a cornerstone of the African Union Constitutive Act. The ACHPR has a number of mechanisms, which can function as vital resources for women’s rights activists seeking to engage with a process of reform in South Sudan. The first is the African Commission on Human and Peoples’ Rights which is the principle regional human rights body tasked with promotion and protection of human and people’s rights. In addition to monitoring state compliance with the African Charter, the body can “perform any other tasks...entrusted to it by the Assembly of Heads of State and Government” and is charged with hearing individual complaints or “communications.” Communications which expose particularly problematic aspects of the system could be contemplated once the ACHPR is signed and ratified. This latter process has been recently bolstered by the creation of a Court, the African Court of Human and People’s Rights, the decisions of which must be enforced. It is vital that South Sudan be encouraged not only to ratify the ACHPR but also the Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and Peoples’ Rights and to make a declaration permitting the right of individual petition to the court.

- **The Protocol to the ACHPR on the Rights of Women in Africa** is also another key instrument that augments with greater specificity the protections in the ACHPR, which are particularly relevant to the experiences of women and girls in Southern Sudan. It contains extensive provisions setting out the rights of women in the context of African cultures and societies dealing, *inter alia*, with marriage, divorce, property rights and the elimination of harmful practices. Although not signed or ratified by South Sudan it can be a vital baseline for the promotion of women’s rights in the region.

- **The African Charter on the Rights and Welfare of the Child** was adopted by states in Africa as a result of a recognition that “the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child’s physical and mental immaturity he/she needs special safeguards and care.” It contains a comprehensive set of provisions on a range of matters from the treatment of children of imprisoned mothers, to custody and access in situations of parental separation and the administration of juvenile justice. With respect to the question of the impact of custom and tradition, article 1 is very clear that, (and goes further than the UN Convention on the Rights of the Child in this respect): “[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”

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Eg. The African Committee of Experts on the Rights and Welfare of the Child is charged, *inter alia*, with reviewing regular state reports on compliance with the Charter. It can also give opinions on the scope of the Charter, initiate investigations, and provide recommendations to state parties. Communications may be made to the Committee by “any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.”

- *The Great Lakes Pact* was both signed and ratified by Sudan and was therefore in force in South Sudan prior to the ending of the interim period. It contains ten protocols that deal comprehensively with a range of issues relating to human rights, development and peace and security in the region. Among the topics particularly legislated for and of interest to the current study are: sexual and gender based violence; access to land; women’s equality and equal access to justice and democratic governance. The Pact’s Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, for example, contains a detailed set of measures aimed at tackling the phenomenon of sexual violence, ranging from the prosecution of perpetrators all the way to the compensation of victims and the treatment of offenders. The Protocol recognises a broad range of acts of sexual violence that should be subject to criminal penalty and furthermore, requires that special measures be taken to ensure access to justice and modified trial procedures that take into consideration ‘the emotional state’ of survivors of such crimes. Draft legislation has been developed as a framework for states in the region to implement the Protocol. As South Sudan considers whether to adopt a special law on gender based violence, this could be a useful tool and a starting point for discussion.

### Among the Areas which Might Benefit from Early Focus:

#### Reforming the Law on Adultery

Despite the pervasive use of detention to punish women for adultery, in practice, it appears that the trend of the approach of legislature is towards phasing it out. As discussed above, the Penal Code clarifies that the guilt or otherwise of a married woman for adultery is not an appropriate focus of the state. It is interesting that in an initial visit to the Ministry of Legal and Constitutional Affairs a senior official was at pains to insist that, despite

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265 “Victims and survivors shall give evidence in camera, or by video links, and they shall neither be compelled nor required to give evidence in open criminal proceedings, nor shall the casting of aspersions on their character and integrity be permitted as part of the defence of any person charged with a crime of sexual violence.” Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, 2008, article 6(5).

266 The legislation contains two interesting innovations: the creation of a Committee for the Protection of Women and Children from Sexual Violence charged with overseeing the protection of women and children in each member state, and a Compensation Commission for Sexual Violence Claims tasked with receiving the assessed claims for compensation from the Committee and deciding on the level of such compensation and the responsible person or organ.
the evidence that SIHA had gathered in Juba prison, “there are no women in prison for adultery.” 267 Indeed, between SIHA’s visits to Juba prison in June 2009 and the latest visit in November 2010, there had been a significant change: none of the women in Juba prison in November 2010 were in prison for adultery. Whether this reflects the impact of a deliberate policy shift in the capital city is not known. This development, however, is certainly something upon which a campaign for reform could begin to be built. There are a number of starting points that could be considered.

- Does the evolution of how the crime of adultery has been dealt with at a statutory level provide a foundation upon which additional reform of the statute could be urged, in particular, as a first step, to remove adultery from the list of statutory crimes? Could questions begin to be asked about what is the state interest in criminalising adultery? (Without needing to address, at this point, the right of communities to have their own norms and traditions?)

- Statute law clearly states that married women cannot be found guilty of adultery (unless the person with whom they have sexual relations is himself married to another woman). The reality continues to be, however, that women in South Sudan are regularly found guilty and sentenced to terms of imprisonment for adultery. What would the usefulness be of an awareness-raising campaign on the scope of statute law? Could work be done with the judiciary to clarify the scope of the law on this issue? Does the Chief Justice for example have the power to issue clarifying circulars/practice directives etc. to the judiciary? Could this be one way of starting the dialogue? Could such an effort be backed by a collective legal action on behalf of all married women currently in detention for adultery? Would the South Sudanese Women Lawyers association be prepared to work on such cases? Can a specialised set of materials for paralegals be developed to support challenges to women’s detention for adultery?

**Bringing the Practice of Imprisonment in Line with Statutory Requirement**

In the majority of cases encountered by SIHA, the imprisonment of women, whether on remand, or further to sentence for adultery, seemed to serve little purpose. Prison officials and police were either not aware of, or regularly ignored, the statutory requirements surrounding the use of detention during investigation, post arrest and charge. Children seem to benefit little from the special treatment, which is their right whether as detainees or as children accompanying their detained mothers. The administration of compensation and particularly the abuse of the statutory system to manage payment of compensation (imprisonment of women by proxy etc.,) and the use of imprisonment where fines cannot be paid is a major problem and constitute a huge window of injustice and corruption. The steps that might be considered include:

- Conduct of a study assessing the economic and psycho-social impact of imprisonment for adultery on women, their children and their broader families and communities.

- Instructions to the relevant authorities on the existence of a duty of care towards every person sent to a place of detention. The extent to which authorities are obliged to advise on the right to bail, and training of police and prison officers on this responsibility also needs to be made clear. The special obligations on state officials with respect

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267 Interview conducted by SIHA Network: Juba, November 2010.
to treatment of children, including penalties which may be attracted for violating these rights, whether under the Child Act or the Penal Act, should also be clearly communicated to those in relevant instructions.\textsuperscript{268}

- The development of a simple “know your rights” leaflet/form of oral presentation for women and their advocates on the existence of a right to bail including, for example, the presumption of an entitlement to bail for minor offences, the procedure by which an application for bail can be made, and the conditions upon which it can be granted. As one expert noted simply, “[p]ublic awareness is important, not only about how modern systems or human rights work but to understand what make sense for these women as rights right now.”\textsuperscript{269}

- Might the judiciary be engaged in the development of rights respecting policy guidelines surrounding use of imprisonment in lieu of payment of fines as a way of beginning to limit the use of imprisonment?

- Can the scope of the right of customary law judges to remand to custody be clarified?

\textit{Tackling the Violence and Suffering Created by the Institution of Bride Price}

Bride price is an essential component of the concept of marriage among all customary systems in South Sudan, and indeed many parts of Africa and beyond. In the context of massive economic and social change in South Sudan, the way in which it operates is having a deleterious impact on the lives of women, on men, on communities, and on insecurity generally, particularly in cattle-keeping areas. Bride price is having a hugely negative impact not just on individuals and communities, but also on peace and security more broadly, and has been exacerbated by an influx of resources into the economy, corruption, and bidding for dowry among the Diaspora. It is impossible to talk about women’s personal rights without tackling the issue and finally government officials are beginning to recognise this need for change. In early January 2011 a particularly horrific case received notice in the Sudanese press: the killing of a young girl of 13 in Lakes State after she had been tortured by her brother on the grounds that she was allegedly pregnant.

A post mortem confirmed she was not.\textsuperscript{270} The Commissioner of Rumbek East County, David Marial Gumke commenting on the case declared clearly:

“The idea which caused this is that young men own girls as their wealth. We have captured six men and they are now arrested in Rumbek main prison. I need to assure young men that your sister is not a moving wealth, they should be treated as part of our society - girls are human beings like you and they are not store of wealth.”\textsuperscript{271}

\textsuperscript{268} How can the new Code of Conduct for Prisons staff (developed in the context of the Support to Police and Prisons in Southern Sudan, UNDP project) be engaged with in this regard? See, Support to Police and Prisons in Southern Sudan, UNDP project, Snapshot of project’s major achievements.

\textsuperscript{269} Professor Regina-Naynkir Akok: Comments to Initial Draft, University of Regina.

\textsuperscript{270} Manyang Mayom, “Girl 13, tortured to death in Rumbek over pregnancy allegations,” Sudan Tribune, January 4th 2011.

\textsuperscript{271} Manyang Mayom, “Girl 13, tortured to death in Rumbek over pregnancy allegations,” Sudan
The question of dowry in the new South Sudan, its meaning, value and future within the various South Sudanese cultures in which it currently plays a central role in economic and social life, is a highly sensitive one, but one whose resolution will be essential to the development of the people of South Sudan and particularly its women. The impact of escalating dowry and the practice of dowry on women and men is also something that is intimately bound up with economic and social dispossession. Although the question goes beyond the scope of this paper, it is important to note that calling for a wholesale review of dowry is no longer just the preserve of women's rights activists. It was reported, for example, that in 2009 at the 7th Governors Forum of 2009 the then Governor of Jonglei State Kuol Manyang Juuk, “proposed the reduction or total abolishment of dowry payment in hope of curbing cattle rustling in southern Sudan.”

A senior government official has suggested that it is possible to talk about bride price (and polygamy) as the engines of violence against women, as a starting point.

- Is there space for considering a campaign at a national level to talk about reforming the institution of bride price or is it too sensitive an issue at this point? What kind of information and research would be needed for this campaign? Are anecdotal examples about the impact of the practice on women sufficient or is a more rigorous impact assessment needed? Could lessons be learned from the recently conducted campaign on violence against women?

- Could the provisions of the Transitional Constitution provide a starting point for civil society to begin to look at the impact of some of the practices surrounding the implementation and experience of customary law? There might be questions, for example, about the extent to which dowry practice results in women being forced to remain exposed to violent marriages that harm them or their children, and whether or not this contravenes a host of rights guarantees in the Transitional Constitution.

- SIHA’s partners have suggested that focus should be on enforcing regulations that help limit the negative impact of the practice and create greater opportunities for people to make their own decisions (legal aid/access to justice/economic empowerment etc.). They have also suggested that a standard bride price be agreed as a starting point for phasing out of the practice.

- Elimination of the negative impact of polygamy is a related and urgent challenge, however, a difficult one to address when considering that it is widely recognised that most of South Sudan’s leaders accede to its practice. It is, therefore, critical to focus on implementing the already existing ban on forced marriage, as expressed in the Transitional Constitution and using this mechanism as a driver for substantive social change.

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Tribune, January 4th 2011,

Maker Mabor Marial, “The Ugliness of Excessive Dowry in Sudan,” Sudan Tribune, September 2nd 2010,
Bibliography


Justice Aleu Akechak Jok, Robert A Leitch & Carrie Vandewint “A Study of Customary Law in Contemporary South Sudan” World Vision and The South Sudan Secretariat of Legal and Constitutional Affairs, (March 2004)


East African Community Secretariat, “EAC Strategic Plan on Gender, Youth, Children, Social Protection and Community Development” (March 2010)


Godfrey Malamungu, “The Women’s positive customary rights among the customary laws of the Kakwa, Pojulu, Nyangbara, Baka, Mundu and Avukaya Communities (Central
Equatoria” Norwegian Peoples Aid & The Institute for the Promotion of Civil Society (2009)


Government of Sudan and Sudanese Peoples Liberation Movement/Army, “Comprehensive Peace Agreement” Nairobi (9th January 2005)

Human Rights Watch, “There is No Protection Insecurity and Human Rights in Southern Sudan” (12th February 2009) http://www.hrw.org/es/node/80691/section/10


Jeanne Ward, “Because now men are really sitting on our heads and pressing us down…,” Report of a Preliminary Assessment of Gender-based Violence in Rumbek, Aweil (East and West), and Rashed County, Nuba Mountains, (March 2005)


Manyang Mayom, “Lakes State: Law against impregnating girls “useless” says youth


ONE, “Education is Vital for South Sudan’s Survival” (14th June 2011) http://www.one.org/blog/2011/07/14/education-is-vital-for-south-sudans-survival/


Tumushabe Joseph and Anne Itto “Baseline Study on the Status of Women in the New Sudan: Report for Mundri and Yei Counties, Western Equatoria, Southern Sudan” Sudan People’s Liberation Movement’s Natural Resources Management and Utilization Committee and USAID’s Strategic Analysis and Capacity Building Activity, (July 2004)


UNFPA, “Working with Police in South Sudan to Assist Survivors of Gender-Based Violence”
http://www.unicef.org/esaro/Children_in_South_Sudan_fact_sheets.pdf

UN General Assembly “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (December 1984)
http://www2.ohchr.org/english/law/cat.htm

UN General Assembly “Convention on the Elimination of All Forms of Discrimination against Women” (18th December 1989)
http://www.un.org/womenwatch/daw/cedaw/

UN General Assembly “Convention on the Rights of the Child” (November 1989)
http://www2.ohchr.org/english/law/crc.htm

UN General Assembly “International Covenant on Civil and Political Rights” (16th December 1966)
http://www2.ohchr.org/english/law/ccpr.htm

UN General Assembly “International Covenant on Economic, Social and Cultural Rights” (December 1966)
http://www2.ohchr.org/english/law/cescr.htm

UN General Assembly “International Convention on the Elimination of All Forms of Racial Discrimination” (21 December 1965)
http://www2.ohchr.org/english/law/cerd.htm


United States of America, Department of State, “2010 Human Rights Report: Sudan” (8th April 2011)