



Gender Equality

Gender equality is based on the premise that women and men (including girls and boys) should be treated in the same way. Equality implies that the interests, needs and priorities of both women and men are taken into consideration.

Gender equality also calls for active measures to improve the position of women, which is usually lower in the society, so as to enable them to achieve gender equality through women empowerment.

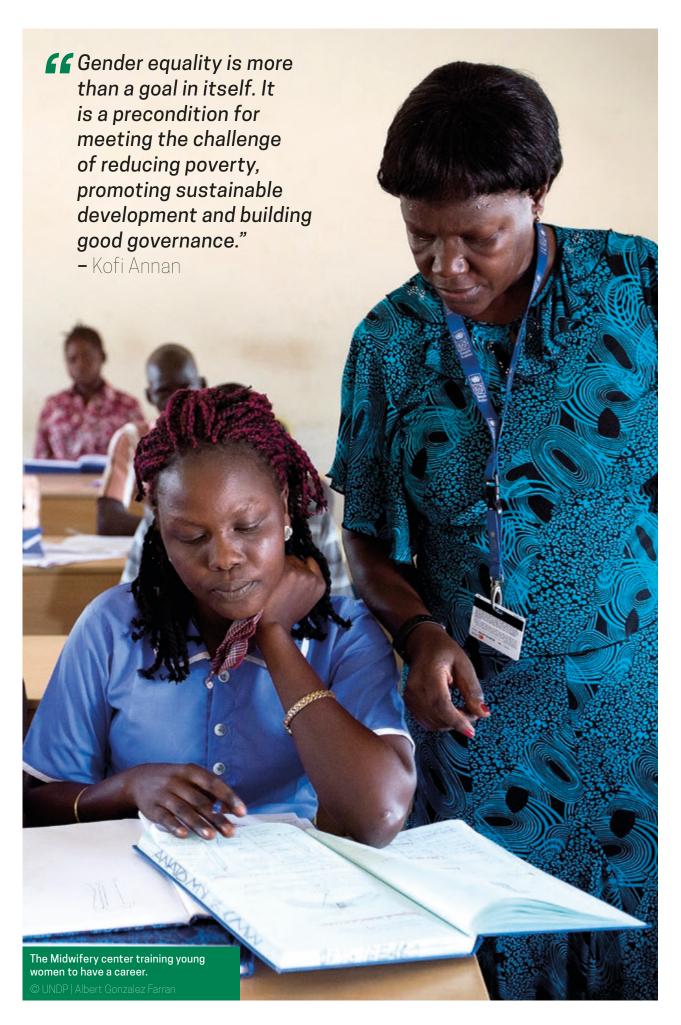
Gender equality means that women and men have the same rights and opportunities in all areas of life. It also means that all people are free to develop their personal abilities and to make choices without limitations imposed by strict gender roles. In a society that respects gender equality, the differences in the behaviour, wishes and needs of women and men are appreciated, valued and supported on the basis of gender equality.

Traditional gender roles often subject women to play secondary roles in communities, placing them at a disadvantage in relation to their male counterparts. The disempowerment of women and girls exposes them to several risks including sexual and domestic violence.

Nevertheless gender roles are changing and women in different parts of the country are slowly moving over to paid work. However, such women are burdened with multiple tasks in that they are engaged in production but continue to look after reproductive and community work. They thus play three-fold roles within their communities.

The laws of South Sudan provide for the protection of women and girls against discrimination, forced marriage and gender based violence. While these legal provisions are important, they are often misinterpreted or ignored. This results from the desire to adhere to customary norms and the weak state of the rule of law institutions.

It is important that legal professionals, human rights defenders and the public are familiar with provisions relating to the promotion of gender equality and prevention of gender-based violence.



Equality Between Men and Women

Article 16 Transitional Constitution, 2011

- "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."

This article provides that men and women are equal. Therefore, women should be treated the same way as men and with respect. Women should be paid the same as men where they do the same work. The Constitution also states that all levels of government should promote the participation of women in public life. This provision also requires that at

least 25 percent of women should be given a seat in the National Assembly and the Government. This provision creates affirmative action to take into consideration the fact that women have been marginalised historically.

The Local Government Act contains a similar provision.

Section 110 Local Government Act, 2009

Rights of Women

- 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 Local Government Councils shall:
 - a. Promote women participation in public life and enforce 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 legislations to combat harmful customs and traditions which undermine the dignity and status of women; and
 - c. Provide maternity, child 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."

Rape and Sexual Violence

Section 247 Penal Code, 2008

- "(1) Whoever has sexual intercourse or carnal intercourse with another person, against his or her will or without his or her consent, commits the offence of rape, and upon conviction, shall be sentenced to imprisonment for a term not exceeding fourteen years and may also be liable to a fine.
- (2) A consent given by a man or woman below the age of eighteen years shall not be deemed to be consent within the meaning of subsection (1), above.
- (3) Sexual intercourse by a married couple is not rape, within the meaning of this section."

The laws of South Sudan prohibit rape and other sexual based violence. Rape is prohibited by law. This means that a person should not have sexual intercourse with another without his or her consent. Persons under the age of 18 years are presumed not to be capable of giving consent to sex. This means that having sexual intercourse with a person under the age of 18 years amounts to an offence, since the person is not capable in law of giving consent. However, subsection 3 means that sexual intercourse between a man and his wife will not amount to rape even where there is lack of consent or one of the spouses is below the age of 18 years. This is

inconsistent with the provisions of the Transitional Constitution, the Child Act and Local Government Act, which protect children from under aged sex, harmful traditional practices and early and forced marriage. Since these legislations came into effect after the Penal Code, they must be deemed as overriding section 247 of the Penal Code. While the Child Act and the Penal Code were passed in the same year, the Child Act came into effect after the Penal Code. Further, the Transitional Constitution is the supreme law of the land and any legislation or law (past or future) that is inconsistent with the Constitution is void and of no effect.

Section 274 Penal Code, 2008

"Whoever, kidnaps or abducts any person in order that such person may be subjected or may be so disposed of as to be put in danger of being subjected to grievous hurt or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding ten years or a fine or with both."

This section criminalises the kidnapping of persons and subjecting them to any form of harm including sexual abuse.

Section 256 Penal Code, 2008

"Whoever, detains another person against his or her will in any place whatsoever with the intention that the person detained should engage in unlawful sexual conduct with himself or herself or another person or with persons generally, commits the offence of detaining a person for the purpose of engaging in unlawful sexual conduct, and upon conviction, shall be sentenced to imprisonment for a term not exceeding one year or with a fine or with both."

This section is similar to section 274 but does not involve kidnapping. It relates to persons who prevent others from leaving premises which they had

already entered so as to force them to have sexual intercourse. This amounts to sexual and gender-based violence.

Section 273 Penal Code, 2008

"Whoever kidnaps or abducts any woman with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse, commits an offence and shall be addressed according to the customs and traditions of the aggrieved party, in lieu of that and upon conviction, shall be sentenced to imprisonment for a term not exceeding ten years or with a fine or with both."

This section outlaws the kidnapping of women for the purposes of marriage. Kidnapping for marriage is a common practice in South Sudan. Where this occurs, the matter is often resolved according to customary practice where the abductor pays a customary fine, pays dowry and a marriage ceremony is performed. While section 273 criminalises kidnapping for the purposes of marriage, it also provides

that the matter can be resolved according to customs. This means that the section only applies where the matter cannot be resolved by custom. The result of this is that women are open to be abducted and married against their will since it is usually the parents who discuss and resolve the matter. The Transitional Constitution should override this since it prohibits harmful and traditional practices.

Equality Before the Law

Article 14 Transitional Constitution, 2011

"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."

This article means that everyone is equal in the eyes of the law regardless of their status in society. Everyone must be treated equally under the law regardless of race, gender, color, ethnicity or religion. Therefore, the law should not discriminate nor should

persons be treated with privilege and the courts should not be biased against one party in favour of another. This also means that women who appear before courts should be treated in the same manner as men.





Right to Found a Family

Article 15 Transitional Constitution, 2011

"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."

This provision gives a person of marriageable age the right to marry. It must be noted that this provision gives a right to the person who intends to marry, and not his or her parents. Therefore, the parents cannot seek to make a decision for the person to marry

nor compel him or her since the right belongs to him or her.

The consent of the person marrying and the role of the parents is underscored by the Local Government Act.

Section 108 (5) Local Government Act, 2009

"No marriage shall be entered into without the free will and consent of the man and woman intending to marry with guidance of their respective parents."

The above provision clarifies the role of the parents. The parents can only advise and guide their children and cannot take a decision on their behalf.

The question arises as to what is "marriageable age." It is clear that a child is not of marriageable age.

Article 17(4) of the Transition Constitution, 2011 defines a child as follows:

For the purposes of this Constitution, a child is any person under the age of eighteen years."

Protection of Children From Early Marriage

Article 17(4), Transitional Constitution of South Sudan

"For the purposes of this Constitution, a child is any person under the age of eighteen years."

Section 5 Child Act, 2008

"Child' means a human being under the age of eighteen years."

Section 111(1) of the Local Government Act states:

"For purposes of this Act, a child is any person or human being below the age of eighteen years."

Section 17(1)(g) Transitional Constitution, 2011

"Every child has a right not to be subjected to negative and harmful cultural practices which affect his or her health, welfare or dignity."

Section 23(1) Child Act, 2008

"Every child has the right to be protected from early marriage, forced circumcision, scarification, tattooing, piercing, tooth removal or any other cultural rite, custom or traditional practice that is likely to negatively affect the child's life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development."

Some have argued that since article 15 of the Transitional Constitutional uses the term "marriageable age" there is a doubt in the law and that marriageable age differs from one ethnic group to another. Further, while article 15 of the Transitional Constitution provides that marriage should be according to the customs of a person, it is clear from section 23(1) of the Child Act and Article 17(1) (g) of the Transitional Constitution that customary practices which are harmful to a child are not permissible. There can be no doubt in the law since section 23(1) clearly protects a child from early marriage. Article 17(1)(g) also protects a child from negative and harmful cultural practices that affect their health, welfare and dignity. Forced marriage will fall under such harmful cultural practices since it is against the will of the child and exposes them to early pregnancy. Early marriage is also harmful because it deprives a child of the right to education which is protected in the Transitional Constitution, 2011 and the Child Act 2008.

must be noted also that notwithstanding the age of a person, 15 of the Transitional Constitution, 2011 states that "... no marriage shall be entered into without the free and full consent of the man and woman intending to marry." So, even if the person is above or below 18 years, he or she cannot be compelled or forced to be married. Consent is important as a stand-alone requirement of the law. Further, forcing a child into marriage will contradict section 17(2) of the Child Act which provides:

"Every child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting him or her."

It must be noted that the above section does not mean that a child may be permitted to marry if he or she agrees to marry.

Article 33 Transitional Constitution, 2011

"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."

South Sudan is a country of cultural diversity with more than 60 ethnic groups. Article 33 protects cultural rights. This includes the rights of the people to practice their culture and beliefs. However, the article requires that the practice should not

be inconsistent with the Transitional Constitution and legislation. Therefore, cultural practices that disregard the consent of spouses and force them into marriage are inconsistent with the Transitional Constitution and should be regarded as void.

Section 26(1) Child Act, 2008

"Every female child has a right to be protected from sexual abuse and exploitation and gender-based violence, including rape, incest, early and forced marriage, female circumcision and female genital mutilation."

This section makes special protection of the rights of a female child. It recognises early and forced marriage as gender based violence. It seeks to protect girls from such practices. Moreover, the Child Act makes the infringement of the rights of a female child a criminal offence. This is contained in **section 30** of the Child Act which states:

Section 30 Child Act, 2008

"Notwithstanding penalties contained in any other law, anyone who willfully or as a result of culpable negligence infringes any right of a child commits an offence and shall, on conviction, be sentenced to imprisonment for a term not exceeding seven years or with a fine or with both, and may be liable to pay such compensation to the child as the Court deems fit and just."

This section means that those who force girls under the age of 18 years into marriage commit a criminal offence and can be charged and prosecuted in a court of law.

Property Inheritence

Article 16(5) Transition Constitution, 2011

"Women shall have right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased."

Section 26 (2)(b) Child Act, 2008

"Every female child has the following rights—

- (a) the right of equal participation on a non-discriminatory basis as partners with a male child in social, economic and political activities;
- (b) equal rights to succession and inheritance to property and reasonable provision out of the estate of a deceased parent without discrimination; and
- (c) the right to develop their full potential and skills through equal access to education and training."

Any custom that prevents the wife or daughter of a deceased man to inherit his properties, is contrary to **article 16(5)** of the Transitional Constitution and **section 26(2)(b)** of the Child Act.

Where a custom is inconsistent with the Transitional Constitution, the Transitional Constitution should prevail. In support of this are the following provisions.

Article 3 Transitional Constitution, 2011

- "(1) This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the Country.
- (2) The authority of government at all levels shall derive from this Constitution and the law.
- (3) The states' constitutions and all laws shall conform to this Constitution."

There are various sources of law in South Sudan. These are the Constitution, statutory law, common law and the customs and practices of the people. Of these sources, the Constitution is the supreme law. Therefore, any law that contradicts the Constitution is void or ineffective and the provisions of the Constitution prevail. Further, the

preamble of the Constitution speaks to its supremacy in the following terms - "'Transitional Constitution of the Republic of South Sudan, 2011,' ... shall be the supreme law by which the independent and sovereign South Sudan shall be governed during the Transitional Period, and undertake to abide by, respect and defend it."

Article 10 Transitional Constitution, 2011

"Subject to Article 189 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."

This provision means that all human rights guaranteed in the Constitution should not be restricted or curtailed by any authority, by any law or for any reason, except where a state of emergency is in force.



Rights of Women to Participate in Public Life

Section 16(3) of the Transition Constitution, 2011

"Women shall have the right to participate equally with men in public life."

Section 16(4)(a) of the Transitional Constitution, 2011

"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."

If women are able to take part in decision-making, they can change their own status and have more control over their lives. Teaching women about issues concerning their own rights and the structure of political decision-making, and educating men, as well, in matters about women's rights is important. Empowering

women to participate in public life, including as policy makers, will help in the implementation of laws and policies that promote gender equality and reduce sexual and gender based violence Therefore, any customary practice that is inconsistent with Article 15 of the Transitional Constitution is void.

Rights of a Female Child to Education

Article 29 Transitional Constitution, 2011

"Education is a right for every citizen and all levels of government shall provide access to education

- (1) 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."

Section 26(2) Child Act, 2008

"Every female child has the following rights-

- (a) the right of equal participation on a non-discriminatory basis as partners with a male child in social, economic and political activities;
- (b) equal rights to succession and inheritance to property and reasonable provision out of the estate of a deceased parent without discrimination; and
- (c) the right to develop their full potential and skills through equal access to education and training."

Section 26(3) Child Act, 2008

"No female child shall be expelled from school due to pregnancy or motherhood or hindered from continuing her education after one year of lactation."

Vulnerability of the girl-child to sexual abuse and teenage pregnancy are factors that also make it difficult for girls' participation in education. Early child marriages impact on the proportion of male-female enrolment in school. Women who have dropped out of school due to pregnancy are not likely to return to school. This disempowers them, making them to be dependent on male figures or companions, thereby making them vulnerable to sexual exploitation and sexual and gender based violence. Lack of education results in the lack of means and knowledge to assert their rights.

Section 26(3) of the Child Act is inconsistent with article 29(1) of the Transitional Constitution which provides that education is a right for every citizen without discrimination as to religion, race, ethnicity, health status including HIV/AIDS, gender or

disability. This is due to the fact that section 26(3) permits a girl or woman to be excluded from school for a period of one year. Only a woman can get pregnant. Therefore, the fact that the woman is excluded from schooling on the basis of her reproductive ability and capacity to give birth, means that only a woman will be excluded from school, (due to the fact that she is a woman). However, men and boys are also involved in the reproductive process, but do not get expelled from school, because they do not have the capability to get pregnant, carry a baby and give birth. For instance, if a boy in a school impregnates a girl, his class mate, the law permits the girl to be excluded from school for up to a year, whereas, the boy continues with his schooling. Therefore, section 26(3) is discriminatory solely on the basis of gender. This delays the education of a girl and is therefore discriminatory in its effect.

South Sudan Legal Framework

South Sudan Legal frame-work for protection against sexual and gender based violence is found in the transitional constitution of South Sudan, 2011, the penal Code 2008 and Child Act, 2009.

| Section | Offence/Provision | Punishment |
|---------------------------|--|---|
| Law: Penal Code Act, 2008 | | |
| 247 | Rape | Imprisonment for a term not exceeding fourteen years, or both imprisonment and a fine |
| 223 | Assault | Imprisonment for a term not exceeding three months or with a fine or with both |
| 225 | Assault or Criminal Force Without Provocation | Imprisonment for a term not exceeding three months or with a fine or with both |
| 249 | Acts of Gross Indecency | Imprisonment for a term not exceeding fourteen years or with a fine or with both |
| 250 | Word, Gesture or Act Intended to Insult the Modesty of a Woman | Imprisonment for a term not exceeding two years or with a fine or with both |
| 251 | Public Indecency | Imprisonment for a term not exceeding six months with a fine or with both |
| 255 | Coercing or Inducing Persons for Purpose of Engaging in Sexual Conduct | Imprisonment for a term not exceeding five years or with a fine or with both |
| 256 | Detaining a Person for Purpose of Engaging in Unlawful Sexual Conduct | Imprisonment for a term not exceeding one year or with a fine or with both |
| 273 | Kidnapping or Abducting a Woman to Compel her Marriage, etc | Imprisonment for a term not exceeding ten years or with a fine or with both |
| 268 | Incest | Imprisonment for a term not exceeding seven years or with a fine or with both |
| 259 | Female Genital Mutilation | Imprisonment for a term not exceeding ten years or with a fine or with both |
| Law: Child Act, 2008 | | |
| 9 | Discrimination against a Child | Imprisonment for a term not exceeding one year or with a fine or with both |
| 57 | Cruelty to Children | Imprisonment for a term not exceeding three years or with a fine or with both |

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