



TRAINERS' GUIDE



MANUAL FOR TRADITIONAL AUTHORITIES ON CUSTOMARY LAW IN SOUTH SUDAN



January 2010 (Revised December 2013)



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*Empowered lives.
Resilient nations.*



Ministry of Foreign Affairs of the
Netherlands



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Acknowledgements

This training manual forms part of the UNDP's Access to Justice and Rule of Law Project objective to strengthen the customary justice system through specific initiatives to promote the harmonization of the customary and statutory law systems, as well as the ascertainment of customary law through continuous research. This is in recognition of the central role played by traditional authorities in the administration of justice in South Sudan. Although the powers and institutional capacity of traditional authorities were severely eroded during the civil war, thereby affecting their effectiveness, their communities and the people of South Sudan continue to rely primarily on traditional mechanisms to resolve their disputes. Considering the gaps in the administration of justice and as South Sudan evolves as a nation, this manual is intended to contribute to a better understanding of traditional dispute resolution mechanisms and their interaction with the statutory court system, constitutional demands and international human rights standards. An understanding and recognition of the rule of law, non-discrimination and gender equality are recognized as foundational for peace and stability, and therefore, have a prominent place in this manual.

The manual has undergone significant transformation from inception to completion. The South Sudan political and legal landscape has changed significantly, since the manual was first drafted in 2010. South Sudan has since moved from a transitional period to statehood. Independence was accompanied by the introduction of new institutions of state, a new constitution, new laws and a differentiated context. Consequently, significant revision of the draft manual became necessary. In this regard, particular credit goes to Dr. Rowland Cole, UNDP Chief Technical Advisor-Ministry of Justice, who provided technical support, and led the process of field-testing, validation, training of trainers and publication of the manual. Ms Oby Nwankwo, UNWOMEN consultant also supported gender mainstreaming of the manual, and contributed to the training of trainers.

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Foreword for Manual for Traditional Authorities on Customary Law in South Sudan

It is important that both traditional leadership and local government structures work together to improve lives in rural communities. Issues related to the roles and responsibilities of traditional leaders have received much attention since the inception of the CPA in 2005 and particularly over the past two years of independence.

It is a known fact that for an organization to be successful, it must be capacitated. In this regard, the Ministry of Justice has, in conjunction with the Judiciary of South Sudan, Local Government Board, UNDP and UNWOMEN, partnered to support the training needs of traditional leaders. The need to build the capacity of traditional leaders has resulted in the construction of a customary law centre at Rumbek as well as the development of this Manual, which was developed to train traditional leaders on principles of law and court procedures. This is in line with the desire of the Government of South Sudan to harmonize customary law with the formal justice system and to ensure that our traditional leaders conduct their duties in line with the Constitution of South Sudan. The Manual will further clarify overlaps between Government and traditional leaders, a scenario that has always visited young post independent African countries, where modern statehood converges with pre-colonial institutions. Though an idealized historical framework of traditional authorities exist, the institution of traditional leaders is not static and has undergone significant changes.

Traditional authorities are widely respected and accessible to the communities of South Sudan and their duties are recognized under the Transitional Constitution 2011 and the Local Government Act 2009. In this regard, they are custodians of customary law, they administer justice, and they have a responsibility in furthering peace and reconciliation in conflict stricken areas. Customary court procedures are generally simple, informal and flexible. Within this context, the Manual should ensure that customary courts are alive to South Sudan's transformation process. For instance, the Local Government Act 2009 embodies comprehensive norms relating to gender equality and the protection of human rights. It is widely acknowledged that in order to keep pace with a changing environment, institutions in South Sudan need to achieve an internal shift to keep with the transformation process. Training and exposure to new ideas and thinking are critical for this shift to take place. Such training needs to be part of a culture of continuous and life-long learning instead of a single event being a solution to a challenge. It is hoped, therefore, that this Manual is a first in a series, and that in the course of training, traditional leaders will consequently form part of the process of the formulation of future training materials.


Honourable Jeremiah Swaka Moses Wani

Undersecretary, Ministry of Justice



Foreword for Manual for Traditional Authorities on Customary Law in South Sudan

Traditional authorities play a very important role in the political and social landscape of South Sudan. Traditional authorities are the only governance structure that majority of South Sudanese interact with. The importance of traditional institutions is reflected by the fact that the Transitional Constitution of South Sudan (2011), provides that the customs and traditions of the people of South Sudan are a source of legislation. Traditional authorities provide the only source of dispute resolution in bomas and payams. As the new State of South Sudan interacts with the rest of the international community, structures are been put in place to meet the demands of a modern nation State. The crucial role played by traditional authorities requires a functional traditional system relating to administrative practices and dispute resolution.

The Local Government Act which governs traditional institutions, including customary courts, demonstrates a desire to promote and respect values that cater for the fair treatment of all South Sudanese including women and children. This is in line with the Transitional Constitution of South Sudan. This Manual provides an opportunity to build the capacity of traditional authorities and to translate these legal provisions into reality. Constant and regular training will be required nationwide to equip traditional authorities with the necessary knowledge and expertise to enable them to align their practices with the standards provided by the Local Government Act and the Transitional Constitution of South Sudan. The Local Government Board is grateful to the United Nations Development Programme (UNDP) and UNWomen for providing technical assistance in the form of this Manual. While this Manual is of vital importance, it is but just one step in a thousand miles. In this vein, I wish to take this opportunity to call upon these two noble partners to engage the Local Government Board in a sustained programme of training of traditional authorities.

On behalf of the Local Government Board, I wish to express my appreciation to UNDP and UNWomen for producing this Manual which represents a momentous moment in the history of South Sudan.



Honourable David Koak Guok
Chairperson, Local Government Board



Acronyms

CEDAW	Convention on the Elimination of all forms of Discrimination against Women
HRBA	Human Rights Based Approach
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SAF	Sudan Armed Forces
NGOs	Non-Governmental organizations
SPLM	Sudan People’s Liberation Movement
SPLA	Sudan People’s Liberation Army
SSHRC	South Sudan Human Rights Commission
SOAS	School of Oriental and African Studies of the University in London
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children’s Education Fund
UNDP	United Nations Development Programme
UN HABITAT	United Nations Human Settlements Programme
UNIFEM	United Nations Development Fund for Women
UNESCO	United Nations Educational, Scientific and Cultural Organization
USIP	United States Institute of Peace



Introduction

This Manual should be seen as a product arising from the need to develop a methodology that would effectively engage traditional authorities as law enforcers of customary law systems that are binding on members of their respective communities.

The Manual consists of five modules through which all relevant questions emerge in assisting the traditional authorities to recognize the need for incorporating important standards, which will increase their effectiveness in performing their functions.

The training commences with an introductory session that addresses all administrative procedures and introduces the trainer/s and the participants. This will also be an opportunity to establish a good learning environment.

The first module will provide the definition and usage of customary law in the respective communities in South Sudan. It will also introduce the scope of laws and the Transitional Constitution of South Sudan and how the issues of customary law and traditional authorities are dealt with at the level of the traditional courts. Differences and commonalities in customary laws of different communities in South Sudan are also addressed.

In the second module the differences between the roles of traditional courts and statutory courts will be discussed. The cultural transformations affecting the customary law practice that have taken place over the years in South Sudan will be acknowledged. The structure and role of customary law and traditional institutions in modern and democratic societies will also be addressed.

The third module is broader and represents the heart of this Manual, as it incorporates human rights based approaches in the delivery of justice in traditional courts. The module offers broader knowledge and useful information to equip users with the awareness of the need to ensure respect for human rights, gender equality, fairness and impartiality during court proceedings and decision-making processes.

The fourth module defines gender concepts, highlights the differences between gender and sex and discusses how gender equality can be mainstreamed in the work of traditional authorities. This module provides tips on how customary court judges and court staff can facilitate access to justice for all by adopting the principle of non-discrimination in providing court user services.

The fifth module gives an overview of several recommendations including ascertainment of customary laws for improving the functions of the traditional courts.

All modules are meant to be interactive and a participatory approach is strongly recommended. A variety of training methods are suggested in the Manual and each module entails a rich use of interactive methods such as group work (multiple groupings, dyads, triads, syndicates, buzz groups), as well as brainstorming, round robin, case studies, hand outs and most importantly, practical exercises and role plays. The trainer will assume the role of a guide rather than a lecturer in the process of training the traditional authorities.

Notes to users of the Manual

This Manual has been specifically designed for use by trainers of traditional authorities in South Sudan. The Manual is very simple in guidance and it contains tips for the trainers, along with all the references used for further research by the trainer, if necessary. Hand outs are found at the end of each module. Trainers are encouraged to produce and share them with the participants.



The Manual has allocated time frames for the different sessions of the training although the trainer can be flexible and modify the timing to suit his/her purpose or preferences. The training can be done at one go using all the modules in the Manual or, depending on the needs of the trainees, the training can be split into several workshops. However, for the initial training of traditional authorities, it is advisable to do a complete training of the five modules. The ideal would be to “budget” six days (a minimum of 48 hours) for the full training to enable trainees to have sufficient time to do practical exercises to reinforce trainees learning. The time allocated for the activities may also be reduced in order to conclude the training in four or five days.

Who Should use the Manual

The Manual is designed for use by trainers of traditional authorities who have experience in conducting workshops and training courses. The Manual is written in simple explanatory English language with a step-by-step guide for the trainer to achieve the objectives of the training.

How to use the Manual

The trainer is urged to always read the Trainers’ Notes on each activity before he/she starts. The notes will always indicate how to use the Manual and provide suggestions on how to adapt it to the specific purpose of the workshop. The trainer however has the option of adapting them to his/her purposes. If training is taking place where power point presentations cannot be made, the trainer should prepare presentations in narrative form, beefing up the notes provided in this Manual. These presentations should form part of the participants’ notes to be given to them either before the training commences or after, depending on the preference of the trainer. The trainer should use the role-plays, case studies, icebreakers and energizers in the Manual and any others to keep trainees alert and motivated. It is advisable to print out the case studies, hand outs and texts for group activities before the start of the workshop.

Planning the Training

Gender balance should be considered in the selection of participants and trainers where possible. Also, persons with at least basic knowledge of gender issues should be included in the group if possible. These considerations add to the diversity of experiences and expertise in the room, which contributes to a better learning environment.

A trainer often will not be in charge of selecting the participants, but he/she can still:

- ◆ Ask the organizers to select a balanced number of women and men, where possible;
- ◆ Request that a local gender expert attends the training as a resource person;
- ◆ Predetermine working/break out groups that include a mix of women and men, and ensure that both women and men participate, where possible;
- ◆ Involve a few male and female trainees in the planning process to advise on logistics and other issues;
- ◆ Make deliberate efforts to ensure that female trainees are able to attend the training.

Overall, the methodology of this Manual should serve as an important tool, capable of equipping its users with useful information and hopefully increase the efficiency of customary courts.



DAY ONE

Climate Setting/Self Introductions



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Duration of Session

The introduction of the training will be based on participant-centred learning principles, guided by the trainer. The duration of this session will be one hour.



Tips for the Trainer

1. Set up the training room - ensure that the training room walls are clear of documents.
2. Materials, equipment, and logistics - ensure there are sufficient training materials - flip chart paper, markers, hand-outs, registration forms, participant lesson notes, notebooks, pens and pencils for each participant, and where possible have a projector.



Goal

The goal of this introduction is to complete all administrative procedures and provide participants with an introduction to their trainers, colleagues and each other. It is also meant to establish a relaxed climate and good learning environment.



Performance Objectives

At the conclusion of this introduction, participants will be able to:

1. Name and identify trainers and colleagues.
2. Provide information for the registration process.
3. Identify administrative issues.
4. Outline the assessment methods used during the training.
5. Identify participants' hopes, fears, needs and expectations.
6. Create the class-learning contract.



Introduction

This training introduction is designed to assist the participants to settle into a new and demanding training. By discussing certain basic issues, positive understanding will hopefully be achieved by both the trainers and the participants. It is essential at this stage to create a learning environment where participants can express their needs, expectations, hopes and fears honestly.

Objective 1: Name the Trainers and Colleagues

Introduction of Trainers and Participants



Group Activity

The trainer first introduces him/herself.

Trainer should write on the board the following headings:

- ◆ Name and age;
- ◆ Occupation and Language;
- ◆ Career information, education; and
- ◆ Hobbies and interests.

Divide the class into pairs and ask them to chat with one another referring to the above headings. If there is an odd number, the trainer should join in.

Each participant should then introduce his/her partner giving all the details he/she can remember. Invite the individual to add to the details.

The trainer should thank the participants for their efforts and contributions and proceed with the following sessions.



Objective 2: Provide All Information for the Registration Process

Trainer Task

Address the course administrative concerns as listed below.



Administrative Concerns

A. Registration

The pre-prepared registration forms/attendance registers (**Trainer Job Aid 1**) will be completed by each participant daily and collected by the trainer for reporting purposes. These forms will also serve as a useful reference for trainers. Ask the course participants to print their names and other information clearly. Participants who are unable to read and write must be discretely identified for possible assistance.

Objective 3: Identify Administrative Issues

Identification of Administrative Issues

A. Smoking

There will be no smoking in the training room area. Participants will have the opportunity to smoke during the breaks, which will be provided three times during the day.

B. Dress

Participants are expected to be properly dressed at all times. This must be made clear prior to the lesson.

C. Absence from Class

Participants must attend all sessions of the course to acquire the necessary certification. The course is structured in such a manner that topics build on one another. By missing a single day, participants will miss valuable information and necessary skills.

D. Breaks and Meals

Breaks will be provided three times during the training: 15 minutes tea break at 10am, one hour lunch break at 1pm and 15 minutes tea break at 3pm.

E. Training Duration

Training will commence at 09.00 and end at 17.00 daily.

F. Training Methods/Approaches

The training methods used may be new to participants. Therefore, the trainer must inform them that participatory methods including brainstorming, case studies, role-plays, and learning games, will be used. It is also important to explain that the exercises are part of the learning process. Therefore, every participant is expected to participate in all the exercises.



G. Participation

The success of the training is to some extent dependent on the full participation of all members of the group as well as the skills of the trainer. They will all learn from one another and the participants will be undertaking interactive group work as well as individual tasks. The trainers are there to assist and clarify any issues and answer questions, and by doing so, encourage participants to share their questions and comments. The trainer should encourage participants to volunteer in teams of three as monitoring groups to recap the previous day's sessions. Each new day should have a new team. They will split the sessions of the previous day into three so that each one of them will recap a part of it.

H. Participant Notes

The extensive Participant Notes contain all the information required for the course. Participants will be issued with their personal copy and told it is a working book and should be used as such throughout the course.

I. Time Table

A copy of the timetable should be displayed in the training room. A brief overview of the structure of the timetable should be given to participants as part of the settling-in period, and to ensure that they are aware of the scope of the course. Copies should be displayed in the training room for participants to pick up. This will enable them to prepare for each day's session in advance.

A sample time table is included in this manual as **Appendix 2**.

J. Mobile Phones

All mobile phones should be put on modes that do not disturb the training.

Objective 4: Outline the Assessment Methods Used During the Course



Trainer Task

The trainer should outline the assessment methods to be used in the training so that participants are absolutely clear on how they will be assessed. This should be explained in detail to the participants, but they must also be given re-assurance that the trainer is always available to assist all participants on the training content, as the intention is that all participants should be successful.

Participant Assessment Methods

The training is designed with clear objectives. Participants need to be aware of the importance of the objectives, as all assessments will be based on these objectives. Participants are required to meet all of the objectives therefore it is necessary to keep-up with the work on the training. They will be required to take part in a pre and post workshop evaluation that will assess their level of knowledge before the training, and improvement thereof, on the subject matter of the training by responding to the same questionnaire.

A pre workshop evaluation to assess the level of knowledge of each of the participants is necessary.



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Pre Workshop Evaluation

Name:

Gender:

Academic Qualification(s):

Nature of Work:

Profession/Occupation:

Have you ever undergone any form of training as a traditional leader/authority/court? YES/NO

If so, which one (s)?

Have you ever participated in a Gender training? YES/NO

In one sentence define Gender Equality:

Mention 2 ways in which you can ensure that women's rights are respected in the work you do:

Are you aware of the laws governing the work of the local courts? If so name them:

What is the structure of customary law courts and their jurisdiction? (Use additional paper, if needed)

What is the structure of statutory courts and their jurisdictions? (Use additional paper, if needed)

Have you ever been trained on Human rights?:

If yes please state when and the name of the training workshop

YES/NO

In one sentence define Human rights:

What is the limit of the jurisdiction of customary courts in criminal cases?

Give one example of how you can apply human rights in the work you do?

Objective 5: Identify Participants' Hopes, Fears, Needs and Expectations and Explain the Objectives of the Workshop

Identification of Hopes, Fears, Needs and Expectations

The object of this session is for the participants to freely disclose the hopes, fears, needs and expectations they have about the training course. If this is not done at the start of the training, there can be severe setbacks during the training. The trainer should remember that not all problems disclosed can always be resolved but at least the trainer is made aware of them and can therefore be understanding towards the participants. Efforts should be made to ensure that participants who are shy, especially women are encouraged to speak out.



Trainer's Note

Individual Task: Direct each participant to write down his or her own hopes, needs, fears and expectations of the course. Where participants are not literate, this exercise could be done orally by resource person explaining to them what is expected of them and recording their responses on flip chart. Give them at least 15 minutes to complete this task.

Group Work: Form the participants into three groups and instruct them to discuss the hopes, needs, fears and expectations, which they have written down and ask each group to complete a flipchart following their discussion, making a list under each separate heading. Allow at least 10 minutes for this task.

Group Presentations: After the group work all the groups should present their own flip chart. Ask a member of each group to make the presentation to the rest of the class. Allow 10 minutes for each presentation. After each presentation, ask members of the group if they have something to add and thereafter invite questions or comments from the other groups.

The trainer should make his/her presentation on the objectives of the training, clarifying which ones align with participants' stated expectations and highlighting which expectations cannot be met. Keep flip charts and display on the wall for reference during the course and to check out as a form of evaluation with the participants at the conclusion of the course.



Trainer Job Aid 1 Participants List

S/N	FIRST NAME	SURNAME	AGE	SEX	RANK	COUNTY/ TOWN	PHONE NO	SIGNATURE
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								
12								
13								
14								
15								
16								

DAY ONE

Continues

Module 1: Customary Law in South Sudan



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Duration of Module

The module will be based on participant centred learning principles guided by the trainer. The duration should be 4hrs 55 minutes.



Tips for the Trainer

Set up the classroom. Ensure there are sufficient registration forms, participant notes, notebooks, pens, pencils, and folders for each participant. Ensure that all planning is completed.



Material, Equipment, and Logistics

White board, flip chart, paper, markers, Participant Notes and Handouts



References

The Transitional Constitution of South Sudan, 2011.

The Comprehensive Peace Agreement, 2005.

The Local Government Act, 2009.

Customary Law in Southern Sudan: A strategy to strengthen Southern Sudanese Customary Law as a source of law in an autonomous legal system, by Manfred O Hinz, University of Namibia, 2009.

Study on Informal Justice Systems Access to Justice and Human Rights, by the Danish Institute for Human Rights for UNDP, UNICEF and UNIFEM, 2010.

A Study of Customary Law in Contemporary Southern Sudan, by Justice Aleu Akechak Jok, LLB Robert A Leitch, M.BE Carrie Vandewint, B.Hum M.A., March 2004.

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Local Justice in Southern Sudan, by Cherry Leonardi, Leben Nelson Moro, Martina Santschi, and Deborah H. Isser, A joint project of United States Institute of Peace and Rift Valley Institute, 2010.

“This Is How Marriage Happens Sometimes’: Women and Marriage in South Sudan.” In Friederike Bubenzer and Orly Stern, eds. *Hope, Pain and Patience: The Lives of Women in South Sudan*. Johannesburg: Jacana Media, 2011, pp. 1–23



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Module Goal

The goal of this module is to provide participants with the definition and usage of customary law in the respective communities in South Sudan. It will also provide the participants with an overview of the provisions of the Transitional Constitution, the Comprehensive Peace Agreement and other legislations, and how they deal with issues of customary law and traditional authorities, including the jurisdiction and administration of customary courts at different levels. It will also examine the effects of customary law on women's and children's rights.



Performance Objectives

At the conclusion of this module, participants will be able to:

1. Define customary law and describe its usage;
2. Identify the differences and commonalities in the customary law systems existing in South Sudan;
3. Understand and discuss the provisions of the Comprehensive Peace Agreement and the Laws of the Government of South Sudan regarding the administration and jurisdiction of customary courts;
4. Understand how customary laws affect women and girls and how respect for women and children's rights affect their access to justice.

Objective 1: Define Customary Law and Describe its Usage



Duration: 1 hour



Brainstorming Questions:

- ◆ What do you understand by customs and beliefs?
- ◆ What is customary law and how is it applied in South Sudan?
- ◆ How would you describe the use of customary law in your everyday practice?
- ◆ How does customary law affect women and children?

Write the answers on a flipchart and start a discussion. Allow time for answers and

commend each answer. After the discussion the trainer should give a general definition of customary law based on the answers given by participants and using the text below.

Customary Law: Definition and Usage by the Traditional Authorities

Customary law is the manifestation of the customs, beliefs and practices of the people. It is broadly accepted that customary law refers to the body of traditions, morals, social conventions and rules that through long usage and widespread acceptance, directly govern traditional societies. Customary law is a social convention as it is legal protocol and we will be dealing with this during the whole course trying to identify and highlight the importance of the customary law for the people of South Sudan and the application/usage and principles of customary law which are not contrary to statutory law, to universal public order and morality or to the principles of humanity and equity as defined by the transitional legal framework for South Sudan.

Several researches have been conducted in the field of customary law systems in South Sudan. As in other African countries, customary law is very important to South Sudan.

Over the years there have been many attempts to define customs and customary law. We will mention the general definition that can be found in Osborn's Concise Law Dictionary by John Burke:

"Custom is a rule of conduct obligatory to those within its scope, established by long usage. A valid custom has the force of law. Custom to the society is what law is to the State."

For the purposes of generalization, the term "customary law" in South Sudan can be understood to mean a body of customs and traditions that is utilized by, and unites the majority of citizens in that jurisdiction (in *A study of Customary Law in Contemporary Southern Sudan*).

It is noticeable that customary law is considered to be the predominant source of law in South Sudan and it is the main factor around which the order and stability of communities revolve. As stated in many studies and reports almost 90% of every day criminal and civil cases are dealt with and executed under customary law and by traditional chiefs and leaders. The basic principle of customary law is reconciliation, which makes it an important and vital tool in conflict resolution. Conflict resolution through customary law is essential to developing a peaceful and fair society.

Customary laws still exist as unwritten systems; they remain dynamic and are characterized as very flexible. The flexibility of customary laws could result in favouritism as it has been alleged in certain quarters that the wealthier people are favoured more than the poor in the resolution of disputes in customary courts. It is easy to notice that in relation to family issues, litigants prefer to resolve their disputes at the traditional courts, or even by out of court amicable settlements. It is usually preferred that disputes or problems are dealt with privately without public interference, and with it, shame of exposing one's private life in public, as is the case with the statutory courts.

The more than two decades of war severely affected the status of customary law. The war marked a turning-point in customary law practice as the role of traditional chiefs and leaders changed enormously. The war resulted in the displacement of several people. Inevitably, there were clashes within the tribal areas in matters of customs and culture which resulted in a change of status and power of the traditional authorities.



This shift in power will be discussed during the course and we will try to find the best ways and practices to effectively engage traditional authorities as law enforcers of discrete, mostly unwritten customary law systems that are binding to members of their respective communities.

The majority of South Sudanese customary law systems show plainly a conflict between international human rights laws and rights granted to women and children in customary law as can be seen in discussions below. Within South Sudanese society the role and status of women is seen as a reflection of a culture that places a premium on the cohesion and strength of the family as a basis of society. The male is the undisputed head of the family and marriage is a means of strengthening the bonds between families and clans within tribes. The role of women in this social pattern is that of cementing family ties through “bride-wealth” and of producing children. To the outside observer, particularly one whose culture is based upon the rights of the individual, the status of women in this role is that of property. Notwithstanding the fact that these cultural practices have evolved over countless generations and survived twenty years of war, some in the international arena view their effects upon the status and role of women to be repugnant and clamour for change. (*Customary Law Overview in South Sudan, (2004)*).



Trainer's Note

After the successful completion of the Objective 1, remind the participants that they can ask questions for clarification and better understanding. Develop a series of questions for better understanding in order to get more information from the participants.

Objective 2: Identify the Differences and Commonalities in Customary Law Systems Existing in South Sudan



Duration: 1 hour 30 minutes



Group Work

Divide the participants into five groups to identify the principles of customary law as they are practised in the different localities each working on one of the following subject heads: Marriage, Divorce, Custody of Children, Inheritance and ownership of Property. Tell participants to highlight the differences and commonalities in the different localities.



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The answers should be recorded on a flipchart and kept for further use. As the participants are making the presentations, the trainer should tease out the differences and commonalities between the different customs. Using the key words from their discussions, make a presentation with text below.

Differences and Commonalities in Customary Laws in South Sudan

There are many tribes existing and living in South Sudan and each one of them practice their own customary laws. Almost each tribal group has its own discrete body of customary law. Although a lot of research have been conducted on customary law issues, all such research give focus to large tribal groupings, leaving out the smaller tribal groups. Some researchers on the other hand, have tried to simplify the grouping by classifying the numerous customary law systems in two generic groups; those that reflect the customs of a central authority system, and those of a decentralized system.¹ We will use these classifications for our purposes.

Central authority system includes the Zande, Shiluk and Anyuak tribes, which tend to be based around powerful, centralized hierarchical structures. Decentralized customary legal systems include the Dinka, Nuer, Bari and Fertit tribes. These systems typically comprise tribes or sub-tribal units where local individuals or committees also exercise social and legal powers.

There are noticeable variances and differences among tribal systems, bodies and the peoples. However, there are also common and very similar themes and practices in all the customary law regimes. We can notice differences more in the style than the substance. These differences are related to differing value systems, particularly in the area of community wealth.

The most remarkable commonality and the basis of all customary law is the special need for reconciliation and providing harmony instead of punishment (punishment is only meted out when it is absolutely necessary). This is what distinguishes the customary law from the western law and the formal system, also referred to as statutory law.

The combination of civil and criminal law under a single code also presents a different practice from western law. As mentioned before, the primary and most important aim of customary law is conciliation and dispute resolution. Reconciliation between the wronged and wrongdoer is critical in both the spheres of civil and criminal law. This is in marked contrast to the western system which lays emphasis on blame and punishment. The western courts aim to obtain an acceptable version of the truth, allowing the two sides in the dispute to have their arguments presented, but the truth in the traditional courts may sometimes be of a secondary level.

Customary law includes procedures. This refers to the presentation of legal issues before a court. In customary courts, the procedure involves participation by the audience in the process and in making the judgment. The decision is all about logic, and what is reasonable. (Justice George Ladu, High Court, Juba) (*Local Justice in Southern Sudan*).

The principles of customary law practice are very simple and aimed at the amicable resolution of disputes. The four principles are:

1. The principle of conciliation;
2. All efforts are made to settle disputes outside the statutory courts;
3. All procedures are made as simple as possible, with the aim to avoid logistics problems and unnecessary expenses and collateral losses;
4. The procedures follow a system with Chiefs or Judges actively engaging the parties during the decision-making process and not just being an observer.



Presentation

Differences and Commonalities in Customary Law Systems in South Sudan



Trainer's note

Make the presentation and allow time for questions and comments

A simple overview of the commonalities could be examined under the four subject areas of customary law:

1. Family Law

Marriage

It is known that all South Sudanese customary law systems have a common recognition of the purpose of marriage, which is recognized as a union between a man and a woman for life, with the purpose of producing children and strengthening the continuity of the family. Marriage is considered to be between two family groups rather than two individuals. Marriage as an institution under all customary law codes involves a payment of "bride-wealth" by the man and his family. The complexity of payment and its distribution is designed in part to make both divorce and adultery socially unacceptable actions. Adultery is considered to be very serious and is punishable as a crime by imprisonment. It is also a civil wrong attracting payment of reparation to the husband. All customary law systems have contingencies for dealing with mixed marriages across tribal groups.

The issue of the rights of women and children under South Sudanese customary law can only be fairly judged within the context of the family and that part of customary law known as Family Law (or Personal Law). An understanding of Family Law must begin by recognizing that the traditional Sudanese concept of family differs markedly from the Western institution. Classically, the former recognizes polygamy, the latter is monogamous, but the differences are far more subtle and complex.

In many African societies, including South Sudanese society, there exists a custom known as *levirate* under which women remain married to their dead husbands and cannot marry again unless they obtain a divorce from their dead spouse. Children continue to be born to them by the deceased husband's surviving kinsmen but bear the name of and are considered in all respects offspring of, the dead man. This custom results in a practice, known as "wife-inheritance". When a man dies his immediate kinsmen, brothers or paternal uncles, are required to offer marriage to his widow and to care for her and her children. Any future children that the kinsmen may have with the widow will bear the dead man's name. Moreover, men who die before marrying are given wives, through 'ghost marriages', again to the man's brothers or paternal uncles. Children born of these marriages also bear the dead man's name not the biological father's. (*A Study of Customary Law in Contemporary Southern Sudan* by Justice Aleu Akechak Jok, LLB Robert A Leitch, M.BE Carrie Vandewint, B.Hum M.A., March 2004, page 33).

By these and other customs, the living are linked inextricably with the dead and procreation gives permanence and continuity to the institution of the family. The



living too strives to add to this continuity by ensuring they have children “to leave behind when they die”. These customs are also designed to strengthen and expand the family through the retention of property and material wealth within the male lineage. Additionally, they have an indirect effect of “providing a constant supply of man-power as an insurance against the insecurities inherent in their traditional way of life.” Notwithstanding the perceived and real inequities of the institution, particularly with regard to the status of women, there are also real strengths. Close examination shows that, as with all South Sudanese customary laws, the main aim is to create and reinforce communities.

For the major peoples and tribes of South Sudan, there is “Bride wealth” which takes the form of cattle and occasionally donkeys, sheep and goats. For the minority tribes, usually non-pastoralists, “bride wealth” takes the form of tools, weapons and beads. Recently and increasingly, money is being used as “bride wealth”. “Bride wealth” brings stability to the marriage since the parents and relatives acquire economic benefits through such payment. (*Customary law Overview in South Sudan*)

Divorce

The issue of divorce is managed in very similar fashion under all customary law systems. Grounds for divorce are common:

- ✓ 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

The key relief in divorce is return of the “bride wealth”. In the event of a failure of the marriage through divorce or desertion, all or part of the “bride wealth” may have to be repaid. Given the complexity of providing “bride wealth”, particularly cattle, the logistics of returning the wealth often causes severe friction within families and is a strong force militating against divorce. Due to this situation, women often remain in abusive marriages with severe consequences, including death.

Custody of children

Laws dealing with the custody of children are very similar and reflect the ethos of a patrilineal society. Children remain with their mothers until they are seven years old. Thereafter, they will go to their father if he has paid dowry, and to the maternal uncle, if the father has paid nothing.

2. Laws of Property

Customary law systems reflect the importance each tribal group places upon movable and immovable property. The pastoralists, who place great value on land for grazing and on cattle as a symbol of wealth and power, have more complex property laws than sedentary agriculturalists. Nevertheless, all groups have common laws regarding ownership and inheritance of property. The aim of customary law is to ensure that all property stays within the family. Daughters cannot inherit any part of the estate as they are considered potentially part of another family. Divorced wives cannot inherit from a deceased ex-husband. Whilst this may be self-evident in that she is no longer part of the family, it also applies to widows who, in customary law remain married to the



deceased. If a widow chooses to divorce her deceased husband she must give up any part of the estate she has inherited.

3. Homicide

All customary law systems in south Sudan have traditionally dealt with homicide as an offence that is both a tort (an act that requires the perpetrator/s to pay the injured parties reparations) and also an issue of collective responsibility. The payment of reparations, known collectively by the Arabic term “*dia*”, depends upon the customs and values of the community from which the victim comes. Payment may be in multiples of cows, young girls or money. Where one tribal group has committed homicide against another, systems exist within customary law systems to assess reparations in kind.

4. Procedures

Although individual customary law courts may conduct their proceedings according to tribal custom, variations are more style than substance. The reasons for commonality of procedures lie in colonial history. The Constitution of the Chiefs’ Courts governs the customary laws of the people of South Sudan. This structure was established by the Anglo/Egyptian condominium and was legislated by means of statutory instrument. The Chiefs Courts Ordinance of 1931 was passed to regulate the administration of traditional justice in South Sudan. Although this ordinance was repealed by the People’s Local Courts Act of 1977, the repeal section contains a proviso that courts established under the Chiefs’ Courts Ordinance continue to be in place until warrants of establishment of new courts have been issued. The jurisdiction of individual customary courts are determined by the Chief Justice and defined in a warrant issued by his office authorizing their establishment. Invariably, restrictions are placed upon the jurisdiction of each court, which determines such issues as the value of fines/awards, the types of cases that can be heard and the territory within which the court may exercise its powers.



Trainer’s Note

After the successful completion of **Objective 2**, remind the participants that they can ask questions on issues that are unclear and try to give answers and information as much as possible.



Objective 3: Understand the Provisions of the Comprehensive Peace Agreement and the Laws of the Government of South Sudan Regarding the Administration and Jurisdiction of Traditional Courts

Duration: 20minutes



Trainer's Note

Give an overview of the provisions of the Comprehensive Peace Agreement (CPA), Transitional Constitution of South Sudan, Local Government Act and other laws governing the work of Traditional Authorities. Distribute **Trainer Job Aid 1– Handouts 1–3 to 1–6** at the end of the presentation. The handouts contain relevant sections of the Transitional Constitution, Local government Act and CPA.



The Provisions of the Comprehensive Peace Agreement and the Laws of South Sudan Relating to the Administration of Traditional Justice

The Government of South Sudan was established in terms of the Comprehensive Peace Agreement in 2005. The Comprehensive Peace Agreement set a legal framework for the country based on the principles of: “one country, two systems,” by which Islamic law shall apply in the North, while the South shall have a secular democratic system, in which the source of legislation shall be: “the values and customs of the people.” The provisions of three articles cited below, illustrate more how the Comprehensive Peace Agreement has emphasized the role of the customary system in the legal pluralist system of the Sudan in general and in South Sudan in particular.

On its own part, the Transitional Constitution of South Sudan prescribes (3) three levels of Government, namely, the Government of South Sudan, State Governments and Local Governments.

The Comprehensive Peace Agreement redefined South Sudan in terms of Inclusivism, Pluralism, Participation, Democracy and Human Rights. The preamble says:

“Whereas the parties are desirous of resolving the Sudan conflict in a just and sustainable manner by addressing the root cause of the conflict and by establishing the framework of government through which power and wealth shall be equitably shared.”



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The preamble of the Comprehensive Peace Agreement is echoed in the Transitional Constitution 2011 which notes that, "... further committed to establishing a decentralized democratic multi-party system of governance in which power shall be peacefully transferred and to upholding values of human dignity and equal rights and duties of men and women."

The Local Government Act, 2009 extrapolates the principles of decentralization expressed in CPA and Transitional Constitution, by providing that, "*the purpose of this Act is to provide for the establishment of Local Governments, their powers, functions and duties, structures, composition, finance and any other matters related thereto.*"

Trainer Job Aid 1

Handout 1.1: Comprehensive Peace Agreement

Article 3.7.2.1 provides that the South Sudan Supreme Court shall:

"Be the court of final judicial instance in respect of any litigation or prosecution under Southern State or South Sudan law, including statutory and customary law."

Article 2.2: The Parties agree that a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws and practices, and local heritage.

Article 2.6.6.2: Recognition of customary land rights and/or law.



Trainer Job Aid 1

Handout 1.2: The Transitional Constitution of South Sudan 2011

The Transitional Constitution repeated some of the Comprehensive Peace Agreement provisions on customary law and traditional justice. In terms of the Transitional Constitution of South Sudan, “customs and traditions of the people” are recognized as the third source of legislation in South Sudan.

The Transitional Constitution of South Sudan contains several articles of relevance to customary law and traditional authority:

Article 5 determines the sources of legislation, as follows:

“The sources of legislation in South Sudan shall be:

- ◆ this Constitution;
- ◆ written law;
- ◆ customs and traditions of the people;
- ◆ the will of the people; and
- ◆ any other relevant source.”

Article 166 (1) deals with local government and requires that:

“Pursuant to **Article 47 (c)** of this Constitution and the state constitutions, the states shall enact laws for the establishment of a system of local government based on urban and rural councils for which they shall provide structures, composition, finance and functions.”

Articles 167 and 168 contain general rules on traditional authority.

Article 167 provides that:

1. The institution, status and role of Traditional Authority, according to customary law, are recognised under this Constitution;
2. Traditional Authority shall function in accordance with this Constitution, the state constitutions and the law;
3. The courts shall apply customary law subject to this Constitution and the law.

Article 168 adds:

1. Legislations of the states shall provide for the role of Traditional Authority as an institution at the local government level on matters affecting local communities;
2. Legislations at the National and state levels shall provide for the establishment, composition, functions and duties of councils for Traditional Authority leaders.



The Local Government Act of 2009 codifies the recognition of customary law courts in South Sudan. These courts deal with cases within their jurisdiction by applying “the customs, traditions, norms and ethics of the communities.”¹ The Act prescribes principles for decision making in these courts, including general principles like non-discrimination, non-delay, compensation, possible mediation, and a focus on substantive justice². Chapter 12 deals exclusively with Traditional authorities. It defines Traditional Authorities as semi-autonomous institutions of traditional system of governance at the State and Local Government levels which shall administer customary law and justice in the customary law courts in accordance with the provisions of the Act and any other applicable law. It goes further to enjoin them to “observe, respect and adhere to the Act of Rights as enshrined in the Comprehensive Peace Agreement, the National ... and state constitutions.”

Trainer Job Aid 1

Handout 1.3: Local Government Act 2009 Customary Courts

Section 93. Establishment of the Customary Law Council

There shall be established in each County a Customary Law Council which shall be the highest Customary Law authority in the County.

Section 94. Composition of the Customary Law Council

1. The Customary Law Council shall comprise of:-
 - a. the County Paramount Chief as the head;
 - b. all Head Chiefs of the “B” Courts or Regional Courts of the County as members;
 - c. the Secretary of the Council, who is appointed by the Customary Law Council, as an ex-officio member;
 - d. Three community elders, three women and one youth representative appointed by the County Commissioner after consultation with the community; and
 - e. Any other ex-officio members as may be invited by the Council.
2. The membership of the Customary Law Council shall not be combined with the membership of the Legislative Council or the State Judiciary, except as ex-officio members.

Section 95. Functions and Duties of the Customary Law Council

1. The Customary Law Council shall protect, promote and preserve the traditions, customs, cultures, values and norms of the communities;
2. The Customary Law Council shall regulate, maintain, monitor and ensure proper administration of the customary law;
3. Members of the Customary Law Council shall be impartial in the performance of their functions and duties.

¹ Local Government Act 2009, Sec. 98(1)

² Local Government Act 2009, Sec. 98(3)

Trainer Job Aid 1

Handout 1.3: Local Government Act 2009 Customary Courts (continued)

Section 96. Authority of Customary Law Council

1. The authority of the Customary Law Council shall be derived from the customs and traditions of the people of the County in accordance with the provisions of this Act and any other applicable laws or regulations;
2. The Customary Law Council shall be responsible for the selection, recruitment, and training of the Customary Law Courts staff and the maintenance of professional standards in accordance with applicable rules and regulations;
3. The Customary Law Council shall ensure women participation by at least twenty-five percent of the membership;
4. The Customary Law Council shall ensure that the freedoms and rights enshrined in the Constitutions are upheld and respected in the Customary Law Courts.

Section 97. Establishment of Customary Law Courts

1. There shall be established Customary Law Courts as follows:-
 - a. "C" Courts;
 - b. "B" Courts or Regional Courts;
 - c. "A" Courts or Executive Chief's Courts; and
 - d. Town Bench Courts.
2. The Local Government Authority shall ensure adequate representation of women in the Customary Law Courts.

Section 98. Competences of Customary Law Courts

1. The Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities;
2. A Customary Law Court shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent Statutory Court;
3. In deciding cases, the Customary Law Courts shall, inter alia apply the following principles:-
 - a. justice shall be done to all, irrespective of social, economic and political status, race, nationality, gender, age, religion, creed or belief;
 - b. justice shall neither be delayed nor denied;
 - c. adequate compensation shall be awarded to victims of wrongs;
 - d. voluntary mediation and reconciliation agreements between parties shall be recognized and enforced; and
 - e. substantive justice shall be administered without due regard to technicalities.
4. All organs and institutions of the Council shall obey and execute the judgments and orders of the Customary Law Courts;
5. Decisions of the Customary Law Courts shall be appealed against in accordance with the provisions of this Act.

Trainer Job Aid 1

Handout 1.4: Local Government Act 2009 Council of Traditional Authorities

Section 119. Councils of Traditional Authority Leaders

1. Pursuant to the provisions of **Article 175 (2)** of the Constitution, there shall be established in:
 - a. Southern Sudan, a Council to be known as “the Council of Traditional Authority Leaders; and
 - b. Each State of Southern Sudan, a State Council of Traditional Authority Leaders whose composition, functions and duties shall be determined by relevant State legislation.
2. Pursuant to the provisions of **Article 5** of the Constitution, the Council of Traditional Authority Leaders shall be the custodian of the customs and traditions of the people of Southern Sudan as a source of legislation.

Section 120. Composition of the Southern Sudan Council of Traditional Authority Leaders

The Council of Traditional Authority Leaders shall be composed of forty five members as follows:–

- a. Four elected representatives of each State Council of Traditional Authority Leader, at least one of whom shall be a woman; and
- b. Five members appointed by the President after consultation with the relevant authorities

Section 121. Functions and Duties of the Southern Sudan Council of Traditional Authority Leaders

1. The functions and duties of the Southern Sudan Council of Traditional Authority Leaders shall be, but not limited to: –
 - a. provide a forum for dialogue with all levels of government on matters of customs and traditions of the people of Southern Sudan;
 - b. intervene to resolve intertribal disputes by applying customary and traditional conflict resolution mechanisms;
 - c. foster peace building and resolution of conflicts through mediation and other conciliatory mechanisms;
 - d. advise all levels of Government on matters of traditions and customs of the people of Southern Sudan; and
 - e. perform other functions and duties as provided for in this Act or any other applicable law or regulations.
2. The duties of the Council of Traditional Authority Leaders shall be, but not limited to:
 - a. Organize regular sessions of dialogue with stakeholders on customs and traditions;
 - b. Initiate, establish and disseminate processes and traditional conflict resolution mechanisms for interventions in the settlement of inter-tribal disputes; and
 - c. Establish, promote and maintain linkages and peaceful coexistence with all traditional leaders and nationalities across Southern Sudan.



Objective 4: Understand How Customary Laws Affect Women and Girls and How Respect for Women and Children’s Rights Affect their Access to Justice

Duration: 2 hours 10 minutes



Group Activity

Divide participants in two groups and task them to discuss the following questions:

- ◆ How do the Customary Courts deal with cases of (1) marriage, (2) divorce, (3) Adultery, (4) Sexual offences, (5) Ownership of property and (6) Inheritance;
- ◆ Group 1 should respond in respect of 1–3 while Group 2 should respond in respect of 4–6.



Trainer’s Note

Their responses should be recorded on a flipchart (1 hour). Each group should have 15 minutes to present their answers and then discuss the topic using the text below.



This session will discuss the impact of South Sudan’s customary legal system on women’s rights, especially with respect to domestic violence, divorce, adultery, ownership of property and inheritance laws, and sexual violence. Women’s rights activists argue that many customary laws discriminate against women as can be seen from the way it deals with the above mentioned issues.

Marriage: Many concerns relate to marriage, an institution of critical importance, which—perhaps more than any other aspect of life—shapes a woman’s experience, status, and security. In marital disputes customary courts place the emphasis on preserving marriages, even if doing so is to the detriment of a woman’s safety and well-being. Under all of South Sudan’s customary law codes, marriage involves the payment of a bride wealth by a man and his family to a woman’s family. Chiefs often overstress its importance and a husband’s resulting rights over his wife. Marriage is thus the backdrop against which the topics discussed below need to be understood. (*Stern 2011*).

Domestic violence: Customary law allows a certain level of violence in the home and permits a man to “discipline” his wife. Rather than granting a divorce in a domestic violence case, a court may order a man to compensate his wife for harm inflicted, such as by paying her hospital bills. Alternatively, he may have to pay a fine of a certain number of cows or—in extreme cases—serve several months in prison. In deciding whether to grant a divorce, courts place an emphasis on whether the man wishes to remain in the marriage. A court is likely to order a woman to remain with her husband if he does not wish to be divorced and apologizes to his wife, promising to desist from further excessive beating.



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Courts only grant divorce to couples if the domestic violence reaches a certain level of gravity or regularity, or if the violence can be seen as evidence that a man has disowned his wife. This position has occasionally provided an incentive for men to beat their wives repeatedly in order to force a divorce. If a divorce is not granted, a woman is almost always compelled to return to her abusive husband, with little done to protect her from further harm. As a result, women are often afraid to report domestic violence, fearing that their husbands will only become more irate. Notably, a man only has the right to use violence against his wife or his daughter. Courts take violence that targets non-family members more seriously. Domestic violence is often condoned by a court if a wife is found to be “behaving badly” or not fulfilling her duties, such as by failing to cook for her husband, insulting him, or drinking. Many of the women who take their husbands to court for excessive abuse may end up themselves sentenced by the courts; wives are sometimes punished more harshly than their offending husbands, for example by receiving a larger number of lashings. (*Sudan Human Security Baseline Assessment (HSBA)*).

Divorce: Divorce procedures vary among tribes. Despite these variations in procedure, in most of the customary law systems it is the return of bride price to a husband’s family that renders a couple divorced. The need to return the bride price can create a number of difficulties, resulting in women remaining in abusive relationships. Whenever divorce does occur, most versions of customary law place children with their fathers as they are considered part of the male lineage. However, young children are permitted to remain with their mothers until they turn between three and seven years old. The prospect of losing custody acts as a strong disincentive to mothers who are considering a divorce. Opting for informal separation creates problems for the women too. While polygamy is legal for men, for women it is not; if a separated woman enters into a new relationship or marries another man this is considered to be adultery. Any children she might have with her new partner will “belong” to her former husband. Other men may thus avoid becoming involved with separated women, as children born to these unions will not be considered to be of their lineage (Stern, 2011). On leaving a family through divorce, a woman forfeits all of her belongings, which continue to be owned by the husband’s family. The threat of being left with nothing can also serve as an enormous disincentive to divorce.

Adultery: is forbidden in customary law. Among the Dinka and some other tribes a man who has slept with or impregnated a woman who is not his wife may have to pay a fine to her husband or, if she is unmarried, her parents. Adultery by women is treated more harshly. An accused woman may be held in prison for 24 hours while an investigation is carried out and may be sentenced to several months of incarceration if she is found to be guilty. Like men, women are often given the option of paying a fine instead of serving time in prison but because most women do not have incomes of their own and because their money and possessions belong to their “aggrieved” husbands, they are more likely to spend time in prison.

Ownership of Property: The Interim Constitution expressly states that women have the right to own property and to share in the estates of their deceased husbands. Customary law differs on this point. It focuses instead on ensuring that property remains within families. Although property is owned by a family, it is held by the man, as the head of the household—an arrangement that is often confused with that of “ownership”. According to the customary laws of many tribes, women cannot own property in their own capacity, nor may they keep their own income. According to most versions of customary law, death does not terminate a marriage. A widow is therefore still considered married to her deceased husband.



The deceased's property remains within his family, dispersed among his male relatives. Widows thus find themselves dependent on their deceased husbands' families for support. It is not uncommon for them to be evicted from their homes and left with nothing. In other cases, "wife inheritance" (a practice in which a wife is "inherited" or remarried to the deceased's closest male relative) kicks in as a means to guarantee support for widows.

Sexual Offences: Officially, customary courts are not supposed to hear serious criminal matters such as rape; they are expected to refer these cases on to the statutory court system. In practice, however, customary courts frequently do try rape cases. If perpetrators are convicted, punishments are often mild. A rapist might be sentenced to a short prison term—sometimes around three months—or might be forced to pay compensation to a woman's family if she is unmarried or to her husband if she is married. To a great extent, those who rape get away with the crime, perpetuating a perception that men can rape with impunity.

Trainer's Note

After the completion of Objective 4, thank the participants for the first day of participating in the training, appraise the contribution of the participants and give links for the sessions of the next module.



DAY TWO

Module 2: The Structure and Role of Traditional Authorities and Formal or Statutory Courts in the Administration of Local Justice



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Duration of Module

The module will be based on participant centred learning principles guided by the trainer and the duration is 6 hours 15 minutes.



Tips for the Trainer

Set up the training room. Ensure there are sufficient registration forms, participant notes, notebooks, pens and pencils for each participant. Ensure that all planning is completed.



Material, Equipment, and Logistics

White board, flip chart, paper, markers, Participant Notes and Handouts.



References

The Transitional Constitution of South Sudan, 2011.

The Comprehensive Peace Agreement, 2005.

The Local Government Act, 2009.

Study on Informal Justice Systems Access to Justice and Human Rights, by the Danish Institute for Human Rights for UNDP, UNICEF and UNIFEM, 2010.

Customary Law in Southern Sudan: A strategy to strengthen Southern Sudanese Customary Law as a source of law in an autonomous legal system, by Manfred O. Hinz, University of Namibia, 2009.

A Study of Customary Law in Contemporary Southern Sudan, by Justice Aleu Akechak Jok, Robert A. Leitch and Carrie Vandewint, March 2004.

Legal Pluralism in Southern Sudan, by Kuyang Harriet Logo from the Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, hosted by USIP, George Washington University and World Bank, 2009.

When Legal Worlds Overlap: Human Rights, State and Non-State Law, by International Council on Human Rights Policy, 2009.

Traditional Authorities and Local Government in Southern Sudan, by Markus V. Hoehne, 2008.



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Module Goal

The goal of this module is to provide participants with the understanding of the structure and role of traditional authorities in the administration of local justice and the structure and role of formal statutory courts (judiciary). The participants will acknowledge the cultural transformations affecting the customary law practice that have taken place over the years in South Sudan. The participants will recognize the important fact of moving towards modernity that affects the customary norms of the people within each of the communities.



Performance Objectives

At the conclusion of this module, participants will be able to:

1. Understand the structure of traditional courts under the laws of South Sudan;
2. Distinguish between the roles of the local and formal justice systems in South Sudan;
3. Understand the structure and role of the statutory or formal courts;
4. Understand the cultural transformations regarding customary law and the inevitable social movement towards modern society and statehood.

Objective 1: Understanding the Structure of Traditional Courts under the Local Government Act etc.



Duration: 30 minutes



Presentation

Open the session with a brief presentation on the structure of the customary courts and hold discussions on the courts they manage. They should be able to say the level where their courts fall in. Bear in mind that some courts operate outside the judiciary structure and in some cases without a specific name. Discuss and make the point that there is need to comply with the laws setting up traditional authorities.

Structure of Customary Courts in South Sudan

The Local Government Act provides rules that govern local government in the general sense and traditional authority, including rules on the administration of justice under customary law.

Section 6 (1) of the Local Government Act defines local government as the third level of government, which consists of a number of autonomous local government councils to be established in accordance with this Act.

Sub-Section 4 of the section adds that the Community Governments are the Local authorities which pre-existed in all the homelands of the people and in urban settlements of the people founded on their customs and traditions where customs are the source of legislation and where cultures are the basis of strength, harmony and inspiration, to which Local Government institutions shall be committed, respected and promoted.

In line with this and like **Article 5** of the Transitional Constitution, **Section 9 (1)(d)** of the Local Government Act refers to sources of local government legislation as:

“Customs and Traditions of the people of the respective Local Government territory within the state.”

The Act distinguishes three tiers of local government:

1. the level of County, City, and Town Councils;
2. the level of Payam and Block Councils – the coordinative administrative units; and
3. the level of the Boma and Quarter Councils – the basic administrative units and three types of Local Councils:
 - a. Rural Councils;
 - b. Urban Councils; and
 - c. Industrial Councils.

Section 19 of the Act gives special attention to the Incorporation of Traditional Authority Systems and states:

1. The administrative aspects of the Authority institutions and systems shall be incorporated in the three tiers of the Local Government.
2. The traditional leaders shall represent their people in the County Legislative Council as determined by this Act and regulations there under.
3. The Boma shall be the main domain of the traditional authority where traditional leaders perform their administrative and customary functions.



4. In the Town Council, the traditional authority shall perform its administrative and customary functions within the quarter council.
5. There shall be no customary bench courts at the Municipal and City Council levels.

The Local Government Councils shall – as **Section 22** of the Act stipulates - have three organs:

- a. the Legislative Council;
- b. the Executive Council;
- c. the Customary Law Council.

Section 23 adds:

“Subject to the provisions of the Constitution, the Local Government Councils shall exercise legislative, executive and customary judicial authority on matters and functional areas as specified in Appendix II of the Act.”

Chapter X of the Local Government Act regulates the traditional courts.

Section 97(1) distinguishes between four types of customary law courts:

- a. “C” Courts;
- b. “B” Courts or Regional Courts;
- c. “A” Courts or Executive Chief’s Courts; and
- d. Town Bench Courts.

In each County shall be established “B” Courts or Regional Courts, which shall be the Customary Law Courts³. The Head Chief shall be the Chairperson of the court, with the Chiefs as members. The Chairperson of the court is responsible for the administration of the Customary Law Courts of the Payam and answerable to the Paramount Chief for the performance of the court.

“A” or Chief Courts shall be established in each Boma. The “A” Court shall be the customary court of the first instance. “A” or Chief Courts shall be established in each Boma. The “A” Court shall be the customary court of the first instance.

Section 102 provides for the establishment of Town Bench Courts in the areas of Town Councils, one at the level of the town and equivalent to “B” or Regional Courts and one equivalent to “A” Courts in the areas under the towns Quarter Councils.

Chapter XII of the Act deals with traditional authorities in Southern Sudan: the status of traditional authorities; the types of traditional authority; the establishment, and composition of chiefdoms (chiefdoms and chieftainships); the election or selection of chiefs; the immunity of kings and chiefs; and the council of traditional leaders.

Section 113 distinguishes two types of traditional authorities:

- ◆ kingdoms with centralized monarchical systems of rule and the territories of which may cover more than one county; and
- ◆ chiefdoms with decentralized systems of rule.



³ Section 100(1)

Objective 2: Roles of the Local Justice Systems in South Sudan

Duration: 3 hours 30 minutes



Brainstorming Question

Do traditional courts have jurisdiction in criminal matters and, if so, to what extent?

The trainer should discuss this with the participants and try to get them into large group discussions about the matters of jurisdiction given to them. Thereafter, they should work in groups on the Case study below.



Group Activity

Divide participants in two groups and give them the task to discuss the following the case study and respond to the questions on flipchart. **(1 hour)**

Each group should have **10 minutes** each to present their answers.



Trainer Job Aid 1

Handout 1.5: Rape and Sale of Land

A lady named Tolu who lives in Juba, South Sudan went to her native Jonglei state and brought with her Julie, a 15 year old niece. She promised Julie's mother that she would have better opportunities in Juba to go to school. After returning to Juba, she used Julie to hawk goods on the streets of Juba. 15 years old Julie was violently raped by Saide when she went to drop off goods at his house.

Julie was picked up by the police and taken to the hospital.

During her trip to Jongei, Tolu sold a piece of land belonging to her husband to two different people under false pretences. She collected money from the two persons and issued them with receipts. The two men Tabu and Sebit discovered what has happened when the young men each of them sent to clear the land – Simon and Richard – engaged in a fierce fight over ownership of the land. Simon sustained serious injuries and was hospitalized. Tabu reported the matter to the police in Jonglei and also filed civil action in Jongei Customary Court against Tolu. Sebit also filed a civil action in the customary court and reported the case to the police.

Tolu was charged with obtaining money through false pretences from Tabu and Sebit.

Several days later Saide was arrested in his friend's house and charged to Customary Court by the police with the crime of rape which carries a sentence of life imprisonment without the option of a fine.

Discussion Questions

1. What will you do if these cases were charged to your court?
2. Discuss the issues in light of the Local Government Act and any other laws governing the operation of customary courts in South Sudan?



Trainer's Note



Summarise the issues in the case study as follows:

Under the Local Government Act, 2009, customary law courts do not have jurisdiction to try criminal cases except the ones that have customary law interface and which have been referred to them by the High court.

Explain that the case study has many different issues – criminal and civil and chiefs have to take into consideration the manner in which a case has been brought before them in order to determine if they hear them or refer them to statutory court. Cases filed before them in the case study are:

1. Rape, which is a serious criminal case and under the law should be sent to the County Court.
2. Obtaining money by false pretences, another serious criminal offence that should be referred to the County court.
3. Civil actions over land are within the jurisdiction of the customary courts
4. Fighting – Although this may be considered minor, it is still a criminal case for statutory courts only.

Explain that the Local Government Act is very clear that customary courts do not have the power to try criminal cases except those referred to them by the County Court.

Round Robin Activity



This activity allows each group member, (in some cases including the trainer) an opportunity to voice his/her own thoughts on a given issue by going round the group in turns. When a person is actually speaking, everyone else should listen quietly and no interruptions are to be made. If a particular comment is made which merits further discussion, this will take place after the round is complete. Any individual should be allowed to “pass” if he/she wishes to do so. Another approach would be to ask volunteers from the group to give responses rather than expecting each participant to speak. Remind participants that they should be brief and pose the following questions:

- ◆ Participants should be divided into 3 groups and required to briefly respond to the following questions:

Questions

- ◆ How would you describe your role and responsibilities
 - ◇ in your community; and
 - ◇ in the courts in which you administer justice?
- ◆ What could influence the role you have as traditional authorities?
- ◆ How do you deal with cases involving women in abusive marriages?

Practical exercise: Explain the next activity and distribute **Trainer Job Aid 2 - Handout 2.1 and 2.2** to the participants. Ensure you give direct instructions on how to deal with practical exercises. Practical exercises are an excellent training tool to test the participants' understanding of the subject material, and are extremely



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popular with participants eager to see if the theory of the training room actually transfers to the real world.

Divide participants into four groups – Groups 1 and 2 should work on **Handout 2.1**; Groups 3 and 4 should work on **Case study 2.2**. Responses should be recorded on a flipchart. Each group should be given **10 minutes** each to report back at the plenary.



Tips for the Trainer

The trainer must always remember his/her responsibility as a supervisor, in addition to that as trainer. Remember to ensure that the groups understand the question or activity to be carried out.

After the completion of the practical exercise debrief and discuss with the participants presenting the role of the customary courts using the text below.

In this section, the role of the traditional authorities in the administration of local justice in South Sudan will be discussed. In accordance with research findings and materials dealing with these matters and in close conversations with some of the traditional authorities, this session will give perspective to the reality of what happens during the dispensation of justice by the local justice systems in South Sudan in general and within the communities in particular.

The origin of the Local Courts in South Sudan can be traced back to the Chief's Courts Ordinance of 1931 and 1932. Local Courts were introduced by the British Colonial Administration for two main purposes:

- ◆ First is to provide a system of laws for natives to settle their disputes without involvement of the District Authorities;
- ◆ Second is to create a native governing authority to assist in the administration of the localities.

The Colonial Administration recognized customary law as suitable law and it was applied in the Courts for the settlement of disputes between the natives.

Section 7(1) of the Ordinance states:

"A chiefs Court shall administer:-

1. The native law and custom prevailing in the area over which the Court exercises its jurisdiction provided that such native law and custom is not contrary to justice, morality and order."

The chiefs in their localities also represented the government and implemented government policies. They maintained law and order, collected taxes, mobilized people for communal work, such as the building of village schools, health centres and roads. They also represented the interests of their communities. In this capacity, they requested the government to refrain from doing anything harmful to the welfare of the communities.

Although the chiefs did judicial work, they received remuneration from the local government and revenue derived from the Courts went to the Local government authorities.



The main objective of the Local Government Act is to acknowledge and incorporate the role of traditional authorities in the local government system. The Act will lead to substantial changes in the traditional set up of South Sudan.

Point 6 of Appendix II – Schedule I: Powers of a Local Government Council

It is part of the executive and legislative powers of a Local Government Council to coordinate customary courts and to administer justice at the Local Government level.

Section 98 (1) and (2) determine the Competences of Customary Law Courts by saying:

1. The Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities.
2. A Customary Law Court *shall not have the competence to adjudicate on criminal cases* except those criminal cases with a customary interface referred to it by a competent Statutory Court.” (Italicised for emphasis)

In other words, the jurisdiction of traditional courts in South Sudan will, with the implementation of the Local Government Act, be restricted to customary law cases and criminal cases that have **a customary law interface**. Further, such criminal cases should be referred to a traditional court by a statutory court.

Sub-Section 2 lays emphasis on the principles to be respected in adjudicating cases, such as the principle of adequate compensation to victims of wrongs, and the need to respect voluntary reconciliation agreements between parties.

The “C” Court is the highest Customary Law Court of the county, and shall be established in each county. The “C” Court shall have jurisdiction to decide on

- a. appeals against the decisions of “B” Courts;
- b. cross cultural civil suits; and
- c. criminal cases of customary nature referred to it by a competent Statutory Court.



Trainer Job Aid 2

Handout/Group work 2.1

Divide participants into two groups and ask each of them to make a list of examples of criminal cases with customary interface and how they have dealt with them in their courts.

Discuss their responses and make a presentation on the role of traditional authorities under the Local Government Act.

Trainer Job Aid 2

Handout 2.2: Case Exercise: The Bleeding Accused

Two men are brought to your court and one of them is bleeding. The young man who is bleeding keeps quiet and he continues to stand with his head down whilst the other young man is shouting and trying to attack the bleeding man. The man who is shouting says in the court that this other person killed his father and says the murder happened because of jealousy. "We are rich and he is a poor nobody" - said the shouting young man. A lot of people gather in the court and they all start accusing the young bleeding man, who is still silent and with his head down. An uncontrolled situation starts to develop in the court and all the people and observers are asked to step outside the court.

The bleeding man starts to speak. He admits to the court that he has done wrong, but says that he had to defend his sisters' pride. He said his sister was raped by this shouting young man several times and nobody tried to stop him. Not even the police intervened, nor the fathers as elders in the family. Then the bleeding man puts his head down again and says no more.

1. How will you approach the case if the two men were brought to your court?
2. What measures will you take upon noticing that the young man is bleeding?
3. Does it make any difference to you if the litigant is rich or poor?
4. What is the customary law provision on rape? What is the statutory law on rape?
5. How would you approach the case now that you have heard the other man speaking?
6. How does the customary law deal with a rape case?
7. And how does the customary law deal with murder?
8. In your practice, have you experienced similar situations when people attend court hearings and try to openly take sides with litigants?



In each County shall be established “B” Courts or Regional Courts, which shall be the Customary Law Courts⁴.

The jurisdiction of the “B” Courts is regulated as follows:

2. The “B” Court or Regional Court shall be a court of first instance in:
 - a. major customary disputes; and
 - b. minor public order cases.
3. The “B” or Regional Court shall have an appellate jurisdiction in respect of appeals against decisions of the “A” or Executive Chiefs Court.
4. The “B” or Regional Court shall have the competence of deciding, inter alia, on:-
 - a. major customary civil suits of marriage;
 - b. divorce, adultery and elopement;
 - c. inheritance;
 - d. child rights and care;
 - e. women rights; and
 - f. customary land disputes.

The Head Chief shall be the Chairperson of the court, with the Chiefs as members. The Chairperson of the court is responsible for the administration of the Customary Law Courts of the Payam and answerable to the Paramount Chief for the performance of the court.

“A” or Chief Courts shall be established in each Boma. The “A” Court shall be the customary court of the first instance. “A” Courts have jurisdiction in:

- a. family disputes;
- b. traditional feuds;
- c. marriage suits; and
- d. local administrative cases.

Appeals against the decisions of the “A” courts shall be entertained by the “B” or Regional courts.



⁴ Section 100(1)

Town Bench Courts, Town Bench, “B”/Regional Courts, “A” Courts and “C” Courts

According to **Section 102**, two types of Town Bench Courts shall be established in the areas of Town Councils, one at the level of the town and equivalent to “B” or Regional Courts and one equivalent to “A” Courts in the areas under the towns Quarter Councils.

The jurisdiction of both Town Bench Courts shall be to decide:

- a. administrative cases;
- b. customary civil suits;
- c. rates, excise and other service provision related disputes; and
- d. public order cases.

Also under **Section 102 (a)** Town Benches have competence of Regional Courts of settling customary civil suits of

- ◆ marriages;
- ◆ divorces;
- ◆ adultery; and
- ◆ elopement.

The Act is silent on composition and oversight of Town Bench Courts.

Appeals against the decision of Town Bench Courts lie with the County Court Judge of First Grade while those of Town Court or “B”/Regional Court go to “C” Court.

Payam Courts

Under the Code of Criminal Procedure Act, 2008, Payam Courts are State Courts. But under **Section 18 (5)**, Judiciary Act, 2008, their seats are in Payam Headquarters in rural areas.

On the jurisdiction of Payam Courts, under **Section 15**, Code of Criminal Procedure Act, 2008, it tries cases summarily and can:

- a. Imprison an offender for a term not exceeding one year;
- b. Fine not exceeding SSP 300.

The qualification for a Judge of a Payam Court includes a law degree.

It is worthy of note that **Section 112 (2)** of the Act provides that “in the exercise of the delegated and/or deconcentrated powers, the Traditional Authorities shall observe, respect and adhere to the Act of Rights as enshrined in the Comprehensive Peace Agreement, the National, Southern Sudan and State Constitutions”.



Section 112 which provides for the status of traditional authorities reads:

1. "The Traditional Authorities shall be institutions of traditional system of governance at the State and Local Government levels which shall:-
 - a. be semi-autonomous authorities at the State and local government levels;
 - b. administer customary law and justice in the customary law courts in accordance with the provisions of this Act and any other applicable law; and
 - c. exercise deconcentrated powers in the performance of executive functions at the local government levels within their respective jurisdictions."

The practice of the traditional courts is that they very often use the language applicable to criminal law, by imposing fines and imprisonment as consequences for offences as well as other disputes. However, in principle, the main emphasis of traditional courts is arriving at a solution which primarily aims at satisfying both parties in the matter. The task of traditional courts is normally to satisfy the interest of the victim or his or her family, on the one side, and the wrongdoer and his or her family, on the other. This is described as the reconciliatory function of customary law and traditional courts.

Under the Local Government Act, appointment of Chiefs, the determination of their judicial powers and dismissal of Chiefs are functions of the local government authorities.

Section 105 (4) Local Government Act says:

"The Commissioner, Mayor or Town Clerk shall upon receipt of the report appoint the Chief and request the President of the High Court to confer judicial powers upon the Chief..."

In relation to the dismissal of a Chairperson and members of customary court, **Section 106 (3)** of the Local Government Act states:

*"Notwithstanding the provisions of **Sub-section (1) and (2)** above, a Chairperson or a member of the customary law Court may be removed by the County Commissioner."*



Objective 2: Understand the Structure and Role of the Statutory Courts



Duration: 30 minutes



Brainstorming Question

Before the start of achieving Objective 2, brainstorm the following question:

- ◆ Name the statutory courts in South Sudan.
- ◆ What is the role of the formal or statutory courts in South Sudan?

Write the answers on flipcharts and discuss with participants.

Structure and Role of Formal or Statutory Courts in South Sudan

“Like other former colonies, the Sudan and particularly the South is no exception in regard to grappling with legal pluralism, for the prevalence of the colonial law to govern commercial transactions for instance; and tribal law or customary law to govern family matters is and has been the known practise. But over time the distinctions have gotten weak and persons often seek legal claims from systems that would better work in their advantage or a system that is more comprehensible to them.”

(Legal Pluralism in Southern Sudan)

Since the colonial period there is an existence of three-tier hierarchy of executive chiefs’ courts, regional chiefs’ courts and county judges in South Sudan, and the urban courts consisting of townsmen and town chiefs. The vague boundary between statutory and customary law and between formal judiciary and chiefs’ courts could be easily noticed. It is vague because of the unclear dichotomy existing in the roles that the traditional courts enjoy and the space new courts occupy need to be established.

Both the chiefs’ courts and the formal courts should receive the necessary training and guidance for a better cohesion and cooperation. The aim of this Training Manual is to enhance the capacity building of traditional authorities in local justice administration. In that case, adopting better ways have to be considered and acceptance of challenges that will increase and improve the efficiency of both systems in administering justice within the communities and in all South Sudan in general.

Two bodies of law operate side by side in South Sudan. Statutory law is generated by the state and consists of the Constitution, legislation, and precedents created through court judgements. About 40 laws have been drafted for the new state, among them legislation that has a direct bearing on women’s security, such as the Penal Code Act (2008), which sets out various criminal offences, and the Child Act (2008). Operating alongside the statutory system is that of customary law, which consists of numerous unwritten bodies of law that have regulated South Sudan’s tribes for centuries. The laws of both systems are binding.



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The Judiciary in South Sudan is a complex structure consisting of constitutionally established government courts, which base their adjudication on statutes, and customary courts, which are presided over by traditional authorities and rule according to the customary laws of their respective ethnic groups. Given that a customary court's decisions can be appealed to a statutory court, two different legal systems may be applied to a single dispute. The effects of this duality of practice are still unclear and vary⁵. In most instances, appealed customary cases are reviewed *de novo* and no deference is given to the customary court, nor are the cases remanded when faced with an incomplete factual record.

The main legal texts establishing the judiciary and defining its jurisdiction and procedures are the Transitional Constitution of 2011, the Judiciary Act of 2008, the Code of Civil Procedure Act of 2007, the Code of Criminal Procedure Act of 2008, and the Local Government Act of 2009.

Statutory Courts

The Judiciary Act 2008 establishes the Judiciary as an independent body answerable to the President. **Section 7** provides for the structure of the Judiciary as follows:

- a. The Supreme Court;
- b. The Courts of Appeal;
- c. The High Courts;
- d. The County Courts;
- e. The Payam Courts; and,
- f. such other Courts or tribunals as deemed necessary to be established in accordance with the provisions of the Transitional Constitution of South Sudan and any other law.

The Supreme Court (National)

The Supreme Court, located in Juba, is the highest organ of the Judiciary. It consists of seven judges (called Justices), one of whom is the Chief Justice of the Supreme Court and one the Deputy President⁶. The Court can form three different panels: the Constitutional Panel, the Criminal Panel and the Civil Panel⁷. The first consists of all justices, the latter of three justices. Decisions are majoritarian⁸. Most of the time the Supreme Court decides cases on the record but it can call litigants for oral argument if needed.

The Supreme Court is the highest appellate court in the country and takes appeals from the Court of Appeals⁹. The Court has original jurisdiction in relation to constitutional matters¹⁰. While original jurisdiction for offenses involving the death penalty lies with the High Courts¹¹, all death sentences must be confirmed by the Supreme Court.

⁵ If the appeals process worked and were socially accepted, it would seem that the government courts would swallow the customary courts, as the government courts would always have the last decision

⁶ Judiciary Act 2008, Sec. 10

⁷ Judiciary Act 2008, Sec. 11(1)

⁸ Judiciary Act 2008, Sec. 11(4)

⁹ Judiciary Act 2008, Sec. 11

¹⁰ Ibid

¹¹ Code of Criminal Procedure Act 2008, Sec. 12



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The Court of Appeals (Regional)

The three regional Courts of Appeals (based in Juba, Rumbek and Malakal, for the Greater Equatoria, Greater Bahr-el-Ghazal and Greater Upper Nile regions, respectively) are intermediary appellate courts that hear cases from the states' high courts¹². They further fulfill an administrative (and possibly harmonizing) function over the High Courts in their jurisdiction¹³. Three judges sit on the bench, with one judge being the President as appointed by the Chief Justice of the Supreme Court.

High Court (State)

Ten High Courts (one in each state capital) are the highest courts in South Sudan with original jurisdiction. Their jurisdiction, in some cases exclusive, is determined by the Civil Procedure Act 2007 and Criminal Procedure Act 2008¹⁴. The High Court hears appeals from all the lower courts. There is no internal appellate hierarchy among the lower courts.

First Class Magistrate Court (County)

The First Class Magistrate Courts are courts of original jurisdiction that are responsible for a specific county within a state. In criminal cases, they can pass prison sentences up to seven years and fines up to 5000 SSP¹⁵.

It should be noted that these lower levels of statutory courts are not fully in place, due in part to a lack of sufficient judges. To compensate for this shortcoming, the judiciary plans to deploy mobile courts.

Second Class Magistrate Court (County/Payam)

The Second Class Magistrate Court is similar to the First Class Magistrate Court, but is more limited in its authority to pass prison sentences (maximum of three years) and fines (maximum of 2500 SSP).

Third Class/Payam Court

The Third Class or Payam Court is the lowest government court. They are not allowed to pass fines over 300 SSP. These courts, even though provided for in the Judiciary Act, have not yet been established in reality.



¹² Judiciary Act 2008, Sec. 12-13

¹³ Judiciary Act 2008, Sec. 13(4)

¹⁴ Code of Civil Procedure Act, 2007, Sec. 20. Code of Criminal Procedure Act, 2008, Sec. 12 (exclusive jurisdiction for offenses punishable by death)

¹⁵ Code of Criminal Procedure Act, 2008, Sec. 13(2)

Objective 3: Understand the Cultural Transformations Regarding Customary Laws

Duration: 2 hours 15 minutes



Brainstorming Question

Has customary law experienced changes and transformations of any kind over the years? And if so could you give examples?

Share the answers of the participants on a flipchart. Time for discussions should be allowed as well. If there is enough time instead of posing the question above the trainer should suggest the following activity:



Activity

Divide the participants in 4 or 5 syndicates and give each syndicate (consisted of 4-5 participants) the same task. The task would be to identify all the changes they think occurred during the years regarding customary law, the reasons why and to give examples.

Each syndicate should be allowed sufficient time for presenting their findings and the trainer and other syndicates should give feedback on the presentations. At the end of the, discussions make a presentation using the text below.



DAY THREE

Cultural Transformations that Affected Traditional Practices and Customary Law



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Going through African history and the practice of customary law, it is easy to notice that laws and customs evolve. The practice between different communities and tribes is not always the same. The historical development of customary law in South Sudan from colonial period, during the war and in the eve of the interim period will be main subject of discussion during this session. This will show how all changes that happened have influenced the practice of customary law.

➤ Anglo/Egyptian Colonial Law

Before the 1820 invasion of the Sudan by the Egyptian forces, the custom and traditions of the South Sudanese tribal groups were the primary source of law to the people. Therefore that invasion was the first and capital thing that influenced the customary law practice and traditions. The colonial regimes under the British and Egyptians also resulted in the enactment of a series of statutory instruments with a goal to codify and control the application, effect and scope of customary laws within the former Sudan.

➤ Mohammedan Law Courts

Maybe one of the earliest instruments affecting customary practice throughout the former Sudan was the *Mohammedan Law Courts Ordinance* 1902 which empowered Sharia Courts to entertain the following:

- ◆ Any question regarding marriage, divorce, guardianship of minors or family relationship, provided that the marriage to which the question related was concluded in accordance with Mohammedan law or the parties are Mohammedans.
- ◆ Any question regarding gift, wills, interdiction or guardianship of an interdicted or lost person, provided that the endower donor or the deceased or the interdicted or lost person is a Mohammedan.
- ◆ Any question other than those mentioned in the last two mentioned above, provided that all the parties, whether being Mohammedans or not, make a formal demand signed by them, asking the Court to entertain the question and stating that they agree to be bound by the ruling of the Mohammedan Law.

➤ Chiefs' Courts Ordinance 1931

The first non-Western laws operating in the former Sudan were formally recognized by colonial powers. Customary Laws were also addressed with the passage of the *Civil Justice Ordinance* 1929 and the *Chiefs' Courts Ordinance* 1931. The first of these Ordinances is the original predecessor to the current **Section 5** of the *New Sudan's Civil Procedure Act* 2003. The second Ordinance was a novel development in that it formally recognized customary Chief's legal authority to exercise customary jurisdiction in the traditional tribal areas. **Section 7** provided that:

"The Chiefs' Court shall administer the Native Law and Customs prevailing in the area over which court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order."

During the past twenty years of civil war, customary law has been the primary source of social order and stability within South Sudan. It has been the foundation that has held together communities and tribes, and has cemented a bridge between many tribal groups in the country. Customary law is a symbolic affirmation of Southern Sudanese culture, tradition and indigenous identity.





Activity tip

Discuss the above together with the participants and try to give examples if possible.

Practice and legal research have shown that the customary law practised today is not the customary law of yesterday. Communities have changed and adapted their customary laws to changing circumstances.

Whatever the legal framework of a country and the hierarchy of its laws, traditional authorities make decisions which are implemented in the communities, and eventually form part of the community's customary law. In some instances, customary laws emanating from the decisions of traditional courts have even found their way into statutory instruments.

Women and Customary Law

A significant change in the legal system is the participation of women. The Transitional Constitution of South Sudan provides for an increased participation of women at various levels of the governmental structure of the country. Women played an important role in the struggle for liberation. Many young women had the chance to get education in other African countries or elsewhere and they learned that there is a need to raise their voices with respect to their position. This certainly adds to the general potential to be employed for change and development of a customary law that is accountable.

The Bill of Rights of the Transitional Constitution of South Sudan declares at **Article 16(4)** that all levels of government shall:

- a. “promote women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs and traditions;
- b. enact laws to combat harmful customs and traditions which undermine the dignity and status of women; and
- c. provide maternity and child care and medical care for pregnant and lactating women.”

The Transitional Constitution of South Sudan provides, as required by international instruments, that families should not force their children into marriage. Marriage is based on consensus by the people involved and not by consensus of the families, although marriage under customary law is more of an arrangement between families than between individuals.

Notwithstanding the provisions of the Transitional Constitution, it can be anticipated that in many cases, marriage is more or less negotiated by the families. However, forced marriages are outlawed. Where force is exercised, the victim should have redress in a court of law. This will be discussed further in the next module, where the human rights based approaches will be considered.



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Changes by Statutory Interventions

Experiences from other African countries show that statutory enactments with respect to customary law are common. These enactments are not codifications of customary law. They usually provide standardized frameworks for the operation of customary law as applied in the different communities. This will be discussed further, (on codification and ascertainment), during the last module of this Manual.

Where customary land tenure systems exist, statute may play a role in determining the main concepts of the communal land tenure system and will attend to areas of possible tensions between the communal land tenure system and, most probably, the concurrent existing land tenure system based on the right to individual ownership. The Land Act of 2009 is a statute of that kind. The Land Act confirms the customary land tenure system as existing in South Sudan.

A further area where a statutory amendment of customary law could be considered is the area of inheritance. The more people opt for urban life and with this, market-oriented economic activities, the more tensions may occur between the community-oriented customary inheritance law and the interest to keep wealth-generating economic entities in the hand of one or two family members who have the skills to promote the enterprise.

Twenty years of war have had far-reaching implications and possible irreversible impact upon South Sudanese society and its customs. Moreover, the effects of external forces for change such as globalization and the revolution in communication which have taken place during the past two decades and have, for the main part, passed South Sudan by, are already beginning to shape the thinking of the country. As peace takes hold and the country is opened up to external influence, particularly from returning refugees, the forces of change will bring unbending pressure upon the society in South Sudan, its customs and laws as well.

Trainer's Note

After completion of **Objective 3** as the last one of this module, thank all participants for their active participation and contribution and give links for sessions of the next module.



DAY THREE

Continues

Module 3: Human Rights Approaches to Local
Distribution of Justice



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Duration of Module

The module will be based on participant centred learning principles guided by the trainer and the duration is **5 hours 15 minutes**.



Tips for the trainer

Set up the classroom. Ensure that there are sufficient registration forms, participant notes, notebooks, pens and pencils for each participant. Ensure that all planning is completed.



Material, Equipment, and Logistics

White board, flip chart, paper, markers, Participant Notes and Handouts.



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Module Goal

The goal of this module is to provide participants with knowledge of human rights and on the need to incorporate and adopt human rights based approaches in the application of the customary law as a tool for delivering justice in South Sudan. The participants will be aware of the need to portray fairness and impartiality during court proceedings and decision-making processes.

Performance Objectives



At the conclusion of this module, participants will be able to:

1. Identify and understand human rights principles and their importance;
2. Understand customary law as a tool for delivering justice in South Sudan;
3. Understand the need for incorporation of human rights based approaches in the courts;
4. Recognize the diversities of cultures and different communities and how to apply the fair treatment of all persons, especially women and children;
5. Understand the Bill of Rights in the Transitional Constitution of Southern Sudan and;
6. Identify the provisions of the Local Government Act which call for conformity to human rights.

Objective 1: Understand Human Rights Principles and their Importance



Duration: 2 hours



Brainstorming session

At the start of the third module, brainstorm the following question: What are human rights?

The answers should be recorded on a flipchart, kept for further use and discussed as follows.

What are Human Rights?

Human rights are rights inherent to all human beings, whatever their nationality and place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Men and women are all equally entitled to human rights without discrimination. These rights are all universal and inherent in every human being; they are inalienable, indivisible, interrelated and interdependent.

Universal human rights are often expressed and guaranteed by law, in the form of treaties, customary international law, general principles of law and other sources of international law. International human rights law lays down obligations of Governments, as duty-bearers, to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Ratification of international treaties signals the intention of States to be bound by the relevant treaties. This creates international legal obligations. Some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilizations. At the individual level, while we are entitled to our human rights, we should also respect the human rights of others, which in the context of Africa provides for duties.

This module will provide a better understanding of the human rights principles that should be applied when dealing with victims, litigants, vulnerable groups, especially women, persons with disability and juveniles. The module will focus on the present situation of customary courts in South Sudan and the process of delivering justice by traditional authorities and their role in upholding human rights in the performance of their duties.

Human rights are classified into three categories - Civil and Political rights, Economic, Social and Cultural rights and Collective or group rights.

A. Civil and Political Rights: are often referred to as “First Generation” rights include right to life, access to information, freedom of movement, freedom from torture, cruel, inhuman and degrading treatment, right to liberty, right to privacy, freedom of religion, conscience and thought, freedom of expression, freedom of assembly, freedom of association, right to participate in the decision making process of one’s own community, freedom of speech, thought and opinion and right to vote and be voted for.

B. Economic and Social Rights: These are referred to as “Second generation” and guarantee people’s social, economic and cultural rights. They include the right to work, education, and adequate shelter, right to form and belong to a trade union, right to own property, right to food and access to good health care, right to earn income and right to do business

C. Collective or Group Rights: These are referred to as “Third generation” rights. These rights recognize that people have the right to decent environment, free from pollution, and protected from destruction, right to development and self determination right of minorities and colonized people etc.

Human Rights and Culture

Human rights are not alien to the African society. Some hold the view that human rights are western, imported or of European origin. This is not so, for if one considers the African concept of communal living and family life, along with our local expressions or folk sayings one would agree that in Africa there is room for individual rights and liberties. Being God’s gift to every human being, human rights are as relevant and necessary to Africans as they are to all societies.





Trainer's Note

Ask participants whether there are local expressions and folk sayings, which embody values of Human Rights or expressions that capture the following sayings?

1. What is good for the goose is good for the gander.
2. Live and let live.
3. Respect is reciprocal.
4. If the left hand washes the right hand then the right hand will wash the left hand.
5. Do unto others what you would like them to do unto you.

Facilitate the above question and start a plenary discussion.



Group Activity Question

Divide participants into two groups to respond to the question below. They should record their responses on a flip chart and have sufficient time to present their responses at plenary.

Group 1: What are the ways that Traditional Authorities can violate the rights of men in the course of their work?

Group 2: What are the ways that Traditional Authorities can violate the rights of women in the course of their work?

Objective 2: Understand Customary Law as a Tool for Distribution of Justice in the Context of Human Rights in Family-Related Matters



Duration: 2 hours



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Case study

Divide participants into three groups. Write out the guiding questions on a flip chart. Give each group one specific case to discuss and deliberate upon from Case Study Hand-out 3-1, 3-2 and 3-3). (1 hour). Their responses should be recorded on a flip chart. Each group should be given 10 minutes to present their responses to the plenary.

Guiding questions for case study

1. Identify the human rights that were violated in the cases? Give your reasons.
2. In the light of international human rights principles, how would you have dealt with the cases if brought before you?
3. What changes need to be made in the local justice system to ensure that human rights are respected and justice is done?

The objective of the above exercise is to help participants understand the possible difficulties in human rights matters that could arise in different communities and by different circumstances in South Sudan.

Awareness of Human Rights

Activity

Split the participants into buzz groups (buzz group is a tutor group of 3 - 6 participants, who are able to discuss a topic for up to 15 minutes. Such groups can be planned and given a structured task to complete. The role of the trainer here is to monitor the work that is taking place. He/she should be careful with his/her positioning. The trainer can easily observe and listen to the groups without interrupting them and if necessary join a group to give guidance. Assessment data is often gathered in this way.

The task is to analyze and discuss whether there is awareness for human rights in the communities and among the people and especially to consider their views on the meaning and realization of human rights. The buzz group discussion should be followed by a large group discussion where all participants discuss the whole or part of earlier deliberations. The deliberations should be guided by the following questions:

1. To what extent are traditional approaches to dispute resolution guided by human rights considerations.
2. Should the rights of those who have committed serious offences be recognized and protected by the courts?

The South Sudan Human Rights Commission (SSHRC) was recently constituted¹⁶. Its Strategic Plan¹⁷ which covers the period from 2008 to 2010, does not refer to customary law related human rights problems. The 2008 baseline survey on human rights¹⁸ and the first annual report, which covers the period from July 2006 to 2007¹⁹, contains some worthwhile information.

The baseline survey of the South Sudan Human Rights Commission (SSHRC), investigated the awareness of human rights. According to the investigation, the majority of the persons interviewed (62%) were unable to explain the meaning of human rights. Of the remaining 38% who attempted a definition, only 23.3% demonstrated an understanding close to what one would expect in view of the international discussion about human rights.



¹⁶ Article 145 of the Transitional Constitution; See also The Southern Sudan Human Rights Commission Act of 2009

¹⁷ SSHRC (2008)

¹⁸ SSHRC (2008b)

¹⁹ SSHRC (2008a)

Another question related to the general one on the meaning of human rights was, when people would start enjoying human rights. Only 11% of the interviewed persons were aware that human rights are rights given at birth. For 7.4%, human rights are rights of adults; 19% believed that human rights depend on the existence of peace; 10.9% held that only educated people would enjoy human rights and that this occurs when their basic needs were met. For 2%, human rights are given to the people by the government.



Questions

Ask the following two questions and discuss.

1. Who can decide if a girl is ready to get married?
2. What is the approximate age for entering into marriage in South Sudan in general or in the communities and tribes in particular?

Family matters are governed by customary laws which are applied by traditional authorities. Customary traditions of most of South Sudan's ethnic groups limit the choices and opportunities available to women and girls, especially in matters of marriage and are inherently discriminatory. Under the system of "bride wealth," the groom's family pays cattle for the bride, and the bride's family has an interest in marrying her off to the highest bidder. Since the bride's family must repay the groom's family if the couple divorces, women and girls are pressured to stay in their marriages, regardless of abuses they may suffer. In some traditions, the age of marriage is as low as 14. Judicial and traditional authorities acknowledge the need for harmonizing customary law with South Sudan's statutes and constitutions, and ultimately with international standards.

It is difficult to reconcile customs with constitutional rights. For example, due to the long-standing cultural practice of bride wealth, which is a custom when a young man wanting to get married must present the bride's family with a bride price, unmarried girls have significant economic value in the communities. Some researchers explain that for many families their daughters are their only assets, as each carries the promise of future bride wealth and a means of social security for the family. When a tort claim such as wrongful death arises between two families, the offender may have no resources to compensate the plaintiff other than offering his own daughter as compensation. Customary courts in South Sudan have historically resorted to this as a remedy: giving orders to a family to compensate another family by giving one of their daughters to the latter. It is impossible to reconcile this legal and cultural practice with contemporary standards of human rights. Nonetheless, it is a practice that has existed for very long period in South Sudanese society.

The Bill of Rights of the Transitional Constitution of South Sudan provides for the right to found a family. **Article 15** states:

"Every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry."



For the purposes of comparison, **Article 16** of the Universal Declaration of Human Rights (UDHR) states that:

1. “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.”

Further, the General Assembly of the United Nations declared, by Resolution 843 (IX) of 17 December 1954, that certain customs, ancient laws and practices relating to marriage and the family were inconsistent with the principles set forth in the Charter of the United Nations and in the Universal Declaration of Human Rights.

The United Nations also reaffirms that all States, including those which have or assume responsibility for the administration of Non-Self-Governing and Trust Territories until their achievement of independence, should take all appropriate measures with a view to abolishing customs, ancient laws and practices that support forced marriage. State should do so by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.

Several cases of illegal arrest and detention of females have occurred on the basis of customary law. These situations mostly concern payment of bride wealth. In some cases, human rights monitors reported that police or traditional courts arrest and detain women and girls for refusing to marry someone whom the family has chosen or for running away from the husband after bride wealth has been arranged or paid.

A fundamental problem arises in applying human rights principles in the customary courts because of their conflict with local norms and social and economic systems based upon patrilineal structures, collective responsibilities and obligations. A typical example is the settling of contracts of marriage by families upon the payment of bride wealth, without the consent of the bride. Nevertheless, the main concern is the wellbeing of all persons that are living in the communities and the need to respect their choices as well. In the present constitutional era and with exposure to education and the attainment of the right to enjoy self-determination, the deprivation of persons of their freedom of choice is problematic. This is especially so if a person is not allowed to enjoy her personal liberty or is in a position of servitude in marriage.

Recap of the previous day's session

Duration: 30 minutes



Objective 3: Understand the Need for Incorporation of Human Rights Based Approaches in the Application of Customary Law



Duration: 30 minutes

Incorporation of Human Rights Based Approach (HRBA) in Customary Law Courts



Discussion

The trainer should constantly check to ensure that individuals are acquiring the necessary knowledge, skills and abilities as they move through their training. This can often be accomplished by simple questioning during the sessions.

The trainer should act as moderator and ask the questions below, allowing the groups to give answers on the basis on who raises their hand first.



Questions for Discussion

- ◆ What are the human rights of persons that you try to protect during trial in court?
- ◆ Give examples of how women's rights are violated by cultural practices?
- ◆ Which groups of people do you think that customary law discriminates against?
- ◆ Can you give examples of different cases you have done that deal with women and children?



The trainer may also add relevant questions if needed.

Remind the participants that they should not see this as a strict knowledge check but more as an interactive way of sharing experiences, opinions and practices. Trainer should go ahead and make the following presentation.

Customary law and practices are largely viewed as an impediment to the full realization of the rights of marginalized persons – women and children. The Transitional Constitution of South Sudan attempts to address the issue by incorporating an affirmative action clause to increase the participation of women in politics and public life; while at the same time addressing the need to enact laws that would combat negative harmful practices that have undermined the dignity of women. (*Legal Pluralism in Southern Sudan*).

How to Incorporate Human Rights Based Approach

Traditional authorities can incorporate human rights based approach in the work they do by adopting the following:

- ◆ Recognizing the existence of human rights and avoid implying that human rights represent western ideals.
- ◆ Acknowledging that Human rights derive ethical strength from their universal appeal.
- ◆ Simply applying those universal human rights standards or principles into all aspects of their work in the customary distribution of justice.

Traditional authorities can apply human rights based principles by asking themselves the following four questions before they take a decision:

- ◆ Is it fair and just?
- ◆ Is it humane – insania?
- ◆ Does it respect the dignity of human person – karama?
- ◆ Does it promote equal treatment of all persons?



DAY FOUR

Different Communities and Diversity of Cultures in South Sudan



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Objective 4: Recognize the Diversities of Cultures of Different Communities and Apply Human Rights in a Universal Manner

Duration: 30 minutes



Questions

How would you describe the term “culture”? Is there tolerance in cultural differences in South Sudan amongst the communities and tribes?

Hold a plenary discussion on these matters.

Tolerance of cultural differences need not, and must not, require the acceptance of practices that violate the most fundamental principles of human rights and dignity. The obligation to accommodate and support a minority culture cannot and should not be absolute, just as the preference to advance a majority culture cannot and should not be unlimited.

(Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review In Southern Sudan).

Those who demand recognition of their cultural diversity may themselves be intolerant of differences and diversities of others (notably of women, religious or other minorities, or atheists).

It is important to recognize that people are bearers of human rights, culture being no exception, and that recognition of rights does not imply rejection of culture. Universalism and cultural relativism “are not alternatives between which one must choose, once and for all; one should see the tensions between the positions as part of a continuous process of negotiating ever-changing and interrelated global and local norms.” To a large extent, the tension is between the formulation of universal general principles and their application in particular circumstances and contexts.

Question

Which groups of people are mainly deprived of human rights in South Sudan?

Open a plenary discussion with the participants and debrief the session.

Human rights are an incomplete project in that standards and their content are continuously evolving, as actors in the global South and North and activists at all levels contribute to their development. Their evolution at local and national level (especially as a result of engagement with national constitutions and laws) often exceeds or pre-empted the development of international standards.



Objective 5: Understand the Bill of Rights in the Transitional Constitution of South Sudan



Duration: 2 hours 45 minutes



Question

Are you familiar with the Bill of Rights in the Transitional Constitution of South Sudan?



Trainer's Note

Name the various rights appearing in the Bill of Rights in the Constitution.

Give the participants the task to name the rights that they think are contained in the Bill of Rights in the Transitional Constitution.

The Bill of Rights in the Transitional Constitution of South Sudan

The nature of the Bill of Rights is found in **Article 9**. The Article provides:

1. "The Bill of Rights is a covenant among the people of South Sudan and between them and their government at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy.
2. The rights and freedoms of the individual and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.
3. All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.
4. This Bill of Rights shall be upheld by the Supreme Court and other competent courts and monitored by the Human Rights Commission."

It further discusses the specific rights that would be of interest to traditional authorities, for their empowerment and increased reflection of human rights values in the decisions of the courts. After all, decisions made in courts could significantly change peoples' lives and that is why special attention has to be addressed in dealing with these matters.



Trainer's Note

Below is the Bill of Rights as stated in the Transitional Constitution of South Sudan. The trainer should focus only on the rights that would be applicable for the purposes of this Manual and for this module in particular. The complete chart of the Bill of Rights will be given to participants as handouts - **Handout 3-5** - after the completion of the session or during the session if need be. The specific rights that are planned to get attention here would be: equality before the law, the right to found a family, rights of women, rights of the child, fair trial, right to litigation and right to inheritance and right to own property.

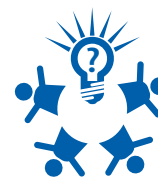
Transitional Constitution

Sanctity of Rights and Freedoms

Article 10. Subject to **Article 190** herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Supreme Court and other competent courts; the Human Rights Commission shall monitor its application in accordance with this Constitution and the law.

Questions for Brainstorming

- ◆ What do you understand “equality before the law” to mean?
- ◆ How can this right be violated through the work you do?
- ◆ In what ways can you uphold this right in the work you do?



Try to share this right with the participants and discuss using the text below.

Those who are poor or otherwise marginalized can be seriously disadvantaged, because they lack resources to navigate the complicated jurisdictional and procedural arrangements that are characteristic of plural legal orders.

Transitional Constitution

Equality before the Law

Article 14. All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status.

Equality before law includes substantive and formal equality

Substantive equality means: De facto equality (equality in fact or actual equality) or equality of results and it implies that everyone is given equal protection, equal opportunities and an enabling environment to achieve equal results. It also looks beyond legal guarantees of equal treatment and inquiries into the impact of interventions.



For example, a law may give equal opportunities for women and men to access credit if they can provide collateral (guarantee or security) but if women cannot inherit property under customary law, then they are unlikely to be able to provide collateral to access credit. Without measures to secure the practical realization of equality, there can be no substantive equality.

Formal Equality

Equality is often understood as providing similar treatment to similar people. But this is formal equality. In this approach, men and women are seen as similar and therefore will be provided with the same treatment. As a result differences based on biology, such as pregnancy or maternity are ignored. Social and cultural differences, social perceptions of women as weak, economically dependent and house bound and their impact on women are disregarded. By ignoring these differences, the particular needs of women are not addressed.

Equality before the law also implies Non-Discrimination

Direct discrimination: refers to an action or omission that has the “purpose” of discriminating against women e.g. unequal retirement age, unequal inheritance rights, terminating employment on the basis of marriage or pregnancy and different ages of marriage for boys and girls.

Indirect Discrimination

This is an action or omission which has the “effect” of discriminating against women, even in the absence of an intention to do so. Women face many obstacles sanctioned by culture e.g. exclusion from politics on the grounds that it is a rough terrain. By that women are excluded from decision making on issues that concern them. Consequently, even though an act or omission may appear to be neutral or even beneficial to women, its effect or impact may be discriminatory.

Multiple Discrimination

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple discrimination based on additional grounds such as disability, age, class, caste, and other factors.

To achieve substantive equality, there’s need to address the systemic, historical, cumulative disadvantage suffered by women that adversely affects their ability to benefit from the identical treatment required by formal equality.



Question

What does the right to found a family speak about?

Try to share this right with the participants and discuss.



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Young girls are often forced into marriages in violation of the Transitional Constitution. Certain cultural practices involve violence as a means of forcing girls into marriage. For instance in one of the examples provided in the research report of Dr. Hinz, a girl’s legs may be speared into the soil to convince her to enter into a marriage to which she objects.

Please note that the Transitional Constitution requirement to obtain the consent of the marrying partners is still an important issue which needs attention by all stakeholders in South Sudan and in particular, the attention of those in charge of customary law matters so that new ways could be found which on the one hand, would allow families to negotiate the marriages of their children, but, on the other hand, give the last word on whether or not to enter into a marriage, to the bride and groom.

Transitional Constitution

Right to found a family

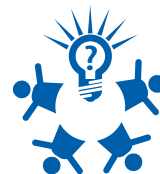
Article 15. Every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry.

Section 108 (4) and (5) of the Local Government Act provides for the right to freely choose a spouse.

4. Every person of marriageable age shall have the right to:–
 - a. marry a person of the opposite sex; and
 - b. found a family according to his or her family traditions and customs.
5. No marriage shall be entered into without the free will and consent of the man and woman intending to marry with the guidance of their respective parents.

Brainstorming Questions

- ◆ What are the rights of women in South Sudan?
- ◆ Are women's rights respected?
- ◆ Are women and men treated equally under customary laws and practices?



Transitional Constitution

Rights of Women

Article 16

1. Women shall be accorded full and equal dignity of the person with men.
2. Women shall have the right to equal pay for equal work and other related benefits with men.
3. Women shall have the right to participate equally with men in public life.
4. All levels of government shall:
 - a. promote women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs and traditions;
 - b. enact laws to combat harmful customs and traditions which undermine the dignity and status of women; and
 - c. provide maternity and child care and medical care for pregnant and lactating women.
5. Women shall have the right to own property and share in the estate of their deceased husbands together with any surviving legal heirs of the deceased.

Paragraph 5 of the Human Rights Council General Comment No. 28 notes that,

“States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Covenant rights.”

The HRC states that inequality in the enjoyment of rights by women is often deeply embedded in tradition, culture and religion and many violations of women’s human rights that inevitably occur have their origin in social custom, belief or practice rather than (or as well as) State law, and are perpetrated by individuals and social groups rather than the State.

Note that **Article 16** of the Transitional Constitution is replicated verbatim in **Section 110** of the Local Government Act.

Trainer Job Aid 3

Handout 3.1: Case Study: Inheritance

Tina is the first child and only daughter of chief Austin and Mrs. Priscilla Naggala who hail from Upper Nile state of South Sudan. Chief Austin has been ill for some time and made a will bequeathing his four bedroom bungalow in Juba and his family home in Upper Nile to his daughter. He explained in the will that his two sons should not get any of his property because they abandoned him when he needed them the most – when he was on the sick bed. Before he died, he had called a meeting of his kinsmen to inform them that he would like his wife to inherit the 3 bed room bungalow he built on the family land and the 4 bedroom house he has in Juba.

The two sons have brought their complaint before your court. Their claim is that under the customary law all property should stay within the family. They argued that their sister cannot inherit any part of the estate as daughters are considered potentially part of another family. Their mother who is a widow cannot inherit from her ex-husband because under customary law widows remain married to their deceased husbands.

The uncles have also come before the same court to claim that the widow Priscilla cannot inherit property because she has refused to be inherited by her husband’s brother.

What will your decision be in this case in the light of the Transitional Constitution and Laws of South Sudan?



Question

What are the rights of children in South Sudan?
Discuss with participants using the text on the following page.



Transitional Constitution

Rights of the Child

Article 17

1. Every child has the right:
 - a. to life, survival and development;
 - b. to a name and nationality;
 - c. to know and be cared for by his or her parents or legal guardian;
 - d. not to be subjected to exploitative practices or abuse, nor to be required to serve in the army nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;
 - e. to be free from any form of discrimination;
 - f. to be free from corporal punishment and cruel and inhuman treatment by any person including parents, school administrations and other institutions;
 - g. not to be subjected to negative and harmful cultural practices which affect his or her health, welfare and dignity; and
 - h. to be protected from abduction and trafficking.
2. In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.
3. All levels of government shall accord special protection to orphans and other vulnerable children; child adoption shall be regulated by law.
4. For the purposes of this Constitution, a child is any person under the age of eighteen years.

The Child Act, 2008 also states:

*“The purpose of this Act is to extend, promote and protect the rights of children in Southern Sudan, in accordance with provisions of **Article 21** of the Interim Constitution of Southern Sudan, 2005, and as defined in the 1989 United Nations Convention on the Rights of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Sudan is signatory.”*

Article 20 of the Act further states:

- b. no child shall be subjected to corporal punishment by chiefs, police teachers, prison guards or any other person in any place or institution, including schools, prisons and reformatories; and
- c. no child shall be subjected to a group punishment by chiefs, police, teachers, prison guards or any other person in any place or institution, including schools, prisons and reformatories.



The Convention on the Rights of the Child has four general guiding principles:

- ◆ the protection of the best interests of the child,
- ◆ the prohibition of discrimination,
- ◆ the safeguarding of the survival and optimal development of the child, and
- ◆ the child's right to be heard.

These four principles should guide the interpretation of the other articles and are relevant to all aspects of implementation of the Convention.

Please note: Article 17 (1) of the Transitional Constitution is replicated verbatim in **Section 111** of the Local Government Act.

Trainer Job Aid 3

Handout 3.2: Case Study: Child's Rights

Soni is a 14 year old orphaned by the war. She is the only surviving child of her late parents. Her uncles are not able to take care of her because of poverty, so they gave her out to a relation of theirs who lives in Juba. He had promised to give her a better life. On arrival in Juba, little Soni discovered that her uncle runs a restaurant and a brothel. She was put as a waiter in the restaurant and as a prostitute. One year later, she became pregnant from rape by one of the customers, Habib. In settlement with the rapist, the uncle agreed to withdraw the case from the police and give her out in marriage to the rapist, from whom they collected bride wealth.

In her new family, after she had the baby Kiden, she was told, against her wish that she would not go to school or work as she would be required to be a full time wife and mother. Because her husband needed money, he arranged for her to commit adultery with Samson. He took Samson to court and won some compensation in the form of cattle. When he asked her to do the same with Parker, she refused and ran away from home, abandoning her baby, Kiden. Kiden, who is now five years old was handed over to another family as compensation for a murder committed by Habib when he killed Soni's lover.

In the meantime, Soni came in contact with a group of prostitutes with whom she had interacted in the past. After hearing her story, they assisted her to file a divorce case in court on the ground that she was forced to marry Habib. She is also claiming custody of her baby Kiden. Her uncles are divided on the fate of Soni – two of them have come to court to oppose divorce because they do not want to refund the bride wealth.

1. Identify the rights of the Soni that have been violated in this case.
2. How will you address this case in your court?

Brainstorming session

Brainstorm the right to a fair trial with the participants and after their answers explain how fair trial is achieved through the application of a human rights approach.



Transitional Constitution

Fair Trial

Article 19

1. An accused is presumed to be innocent until his or her guilt is proved according to the law.
2. Any person who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.
3. In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by a competent court of law in accordance with procedures prescribed by law.
4. A person arrested by the police as part of an investigation, may be held in detention, for a period not exceeding 24 hours and if not released on bond to be produced in court. The court has authority to either remand the accused in prison or to release him or her on bail.
5. No person shall be charged with any act or omission which did not constitute an offence at the time of its commission.
6. Every accused person shall be entitled to be tried in his or her presence in any criminal trial without undue delay; the law shall regulate trial in absentia.
7. Any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice and to have legal aid assigned to him or her by the government where he or she is unable to defend himself or herself in serious offences.



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Right to fair trial therefore could summarized to include the following:

- ◆ Every person charged with an offence is presumed to be innocent. This means that an accused person who is brought before the court should not be condemned before hearing his/her own side. It is only after one's guilt is established that one can be said to be guilty of the offence.
- ◆ Often people are arrested and charged to court without knowing the reason for his/her arrest. This is a violation of the right to fair trial.
- ◆ All trials shall be held in public except there is a justifiable reason for holding a trial in secret or in camera.
- ◆ An arrested person shall not be detained for more than 24 hours before bringing him/her to court.
- ◆ No person shall be charged with any act or omission which was not an offence at the time of his/her arrest.
- ◆ An accused person must not be tried in absentia.
- ◆ Government is under an obligation to provide an accused person with a lawyer to represent him/her in respect of serious offences if the accused is incapable of paying for the services of a lawyer.



Brainstorming session

Brainstorm the right to litigation with the participants and open a plenary discussion based on their experiences.

Right to Litigation

Article 20. The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to courts of law to redress grievances whether against government or against any individual or organization.

This right is violated if certain persons are barred from bringing suit against any other person such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Individuals may also take legal action against the Government of South Sudan.



Objective 6: Understand the Provisions of the Local Government Act which Demand Conformity to Human Rights Standards

Duration: 1 hours 35 minutes



Question

What are the main features of the Local Government Act with respect to traditional authorities and customary law, which demand conformity to human rights standards?



Section 11. The Act of Rights and Citizenship

1. The rights and freedoms of individuals and groups within every local government territory shall be upheld, protected, respected and promoted by all organs, agencies and persons of the Local Government Authority concerned.
2. Every ethnic and cultural community within a local government territory shall have the right to freely enjoy and develop its cultures and practice its own customs and traditions while recognizing and respecting the rights of others.

Chapter X of the Local Government Act is titled The Customary Law Councils and Courts. **Section 93**, the first section in this chapter, defines the Customary Law Council – to be established in each County – as the highest customary law authority in the County.

Members of the Customary Law Council shall be (**Section 94(1)**)

- a. the County Paramount Chief as the head;
- b. all Head Chiefs of the “B” Courts or Regional Courts of the county as members;
- c. the Secretary of the Council, who is appointed by the Customary Law Council;
- d. three community elders, *three women and one youth representative* appointed by the County Commissioner after consultation with the community; and
- e. any other ex officio member as may be invited by the Council. (Italicised for emphasis)



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Section 95 – Functions and Duties of the Customary Law Council; and Section 96 – Authority of Customary Law Council.

Section 95 reads:

1. The Customary Law Council shall protect, promote and preserve the traditions, customs, cultures, values and norms of the communities.
2. The Customary Law Council shall regulate, maintain, monitor and ensure proper administration of the customary law.
3. Members of the Customary Law Council *shall be impartial* in the performance of their functions and duties.” (Italicised for emphasis)

Section 96 adds:

1. The authority of the Customary Law Council shall be derived from the customs and traditions of the people of the County in accordance with the provisions of this *Act and any other applicable laws or regulations*. (Italicised for emphasis)
2. The Customary Law Council shall be responsible for the selection, recruitment, and training of the Customary Law Courts staff and the maintenance of professional standards in accordance with applicable rules and regulations.
3. The Customary Law Council shall ensure *women participation by at least twenty-five percent* of the membership. (Italicised for emphasis)
4. The Customary Law Council shall ensure that the freedoms and rights enshrined in the Constitutions are upheld and respected in the Customary Law Courts.

It is worthy of note that **Section 112 (2)** of the Act provides that “in the exercise of the delegated and/or deconcentrated powers, the Traditional Authorities shall *observe, respect and adhere to the Act of Rights* as enshrined in the Comprehensive Peace Agreement, the National, Southern Sudan and State Constitutions”.



Trainer Job Aid 3

Handout 3.3: South Sudan battles to create modern legal system

Wednesday 28 June 2006

June 28, 2006 (YEI, Sudan) — Emmanuel Batali was accused of conspiring with the devil to kill people. He has spent three months in a dilapidated prison in Yei, South Sudan, and is still waiting for his day in court.

After more than two decades of civil war, official structures such as courts have ceased to function in the south. A 2005 peace deal ended Africa's longest civil war and the south formed an autonomous government. The new authority is still trying to assert itself, and customary law still dominates in many areas.



Male prisoners in an overcrowded, cell block without proper coverage to keep out the rain in Wanjok County Prison, Northern Bahr el Ghazal State, South Sudan on 22 May, 2012.

“My chief said I went to the devil spirit to kill people – it’s completely absurd,”

said 18-year-old Batali. He says the truth is he fell out with his tribal chief over business.

“I still haven’t seen a magistrate. The law is not good.”

The new government is trying to build a formal legal system with newly trained professionals to enforce a modern concept of human rights law. It is grappling with rising crime and lack of funds. In Yei, one of the region's main towns near the border with Uganda and the Democratic Republic of Congo, prisoners as young as eight are crammed into the prison's run-down and crumbling buildings. “It’s as if we are still in the bush under the mango trees,” said prison governor Martin Lado.

Customary law has always played an important role in South Sudanese society.

The line between the jurisdiction of tribal law and the legal system is blurred. Adultery is against customary law and punishable by a fine. Often women, unable to pay, end up in jail.

Nancy Noka, 19, has been in jail for a fortnight for what she said was, “taking a second husband.” She wanted to escape an abusive older husband and ran off with a young lover.

Lodeli Morris, aged 12, was jailed three months ago for murder, living in cramped conditions with adult male prisoners. He has not been tried yet. Morris, a cobbler, used a needle for sewing leather to stab an older boy, who had bullied and beaten him. “I was not clear in my head. It was just an accident,” he said. Every evening, he files in with the adult prisoners to spend a night on the floor of the jail’s one surviving outbuilding.

A lawyer working for the U.N. children’s agency UNICEF, says the teenage cobbler is not the youngest detainee. The minimum age of criminal responsibility, 10 years, is frequently disregarded, she said, and minors are kept for long periods on remand or in jail in lieu of financial compensation.

The Children’s Act establishes a new juvenile justice system, and imposes a duty on the authorities to protect the welfare of children. It also establishes an independent commission to monitor violations. Cases will be heard by “Boma” committees, headed by local chiefs, avoiding a referral to the courts. (Reuters)

Trainer Job Aid 3

Handout 3.4: Group Exercise: Poor Man

A poor man is living in a village with his four children aged between 2 and 7 years. Since his wife died a few months ago, he has been struggling to provide for them as he has no work and has barely enough food for them to survive. One day, with his family being hungry and two of his children being very sick, the man entered into a food store and asked for some bread and milk. The owner of the store raised his voice and threatened to beat the man if he did not leave the store as he did not want a beggar to scare away paying customers.

The man was basically an honest man who would work if he could and was ashamed that his current condition forced him to beg for food because of his concern for the wellbeing of his children. Trying to explain the situation he was in, he asked again, but the owner of the store refused to listen and publicly ridiculed the man in front of other people, calling him disgusting names and verbally humiliating him. He then went to the man and smacked him across the head and told him to get out of his store. One of the other customers asked why he had hit the man, and the store owner replied that he had seen him trying to steal from his shop and he was protecting his goods in the store.

The owner of the store then called out to some of his friends who were close by and told them that the man was trying to take food out of the store without paying for it. People then gathered outside and the man was dragged by the hair from the store and forced along the street and was taken to the nearest traditional chief. On the way to the court, the man was also beaten by some friends of the store owner. The police then intervened and on being told that the man had tried to steal food, one of the police officers also hit the man, calling him "Thief".

In the court, the store owner immediately explained to the chief that the man was stealing from his store and his friends also said that they had seen this happen. The poor man tried to defend himself and say it was not true and also tell the court about his family, but the Chief told him to be quiet as the store owner was a powerful man in town and a good friend, and it was their word against his. The chief did not wish to hear what the poor man had to say and decided to punish him with 50 lashes.

1. What basic human rights was the poor man trying to protect?
2. What other options does a hungry man with no work have in your area?
3. What crime, if any, has the store owner committed?
4. Which of the poor man's rights, if any, has the store owner violated?
5. If you came across this man, what advice would you give him regarding his rights?
6. What violations of the man's human rights, if any, has the Chief committed?
7. Which human rights violations and crimes, if any, did the police officer commit, and if so what should happen to him?
8. Did the poor man get a fair trial? Please explain your answer with reasons.
9. Have you ever had a similar case to deal with? If so, please explain what happened.
10. Should the Chief have dealt with this case in a different way, and if so in what way?

Nature of the Bill of Rights

Article 9

1. The Bill of Rights is a covenant among the people of South Sudan and between them and their government at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy.
2. The rights and freedoms of the individual and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.
3. All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.
4. This Bill of Rights shall be upheld by the Supreme Court and other competent courts and monitored by the Human Rights Commission.

Sanctity of Rights and Freedoms

Article 10. Subject to **Article 190** herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Supreme Court and other competent courts; the Human Rights Commission shall monitor its application in accordance with this Constitution and the law.

Life and Human Dignity

Article 11. Every person has the inherent right to life, dignity and the integrity of his or her person which shall be protected by law; no one shall be arbitrarily deprived of his or her life.

Personal Liberty

Article 12. Every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his or her liberty except for specified reasons and in accordance with procedures prescribed by law.

Freedom from Slavery, Servitude and Forced Labour

Article 13.

1. Slavery and slave trade in every form are prohibited. No person shall be held in slavery or servitude.
2. No person shall be required to perform forced or compulsory labour except as a penalty upon conviction by a competent court of law.

Equality before the Law

Article 14. All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status.

Right to found a family

Article 15. Every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry.

Continued next page...

Rights of Women

Article 16.

1. Women shall be accorded full and equal dignity of the person with men.
2. Women shall have the right to equal pay for equal work and other related benefits with men.
3. Women shall have the right to participate equally with men in public life.
4. All levels of government shall:
 - a. promote women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs and traditions;
 - b. enact laws to combat harmful customs and traditions which undermine the dignity and status of women; and
 - c. provide maternity and child care and medical care for pregnant and lactating women.
5. Women shall have the right to own property and share in the estate of their deceased husbands together with any surviving legal heirs of the deceased.

Rights of the Child

Article 17.

1. Every child has the right:
 - a. to life, survival and development;
 - b. to a name and nationality;
 - c. to know and be cared for by his or her parents or legal guardian;
 - d. not to be subjected to exploitative practices or abuse, nor to be required to serve in the army nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;
 - e. to be free from any form of discrimination;
 - f. to be free from corporal punishment and cruel and inhuman treatment by any person including parents, school administrations and other institutions;
 - g. not to be subjected to negative and harmful cultural practices which affect his or her health, welfare and dignity; and
 - h. to be protected from abduction and trafficking.
2. In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.
3. All levels of government in Southern Sudan shall accord special protection to orphans and other vulnerable children; child adoption shall be regulated by law.
4. For the purposes of this Constitution, a child is any person under the age of eighteen years.

Freedom from Torture

Article 18. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Trainer Job Aid 3

Handout 3.5: Bill of Rights, South Sudan Transitional Constitution (Continued)

Fair Trial

Article 19.

1. An accused is presumed to be innocent until his or her guilt is proved according to the law.
2. Any person who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.
3. In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by a competent court of law in accordance with procedures prescribed by law.
4. A person arrested by the police as part of an investigation, may be held in detention, for a period not exceeding 24 hours and if not released on bond to be produced in court. The court has authority to either remand the accused in prison or to release him or her on bail.
5. No person shall be charged with any act or omission which did not constitute an offence at the time of its commission.
6. Every accused person shall be entitled to be tried in his or her presence in any criminal trial without undue delay; the law shall regulate trial in absentia.
7. Any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice and to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence.

Right to Litigation

Article 20. The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to courts of law to redress grievances whether against government or against any individual or organization.

Restriction on Death Penalty

Article 21.

1. No death penalty shall be imposed, save as punishment for extremely serious offences in accordance with the law.
2. No death penalty shall be imposed on a person under the age of eighteen or a person who has attained the age of seventy.
3. No death penalty shall be executed upon a pregnant or lactating woman, save after two years of lactation.

Privacy

Article 22. The privacy of all persons shall be inviolable; no person shall be subjected to interference with his or her private life, family, home or correspondence, save in accordance with the law.

Religious Rights

Article 23. The following religious rights are guaranteed by this Constitution:

- a. the right to worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes;
- b. the right to establish and maintain appropriate faith-based; charitable or humanitarian institutions;
- c. the right to acquire, possess and own movable and immovable property and make, acquire and use the necessary articles and materials related to the rites or customs of religion or belief;
- d. the right to write, issue and disseminate religious publications;
- e. the right to teach religion or beliefs in places suitable for these purposes;

Continued next page...

Trainer Job Aid 3

Handout 3.5: Bill of Rights, South Sudan Transitional Constitution (Continued)

- f. the right to solicit and receive voluntary financial and other contributions from individuals, private and public institutions;
- g. the right to train, appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief;
- h. the right to observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs; and
- i. The right to communicate with individuals and communities in matters of religion and beliefs at national and international levels.

Freedom of Expression and Media

Article 24.

1. Every citizen shall have an unrestricted right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to order, safety or public morals as determined by law.
2. All levels of government in Southern Sudan shall guarantee the freedom of the press and other media as shall be regulated by law in a democratic society.
3. All media shall abide by professional ethics.

Freedom of Assembly and Association

Article 25.

1. The right to peaceful assembly is recognized and guaranteed; every person shall have the right to freedom of association with others, including the right to form or join political parties, associations and trade or professional unions for the protection of his or her interests.
2. Formation and registration of political parties, associations and trade unions shall be regulated by law as is necessary in a democratic society.
3. No association shall function as a political party at the National or state level unless it has:-
 - a. its membership open to any South Sudanese irrespective of religion, gender, ethnic origin or place of birth;
 - b. a programme that does not contradict the provisions of this Constitution;
 - c. a democratically elected leadership and institutions; and
 - d. disclosed and transparent sources of funding.

Right to Participation and Voting

Article 26.

1. Every citizen shall have the right to take part in any level of government directly or through freely chosen representative, and shall have the right to nominate himself or herself for a public post or office in accordance with this Constitution and the law.
2. Every citizen shall have the right to vote or be elected in accordance with this Constitution and the law.

Freedom of Movement and Residence

Article 27.

1. Every citizen shall have the right to freedom of movement and the liberty to choose his or her residence except for reasons of public health and safety as shall be regulated by law.
2. Every citizen shall have the right to leave and or return to South Sudan.

Trainer Job Aid 3

Handout 3.5: Bill of Rights, South Sudan Transitional Constitution (Continued)

Right to Own Property

Article 28.

1. Every citizen shall have the right to acquire or own property as regulated by law.
2. No private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation. No private property shall be confiscated save by an order of a court of law.

Right to Education

Article 29.

1. Education is a right for every citizen and all levels of government shall provide access to education without discrimination as to religion, race, ethnicity, health status including HIV/AIDS, gender or disability.
2. All levels of government shall promote education at all levels and shall ensure free and compulsory education at the primary level; they shall also provide free illiteracy eradication programmes.

Rights of Persons with Special Needs and the Elderly

Article 30.

1. All levels of government shall guarantee to persons with special needs participation in society and the enjoyment of rights and freedoms set out in this Constitution, especially access to public utilities, suitable education and employment.
2. The elderly and persons with special needs shall have the right to the respect of their dignity. They shall be provided with the necessary care and medical services as shall be regulated by law.

Public Health Care

Article 31. All levels of government shall promote public health, establish, rehabilitate and develop basic medical and diagnostic institutions and provide free primary health care and emergency services for all citizens.

Right of Access to Information

Article 32. Every citizen has the right of access to official information and records, including electronic records in the possession of any level of government in Southern Sudan or any organs or agencies thereof, except where the release of such information is likely to prejudice public security or the right to privacy of any other person.

Rights of Ethnic and Cultural Communities

Article 33. Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures; members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs *in accordance with this Constitution and the law.* (Italics for emphasis)

Right to Housing

Article 34.

1. Every citizen has the right to have access to decent housing.
2. The State shall formulate policies and take reasonable legislative measures within its available resources to achieve the progressive realization of these rights.
3. No one shall be evicted from his or her lawfully acquired home or have his or her home demolished save in accordance with the law.

DAY FIVE

Module 4: Gender Mainstreaming in the Work of the Customary Courts



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Duration of Module

The module will be based on participant centred learning principles guided by the trainer and the duration is 3 hours.



Tips for the Trainer

Set up the classroom. Ensure that there are sufficient registration forms, participant notes, notebooks, pens and pencils for each participant. Ensure that all planning is complete.



Material, Equipment, and Logistics

White board, flip chart, paper, markers, Participant Notes and Handouts.



References

Rani Parker, Another Point of View: A Manual on Gender Analysis Training for Grassroots Workers, UNIFEM, 1993.

Candida March, Ines Smyth, and Maitrayee Mukhopadhyay, A Guide to Gender – Analysis Frameworks – OXFAM GB, 1999.

UNESCO Gender Equality E-Learning Programme, 2005.

Module Goal

The goal of this module is to give an overview of recommendations for future improvements of the functions in the traditional courts for the purpose of giving equal opportunities to litigants and people who choose to resolve their disputes in customary courts.



Performance Objectives

At the conclusion of this module, participants will be able to:

- ◆ Define and discuss gender concepts and use them appropriately.
- ◆ Understand how to mainstream gender in their daily tasks



Recap of the previous day's session

Duration: 30 minutes

Pre-Test: 15 minutes



Participants' level of knowledge in gender should be assessed by this simple learning game called "The Gender game". The same game should be repeated at the end of the session to measure the level of progress made by participants in gaining knowledge on Gender.

Trainer Job Aid 4

Handout 4.1: Pre Test – Gender Game

Establishing the Differences between differences made by God and differences made by man

Tick **S** or **G** against the statements below to indicate which ones refer to **Sex** and which ones refer to **Gender**:

S	G	Statement
<input type="radio"/>	<input type="radio"/>	Women give birth to babies; men do not.
<input type="radio"/>	<input type="radio"/>	Little girls are gentle; boys are tough.
<input type="radio"/>	<input type="radio"/>	House work is for women while office jobs are for men.
<input type="radio"/>	<input type="radio"/>	Women can breastfeed babies, men cannot.
<input type="radio"/>	<input type="radio"/>	Men inherit property; women do not.
<input type="radio"/>	<input type="radio"/>	Men's voices break at puberty, women's voices do not.
<input type="radio"/>	<input type="radio"/>	Women do all the cooking, and men do not cook.
<input type="radio"/>	<input type="radio"/>	Men are usually doctors while women are mid- wives.

If the participants are literate in English and can write, the exercise should be done individually but in a situation where the participants are not literate in English, it could be done orally by reading out the statements to them and recording their responses on a flipchart.

Where individual work has been done, the trainer should ask the participants to swap their scripts with the person next to them to mark. The trainer should give the correct answers and each participant should score the script over 100%. The scripts should be returned to the owners. Trainer should ask those who scored 100% to stand to be counted – this will be done until trainer gets to 10%. Finally, ask them to turn in the marked scripts.

This game should be followed by a presentation on "Understanding Gender Concepts".



Objective 1: Understanding Gender Concepts and using them Appropriately



Duration: 1 hour

Trainer's Note

The trainer should make a quick presentation giving simplified definitions of the gender concepts and relating them to issues they can identify with.

Distribute the handout below to participants at the end of the session.

Gender Terminologies

Gender/Differences made by Men: Socially constructed and differentiated roles and responsibilities assigned to men and women in a given culture or location. They are learned and they may change over time. The roles and expectations vary across cultures, societies and histories. This construct accord men a better status and greater leverage over resources than women.

They define the boundaries of what women and men can and should be and should do. They shape and determine the behavior, roles, expectations and entitlements of women and men and provide rules, norms, customs and practices through which biological differences may become social differences.

Sex/Differences made by God: Biological differences between men and women. Sex is universal, permanent and a basic fact of nature.

Gender Equality: Equal opportunities and absence of discrimination.

Gender Equity: Gender equity means fairness of treatment for women and men, according to their respective needs. This will include equal treatment or treatment that is considered equivalent in terms of rights, benefits, obligations and opportunities. In developmental context gender equity goals often requires built-in measures to compensate for the historical and social disadvantages of women.

Gender Mainstreaming: Gender Mainstreaming is the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal of mainstreaming is to achieve gender equality.

Equity Measures: Putting in place special measures to close the gaps of gender discrimination e.g. special schools, stipends, special food rations to families.

Equity Measures in Health: Men and women suffer from malaria but women die having birth to babies. If, for example, the government of South Sudan has the



reduction of maternal mortality as a priority in its policy; in allocating resources in its budget, the equity measure to address that problem would include funds for training midwives, and everything needed for safe delivery.

Gender Sensitivity: Being consciously aware that men and women are different and their needs are different.

Gender Responsiveness: Being aware of the differences and taking action to address the differences.

Gender Budgeting: Formulation of budgets to respond to identified needs of different groups based on identified needs and priorities.

Gender Discrimination: Not treating people equally. Discrimination can be positive or negative. Affirmative action is positive discrimination being a temporary positive measure put in place to redress an existing gender gap e.g. building special boarding schools for girls to encourage more girls to go to school. Negative discrimination is treating people with bias.

Triple Gender Roles: Roles that women play in the three types of work – Productive, Reproductive and Community.

Productive Work: Work that generates income and produces goods that can be sold and money comes in.

Reproductive Work: Work that happens in the home. Work that is done to keep the family alive, to maintain human life, cooking, washing clothes, taking care of babies, the old, etc.

Community Work: work that is done for the good of the community.

Gender Gap: It is a measure of equality between men and women. Gap between men and women, difference in educational opportunities is a gender gap in education. More women access credit than men. 70% of agricultural work is done by women but when we discuss farmers, only men are mentioned.

Gender Lens: Think of a gender lens as putting on spectacles. Out of one lens of the spectacles, you see the participation, needs and realities of women. Out of the other lens, you see the participation, needs and realities of men. Your sight or vision is the combination of what each eye sees. It is a checklist.

Empowerment: This is a process of building capacities to enable women, men girls and boys to take charge of their lives/exercise control. Giving ability to an individual to gain self-confidence and take control of their lives. Process of providing women, men, boys and girls with a climate to develop critical thinking skills and reactivate their minds to reorganize perceptions about themselves and the environment in which they live. Strengthening the existing capacities e.g. to make better baskets etc. Some empowerment is provided through education, through goodwill – voting people into power. This is not sustainable. It is also a process of increasing access to and control over resources.



Objective 2: Understanding Gender Mainstreaming

Duration: 1 hour 45 minutes



Trainer's Note

The trainer should take a few minutes to give an introductory presentation on the subject using the text below.



It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. It is the process of assessing the implications for women and men of any planned action, including legislation, policies or programs in any area and at all levels.

Give the following example to further explain the definition. If government decides to reduce duty on the importation of vehicles or increase the cost of cooking gas or kerosene the question to ask is how will this impact on women and men. Men are more likely to import vehicles so they will benefit more. Women use public transportation more than men, so there is no impact on them. Their lives remain the same. Women use cooking gas more than men. Women will resort to fetching fire wood, thereby reducing the time they can spend participating in politics or doing other things. So the second policy will have a negative impact on women.

Studies have shown that discrimination based on gender increases poverty, slows economic growth and weakens governance. The society is able to tap the potential of the productive labour force and not exclude one half of the population. When women are unemployed or are not able to go to school, the situation is worse for the society. She will remain at the level of petty trading and this slows down economic growth. There is more poverty in the families. Where a woman is educated, the standard of the family is high – quality of food is good, level of hygiene is good. If women continue to be excluded from governance, issues concerning them will remain secondary.

The legitimacy of gender equality is a fundamental value that should be reflected in development choices and institutional practices. It involves putting women's and men's concerns at the centre of the development agenda.

Group Work

Trainer should ask participants to work in four groups on how they can mainstream gender in the work of their various courts. Their ideas should be recorded on a flip chart. After 30 minutes, each group should report back in plenary. The trainer will then use the following text to clarify or add to their work.



Mainstreaming Gender in Daily Tasks of the Traditional Authorities in South Sudan

"... governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men, respectively."

(Beijing Platform for Action, 1995, para 79)

Crime statistics show that men and women face different security threats. For example, crimes against men such as robbery, assault and homicide take place predominantly in public areas whereas the main crimes against women such as domestic violence, sexual assault and rape often happen in the private sphere at home or the workplace. This should guide you in consideration of cases that relate to women.

Mainstreaming gender into Customary Court operations requires that male and female population groups have equal access to the court, are reached by court activities and are involved in any participatory measures according to their needs.

Among the benefits of mainstreaming gender into Customary Court operations

- ◆ improved services for all;
- ◆ improved effectiveness by stretching coverage to the whole population, including women and girls;
- ◆ increased public support for the courts; increased transparency.

Checklists

- ◆ How does the customary court react when gender related crimes such as domestic violence, sexual abuse of children, rape or trafficking in human beings are reported?
- ◆ Are traditional authorities trained on gender-sensitive interviewing and counselling?
- ◆ What is the gender ratio of the court staff?
- ◆ What positions are occupied by male and female employees of the courts?
- ◆ Who is involved in adjudication of cases etc.?
- ◆ How do you treat litigants from other ethnic groups who appear before you? e.g. use of assessors.
- ◆ Do traditional authorities consider the separation of men and women and children in remanding or detaining prisoners?



Project Management Within The Customary Institutions:

In order to ensure gender mainstreaming the following should be considered:

- ◆ Use gender sensitivity as a criterion when selecting court staff;
- ◆ Conduct gender mainstreaming training for all staff members;
- ◆ Involve an external gender mainstreaming expert if necessary.

Organizational Structure Within the Institution:

To achieve gender mainstreaming in an institution and/or system a gender balance and gender sensitivity should be ensured in all organizational structures of the institution involving different stakeholders such as steering boards, committees, community advisory boards or groups etc.

This means:

- ◆ selecting both men and women;
- ◆ applying gender sensitivity and knowledge of gender issues among the selection criteria;
- ◆ selecting at least one person who is experienced in working on gender-based violence.

Gender Responsive Conferences, Meetings, Trainings, Workshops:

Organizing an event usually brings together traditional authorities and members of the community.

- ◆ A gender perspective can be integrated into the event's theme;
- ◆ Gender balance in the panel should be sought;
- ◆ It is recommended to apply a multi-agency approach thus also fostering cooperation between courts and the community, including NGOs;
- ◆ If events are organized, both women and men should be invited and have the possibility to attend and speak freely.

It may be necessary to do some outreach in order to attract more women to attend events. In planning time and location, the different (gender) roles, responsibilities and needs should be taken into account.

Furthermore, all publications related to the event (invitations, leaflets, agenda, press release, reports, speaking points etc.) should highlight the gender aspect of the event and try to make it appealing to both men and women (e.g. Using photographs representing both sexes and having a statement such as "women are encouraged to apply/attend")

All activities such as meetings, round tables, conferences, advocacy and communication strategies, reporting, briefings and speeches need to relate to gender issues relevant for the theme.



Taking Gender Into Account Means:

Arrest And Detention:

- ◆ Whenever a court orders the arrest and detention of suspects, one of the challenges is on how to deal with female detainees. In some cases, they are left at the mercy of male officers and they are forced to trade sex for their freedom.
- ◆ There is also the challenge of detaining female suspects with their innocent children, sometimes infants.
- ◆ A gender sensitive court (judge) should always ensure that he/she orders special protection to female detainees against sexual violence. Female suspects should not be detained with their children and pregnant suspects should not be detained along with hardened criminals.
- ◆ Courts should advocate for Police to establish gender units staffed by female police officers to handle cases of females especially pregnant and nursing mothers.

Search – Premises and Body:

In ordering a search of premises and bodies of suspects, courts should advise that female police officers should take responsibility of searching female suspects and vice versa.

Recruitment, Incentive and Promotion:

The recruitment and promotion policy of the courts should be gender sensitive without jeopardizing or compromising merit. Basing promotion on sexual favours should be prohibited and sanctioned.

Curriculum of Training:

The curriculum of the training of Traditional Institutions should include gender components so as to empower new court staff to mainstream gender in their daily tasks.

Access to Court

The word “access” has to do with the ability or right to approach and/or make use of a particular service. A person’s access to the customary court can be affected by:

- ◆ Whether the system would be just in the result it delivers;
- ◆ Whether the court is fair in the way it treats litigants;
- ◆ Whether it offers appropriate procedures at a reasonable cost;
- ◆ Whether cases are dealt with at reasonable speed;
- ◆ Whether the rules of court are understandable to those who use it;
- ◆ Whether women and court users with physical disabilities are able to enter and use the court;



- ◆ Whether court users who do not speak or understand the local language can use the court.

There are several circumstances in which some of those who come before the courts may be at a disadvantage when compared with other court users. They may be people with physical or mental disability, children; victims of domestic violence, witnesses who, for whatever reason, are worried or fearful about appearing in court. Everybody including victims who have lost loved ones, should be treated with compassion and respect²¹. All courts must meet certain standards and provide appropriate facilities.

Trainer Job Aid 4

Handout 4.2: Post Test – Gender Game

Establishing the Differences between differences made by God and differences made by man

Tick **S** or **G** against the statements below to indicate which ones refer to **Sex** and which ones refer to **Gender**:

S	G	Statement
<input type="radio"/>	<input type="radio"/>	Women give birth to babies; men do not.
<input type="radio"/>	<input type="radio"/>	Little girls are gentle; boys are tough.
<input type="radio"/>	<input type="radio"/>	House work is for women while office jobs are for men.
<input type="radio"/>	<input type="radio"/>	Women can breastfeed babies, men cannot.
<input type="radio"/>	<input type="radio"/>	Men inherit property; women do not.
<input type="radio"/>	<input type="radio"/>	Men's voices break at puberty, women's voices do not.
<input type="radio"/>	<input type="radio"/>	Women do all the cooking, and men do not cook.
<input type="radio"/>	<input type="radio"/>	Men are usually doctors while women are mid- wives.

Participants should be asked to do the repeat the same test they had at the beginning of the session i.e. the Pre-test. The scores should be compared with the Post test scores to measure the level of progress made in imparting knowledge on gender.

If the participants are literate in English and have done the exercise individually, ask the participants to swap their scripts with the person next to him/her to mark. The trainer should give the correct answers and each participant should score the script he/she marked over 100%. The scripts should be returned to the owners. Trainer should ask those who scored 100% to stand to be counted – this will be done until trainers gets to 10%. Finally, ask them to turn in the marked scripts. But where participants are not literate the exercise should be done orally.



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²¹ Equal Treatment Bench Book accessed at <http://www.equaltreatmentbenchbook2.pdf> on May 10th 2012

DAY FIVE

Continues

Module 5: Strategies for Improvements of the Functions of Customary Law Courts



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Duration of Module

The module will be based on participant centred learning principles guided by the trainer and duration is 2 hours 30 minutes.



Tips for the Trainer

Set up the Training room. Ensure that there are sufficient registration forms, participant notes, notebooks, pens and pencils for each participant. Ensure that all planning is complete.



Material, Equipment, and Logistics

White board, flip chart, paper, markers, Participant Notes and Handouts.



References

Customary Justice and Legal Pluralism in Post-Conflict Southern Sudan, by Hon. Deng Biong Mijak, paper delivered at the Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, hosted by USIP, George Washington University and World Bank, 2009.

Customary Law in Southern Sudan: A strategy to Strengthen Southern Sudanese Customary Law as A Source of Law in an Autonomous Legal System, by Manfred O Hinz, University of Namibia, 2009.

Study on Informal Justice Systems Access to Justice and Human Rights, by the Danish Institute for Human Rights for UNDP, UNICEF and UNIFEM, 2010.

Report on re-organization of local and payam courts, by the Judiciary of Southern Sudan, Juba, 2009.

Module Goal

The goal of this module is to make recommendations for improvements in the functions of the customary law courts including a discussion on Ascertainment of customary laws.



Performance Objectives

At the conclusion of this module, participants will be able to:

1. Make and review recommendations on the improvements of the courts.
2. Understand and discuss the question of ascertainment of the customary laws in South Sudan.



Objective 1: Make Recommendations on the Improvements of the Courts



Duration: 1 hour



Group Activity

- ◆ Divide participants in two groups and task them to work on the following question: Identify problems/challenges in the functioning of customary law courts that need improvement?
- ◆ What are your recommendations for addressing the identified challenges and for improvements of the functions of traditional courts? **(1 hour)**

Explain that one participant of each group will present the findings in 10 minutes. Debrief and discuss the text below with participants.

After the report back session, the trainer should share some of the following challenges that were not raised in the group work with the participants:

- ◆ Some chiefs are unable to analyse their situation and apply new norms
- ◆ Lack of infrastructure – Courts are run under the trees
- ◆ Inadequate training
- ◆ Lack of knowledge on the current legal framework
- ◆ Unwritten form of customary law – references cannot be made in the course of adjudication
- ◆ Absence of formal justice, law and order systems
- ◆ Corruption

Recommendations on how to Improve the Functions of Customary Law Courts

For traditional justice systems to become an effective partner in the legal pluralist system of South Sudan it must be developed and strengthened in relation to its current position. This can be achieved through a number of different approaches such as:

- ◆ Developing customary law through ascertainment, recording, harmonization among various customary regimes taking into consideration constitutional provisions; as well as harmonization of the customary justice system with the formal state legal system.



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- ◆ Raising the capacities of the traditional leaders by increasing their knowledge of how the formal legal system operates as well as educating and training the sitting state and national judges and practicing lawyers about customary law and how the traditional justice system works.
- ◆ Rehabilitation of the working conditions of both the customary and formal state systems.

The above can be achieved through proper employment of internal resources as well as soliciting external technical assistance and funding.

In addition, one effective approach is to encourage appeals to the county court from the customary courts. It is also necessary to employ and train clerks of court to record the proceedings of the customary court to enable a review by the appeal court without having to start the case de novo. When the appeal system is regularised, the customary courts will be more cautious in applying the law and in determining cases.

Appeals to county courts will empower the statutory courts to intervene where unfair decisions or decisions that violate human rights are made. An example of such decisions is where a girl is ordered from one family to another, as compensation for a charge of murder (unlawful killing). Such remedies can be struck down as violations of constitutional principles, but the merits of the case can otherwise be left to the customary court and its interpretation/application of customary law. This may be vital in maintaining the relevance and effectiveness of customary institutions. In the example above, the statutory court need not substitute the decision of the customary court with its own. It may simply refer the case to the customary court to enter a new remedy to vindicate the rights of the individual.

The net impact may well be to further strengthen customary law institutions. First, every reversal of a customary court decision will serve to educate the traditional authorities as to the constitutional standards that must be complied with. The quality and sensitivity of customary law decisions will necessarily improve as a result of this process.

More recommendations on how to further strengthen the traditional legal system are:

- ◆ Provide legal orientation/training on key legal instruments that affect the functions of traditional authorities
- ◆ Support traditional authorities with resources from Government and international agencies to improve the infrastructure
- ◆ Employ and train support staff of the courts to provide recording systems
- ◆ Infrastructure development
- ◆ Documenting customary laws
- ◆ Strengthening and establishment of formal justice systems



Objective 2: Understand the Concept of Ascertainment of Customary Laws and its Advantages to the South Sudanese Traditional Legal System



Duration: 1 hour 30 minutes



Group Work Questions

- ◆ What is your opinion on whether South Sudan's customary laws should be codified/organized in a written form?
- ◆ Do you think that organizing customary law in a written form will affect flexibility of customary law? Give reasons.

Divide participants into four groups and ask two groups to articulate reasons in support of codification while two groups should proffer argument against codification. (1 hour) Each group should record their reasons on a flip chart and take 10 minutes each to report back to the plenary.

Ascertainment of Customary Law:

Ascertainment of customary law in legal understanding involves the process of recording. The act of ascertainment awards the ascertained version of customary law a legal qualification. Mere academic records of customary law based on questionnaires, court observations, analyses of case books of traditional courts, collections of cases and complementary information from parties to cases remain aids for a possible subsequent ascertainment.

Ascertainment can be defined as any kind of authoritative transfer of orally transmitted customary law into a written form. It is one of the tasks of traditional authorities: to ascertain the customary law applicable in the relevant traditional authority after consultations with the members of that community, and assist in its codification. (*Namibian Community Courts Act*)

Ascertainment of customary law is recommended as an important strategy for the improvement of customary courts. Ascertainment reduces arbitrariness in that knowledge of customary law is disseminated. It gives traditional leaders as well as the community opportunity to agree on what their customary laws are, thus, creating some certainty and harmonization. As stated previously, "change must come from within". If this is an acceptable hypothesis then any future strategy should be aimed at facilitating that change rather than attempting to impose it from the outside.



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As opposed to codification, modern reformers have tended to focus on ascertainment of customary law. These written documents attempt to describe—but not prescribe—the principles applied, in an effort to keep ownership of the law in the hands of the original sources. Once it is written, customary adjudicators will be able to predict or determine the substantive law they apply with certainty. Moreover, even if the ascertainment does not serve to hinder the continued development, flexibility and vitality of customary law, if the customary law continues its evolution regardless of the content of a written ascertainment, the ascertainment itself quickly becomes obsolete and eventually requires updating.

Embracing and legitimizing customary law means finding ways to help it adapt in a changing and increasingly globalized world. A more promising approach is to start with training those who hand down customary court decisions. If customary court judges have an appreciation for the constitutionally enshrined principles of law that their decisions must conform to, the community will, ultimately, benefit from better decisions that are consistent with international human rights standards, as well as due process standards implicit in establishing the rule of law.

Presentation:

Different Ways To Ascertain Customary Law



Ascertainment occurs when customary law is transferred into what has become known as the **restatement** of customary law. Dr. Hinz refers to the restatement project conducted by the School of Oriental and African Studies of the University in London (SOAS) under Antony Allott. Allot's definition of the restatement approach is borrowed, as he puts it, from the American Restatements. According to Allot:

“Restatements were authoritative, comprehensive, careful and systematic statements of common-law rules in such fields as torts, contracts and property. Necessarily cast in semi-codified form, they were still not codes, as they lacked the force of legislated law. Instead they were the most accurate and precise statements of what those producing them had concluded were the main principles and rules as evolved by the courts, and, as such, courts and practitioners alike could turn to them as guides.”

Also ascertainment of customary law occurs when traditional communities produce their own versions of their customary law in writing. These are the customary laws that have been accepted by communities. This is referred to as term **self-statement** of customary law. Self-stating customary law refers to a process of ascertaining customary law by the owners. The law is ascertained by the people, the community, and the traditional leaders as the custodians of customary law. The procedures of self-stating may differ from community to community; the most important element in self-stating is that the result will be a product created in the community which is to follow and apply the law. It is left to the community to decide what part of their law is to be consolidated in writing, as the community and community stakeholders will know best, what their law is and where certainty through writing is called for.



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The result of self-stating is that it is binding on the community. Nevertheless this will not prevent the community from changing their law as and when the need arises. As the self-stated law is owned by the community, the community has authority and power to amend the law. Self-statement is similar to codification. It is a sort of codification, not by the organs of state, but by organs of the traditional communities themselves. In actual fact and seen from the perspective of the communities, self-statements of customary law are codifications by the communities.



Presentation:

Model for the Ascertainment of Customary Law

The following is a model for the ascertainment of customary law. The model is based on experience with the ascertainment of customary laws in Namibia through self-stating of the law by the communities. The model consists of ten steps:

1. Identify the target community(ies);
2. Do legal background research with respect to the community(ies);
3. Draft policy on ascertainment of customary law;
4. Develop a comprehensive enquiry guide;
5. Agree with community on the ascertainment process and structure;
6. Recruit and train ascertainment assistants;
7. Conduct and supervise the ascertainment project;
8. Conduct complementary research in identified community(ies);
9. Promote the compilation of the ascertainment texts;
10. Prepare publications in, at least, two languages, the vernacular language and English.

Traditional communities are not homogeneous anymore; where basically everybody knew what the law of the community was and where traditional ways to communicate knowledge provided the necessary education of young people to grow into the value framework of the community. There is a growing understanding that the legal complexities of urban settlements where various customary laws apply should be addressed by ascertaining and even standardising customary law. There is a growing acceptance that the verdict of the chiefs is not necessarily the last word anymore. Dissatisfied parties may take the verdict of a chief on appeal. The judges sitting on appeal will not necessarily know what customary law was applied by the court, unless the proceedings are in writing.



As we approach the end of the last module and seek to achieve our last objective, ask the participants:

What can be concluded from the previous discussions?

Conclusion

The creation of the new state and its budding legal system provides South Sudan with a unique opportunity to reform social practices and to align them with the fundamental guarantees of human rights and equality. To date, this goal remains a distant hope as patriarchal laws continue to be applied, harming women, threatening their security, and relegating them to inferior positions in their homes and communities. Critical change is needed in this area. In developing its legal system, South Sudan will reveal whether its struggle for equality truly entails the pursuit of equality for all.

Trainer's Note

Before ending the last Module of this Manual, ask if there are any questions to answer and thank the participants for their efforts and contributions as well as for their presence during this training.



Closing Ceremony

End of Workshop evaluation, etc.



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Appendices



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APPENDIX 1: Sample Course Time Table for Training of Traditional Authorities in South Sudan

	Time	Activity	Where, How & By Whom
DAY 1			
	08.00 – 09.00am	Arrival and Registration	Participants
	09.00 – 10.00am	Official Opening/Welcome Remarks	Plenary
		Climate Setting and Self – Introductions	
		Workshop Objectives	UN Women
		Expectations, Hopes and Fears	UNDP
		Ground Rules	Trainer
	10am – 10.15am	Tea and Coffee break	Participants
	10.00 – 10.30am	Pre - Workshop Evaluation and Test	Participants
Module 1	10.30 – 11.30am	Definition of Customary Law and its Usage	Plenary Brainstorming Presentation
Objective 1			
Objective 2	11.30 – 01.00pm	Differences and commonalities in the customary laws existing in South Sudan	Group Exercise - participants Plenary Presentation - Trainer
	01.00 – 02.00pm	Lunch break	
Objective 3	02.00 – 02.20pm	Comprehensive Peace Agreement and the Laws of South Sudan regarding administration and jurisdiction of traditional courts	Plenary Presentation Trainer & Participants
Objective 4	02.20 – 03.20pm	Customary Laws and Women's Access To Justice	Group activity - Participants Presentation - Trainer
	03.20 – 03.35pm	Tea and Coffee Break	
	03.35 – 04.45pm	Customary Laws and Women's Access To Justice	Presentation Discussions
	04.45 – 05.00pm	Daily evaluation	Plenary
Day 2			
	08.00 – 09.00am	Arrival and Registration	Trainer and Participants
	09.00 – 09.30am	Recap of Previous Day's Sessions	Plenary Monitoring Group
Module 2	09.30 – 10.00am	Structure of traditional authorities in the administration of local justice	Plenary Presentation – Trainer Discussions
Objective 1			
	10.00 – 10.15am	Tea and Coffee Break	
Objective 2	10.15 – 11.45am	Role of traditional authorities in the administration of local justice	Case study Hand out 1.7 - Participants Report back and Discussions - All
	11.45 – 01.00pm	Role of traditional authorities in the administration of local justice	Plenary/Brainstorming Group work – Hand outs 2.1 and 2.2 - Participants
	01.00 – 02.00pm	Lunch Break	
	02.00 – 03.00pm	Role of traditional authorities in the administration of local justice	Presentation & Discussions Trainer and participants
Objective 3	03.00 – 3.30pm	Structure and Role of Statutory Courts	Plenary Brainstorming - All Presentation - Trainer
	03.30 – 03.45pm	Tea and Coffee Break	
Objective 4	03.45 – 04.45pm	Cultural transformations regarding Customary Law Daily evaluation	Plenary Brainstorming – All Group activity
	04.45 – 05.00pm	Daily Evaluation	
Day 3			
	08.00 – 09.00am	Arrival and Registration	
	09.00 – 09.30am	Recap of Previous Day's Sessions	Plenary – Monitoring Group
	09.30 – 10.00am	Cultural transformations regarding Customary Law	Plenary Group Exercises/Report back
	10.00 – 10.15am	Tea and Coffee Break	
	10.15 – 11.00pm	Cultural transformations regarding Customary Law	Plenary – Participants and trainer Presentation & Discussions

APPENDIX 1: Sample Course Time Table for Training of Traditional Authorities in South Sudan

	Time	Activity	Where, How & By Whom
Module 3 Objective 1	11.00 – 01.00pm	Understanding Human Rights Principles and their Importance	Plenary Brainstorming - All Presentation – Trainer Group activity - Participants
	01.00 – 02.00pm	Lunch break	
Objective 2	02.00 – 03.30pm	Understanding customary law as a tool for distribution of justice in family - related matters	Case Study –Hand outs 3.1, 3.2, 3.3 - participants Presentation - Trainer
	03.30 – 03.45pm	Tea and Coffee Break	
	03.45 – 4.15pm	Understanding customary law as a tool for distribution of justice in family-related matters	Plenary & in groups Presentation – Trainer Discussions
Objective 3	04.15 – 04.50pm	Incorporating Human Rights Based Approach in application of Customary law	Discussion - All
	04.50 – 5.00pm	Daily Evaluation	Monitoring group
Day 4			
	08.00 – 09.00am	Arrival and Registration	
	09.00 – 09.30am	Recap of Previous Day's Sessions and Daily Evaluation	Monitoring Group
Objective 4	09.30 – 10.00am	Different Communities and Diversity of Cultures	Discussions – participants Presentation - Trainer
	10.00 – 10.15am	Tea and Coffee break	
Objective 5	10.15 – 01.00pm	Understanding the Bill of Rights in the Transitional Constitution	Plenary Discussions – Trainer and Participants
	01.00 – 02.00pm	Lunch break	
	02.00 – 03.00pm	Understanding the Bill of Rights in the Transitional Constitution	Plenary – discussions, Brainstorming – Trainer & Participants
	03.10 – 03.15pm	Tea and Coffee break	
Objective 6	03.15 – 04.50pm	Provisions of the Local Government Act that demands conformity with Human Rights Standards	Plenary Brainstorming Group Work - participants
	04.50 – 05.00pm	Daily Evaluation	
DAY 5			
	08.00 – 09.00am	Arrival and Registration	
	09.00 – 09.30am	Recap of Previous Day's Sessions and Daily Evaluation	Plenary – Monitoring group
Module 4 Objective 1	09.30 – 09.45am	Pre Test – Gender Game	Group Exercise - participants
	09.45 – 10.00am	Understanding Gender Concepts	Presentation and Discussions Trainer and Participants
	10.00 – 10.15am	Tea and Coffee Break	
	10.15 – 11.15am	Understanding Gender Concepts	Plenary Presentation - Trainer
Objective 2	11.15 – 01.00pm	Understanding Gender Mainstreaming	Plenary Presentation - Trainer Group work - Participants
	01.00 – 02.00pm	Lunch Break	
	02.00 – 02.15pm	Post test – Gender Game	Plenary Participants
Module 5 Objective 1	02.15 – 03.15pm	Recommendations on improvement of the Court	
	03.15 – 03.30pm	Tea and Coffee Break	
Objective 2	03.30 – 05.00pm	Ascertainment of Customary Laws in South Sudan	Participants
	05.00 – 05.15pm	End of Workshop Evaluation	Group Work
	05.15 – 06.00pm	Closing ceremonies	
	06.00pm	DEPARTURE	

APPENDIX 2: Sample End of Workshop Evaluation Form

Please spare 15 minutes to respond to these questions to enable the organizers to improve on the arrangements of future workshops. Please circle or tick 'X'.

1. How did the training relate to the general objective and session objectives?

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

Please state your reasons and any other comments you may have

2. How well was this training workshop facilitated?

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

Please add your reasons and any other comments you have on facilitation.

3. How would you rate this training for meeting your needs or expectations?

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

4. How would you rate the structure of this training? (Venue, Accommodation, Food, and Conditions of Work)

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

5. How would you rate the course content of this training?

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

6. How would you rate the Methodology and Presentation Skills of the Resource Persons in this training?

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

7. How would you rate the Organization and Overall Logistics in this training?

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

Please add any other comments you have on the logistics.

8. How do you rate the quality of the training materials provided at the workshop?

- a) Excellent b) Satisfactory c) Average d) Unsatisfactory e) Poor

Please add any other comments you have on materials provided.

9. What did you learn from the training that you didn't know before this workshop?

10. What aspects of this training have been especially new, important or challenging to you?

11. Which factors facilitated or hindered your learning?

.....
.....
.....

12. How do you intend to apply what you learnt from this training?

.....
.....
.....

13. Which of the topics did you find most interesting and why?

.....
.....
.....

14. Which of the topics did you find the least interesting in the workshop and why?

.....
.....
.....

15. Please indicate your opinion on the following statements about the training:

i. The trainer was knowledgeable.

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

ii. The trainer communicated clearly and effectively.

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

iii. The training was well organized.

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

iv. The presented material/research were current

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

v. The training activities were appropriate

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

vi. I felt free to ask questions

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

vii. My questions were answered to my satisfaction

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

viii. I was treated with respect

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

ix. My skills/knowledge has increased as a result of the training

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

x. I would recommend this training to my friends or colleagues

- a) Strongly agree b) Agree c) Neutral d) Disagree e) Strongly disagree

16. Which improvement(s) (if any) would you like to see in the overall design, delivery and methodology of the workshop or the Training Manual?

.....
.....
.....

APPENDIX 3: List of Handouts

1. **Trainer Job Aid 1:**
Handout 1.1: Comprehensive Peace Agreement
2. **Trainer Job Aid 1:**
Handout 1.2: Transitional Constitution of South Sudan
3. **Trainer Job Aid 1:**
Handout 1.3: Local Government Act 2009 – Customary Courts
4. **Trainer Job Aid 1:**
Handout 1.4: Local Government Act 2009 – Council of Traditional Authorities
5. **Trainer Job Aid 1:**
Handout 1.5: Case Study: Drug Peddling and Rape
6. **Trainer Job Aid 2:**
Handout 2.1: Practical Exercise: Examples of Criminal Cases
7. **Trainer Job Aid 2:**
Handout 2.2: Practical Exercise: The Bleeding Accused
8. **Trainer Job Aid 3:**
Handout Case Study 3.1: Inheritance
9. **Trainer Job Aid 3:**
Handout Case Study 3.2: Child's Rights
10. **Trainer Job Aid 3:**
Handout 3.3: South Sudan battles to create modern legal system
Trainer Job Aid 3:
Handout 3.4: Poor Man
11. **Trainer Job Aid 3:**
Handout 3.5: Bill of Rights, South Sudan Transitional Constitution.
12. **Trainer Job Aid 3:**
Handout 4.1: Pre-Test Gender game
13. **Trainer Job Aid 3:**
Handout 4.2: Post-Test Gender game

APPENDIX 4: Daily Evaluations Questions

1. What did you like most in the training so far?
2. What are your key learning achievements?
3. What needs to improve?





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