A paradox surrounds the way customary law is viewed in Southern Sudan. The educated, modernized elites largely see it as backward and incapable of addressing the needs of a rapidly changing and modernizing society. Yet, amid the civil war that has raged intermittently for half a century between the dominant Arab-Muslim North and the subordinate South, where the vast majority adhere to traditional beliefs or are converts to Christianity, customary law is an integral component of the identity being threatened by Arabization and Islamization from the North. Moreover, the reality is that an estimated 80 percent or more of all Sudanese in North and South are in traditional settings governed by customary law. Thus, paradoxically, customary law is seen as something to be discouraged and eventually done away with, yet also something to be preserved, promoted, and developed.

The Comprehensive Peace Agreement (CPA), concluded between the government of Sudan and the Southern-based Sudan People’s Liberation Movement and Army (SPLM/A) on January 9, 2005, appears to reinforce the reviverist perspective. Customary law is projected not only as a central element of the Southern identity that the people fought for, but also as an important source of legislation, constitutionalism, and the rule of law for the government of Southern Sudan. Although the Southern Sudanese policymakers recognize the shortcomings of customary law, the general tendency is to idealize the cultural values behind it even as a basis for promoting
and realizing the principles of the universal human rights regime. There is, however, a gap between the positive rhetoric and practical measures for using customary law. This dilemma challenges those responsible for the functioning of the legal system to turn aspirations into practical programs and strategies.

The second section of this chapter relates the political history of the Sudan leading up to the CPA, examining how a well-functioning legal system bequeathed by the British has fallen into disarray and explaining how customary law has become a central part of the clash of identities that fueled the war between the Arab-Muslim North and the African South.

It is not possible to understand customary law apart from the cultural values underpinning it. The third section, therefore, outlines the key cultural concepts of traditional society and their implications for conflict resolution methods, court procedures, and the selection of judges and leaders.

The situation remains open ended, which means that despite the uncertainties involved, there is potential for legal reconstruction and reform. What direction law reform will take depends on whether the country remains united or is divided by southern secession. In the former case, the constructive management of three diverse sources of law—received Western law, Islamic law, and African customary law—will require much creativity. This is the subject of the fourth section, which traces the complex historical interplay of these three divisions of law in Sudan.

In January 2011, the South held a referendum, and preliminary results show a nearly unanimous vote in favor of secession. If the country is divided, the North will presumably continue to consider how to develop along the lines of an Islamic legal system, while the South must grapple with the integration of customary law into a unified administration of justice. The fifth section examines how the SPLM/A, which fought for the South during the last two decades of the civil war and now forms the government of Southern Sudan, approached customary law during the war, and the role it sees for traditional authority in Southern Sudan’s new legal system. It also discusses the ambiguous effects of the war and of broader social change on the role of traditional authority and the place of customary law.

Either way, the South faces great challenges in developing a viable legal and administrative system that builds on its cultural values. With the strong sense of customary law revivalism comes the need to bring customary law in line with the structures and values of the modern state. The final section explores the areas in need of reform, and the emerging thinking of Southern Sudanese leaders in developing practical programs and strategies to achieve it.
Historical Background: Law, War, and Identity

Sudan, geographically the largest country in Africa, covers about a million square miles and comprises several hundred ethnic groups. These divide generally into the Arab-Muslim North and the African South, where people mainly follow traditional religions but, since the advent of British colonialism, have been converting to Christianity. To complicate the picture, there are groups in the North who, although Muslim, have retained their indigenous cultures and even practice an indigenized version of Islam. The political and legal history of Sudan plays out against this complex demographic background, turning conflict into a war of identities.

This section traces the political and legal history of Sudan since colonization, looks at the role of law in shaping the identities behind the civil war, and explains what the CPA envisions for the country’s political and legal future.

Preindependence

Foreign rule began with the Ottoman invasion in 1821 and the establishment of the Turco-Egyptian administration, which lasted until 1885, when it was overthrown by a fundamentalist Islamic movement led by Mohammed Ahmed, who became known as the Mahdi, the Islamic messiah. Although both regimes adopted sharia, much of the rural North was administered by customary laws that claimed to reflect Islamic principles but were mostly indigenous. The South remained outside the control of these regimes and was governed by customary practices based on moral and ethical values associated with traditional religious beliefs.

After joint British-Egyptian forces overthrew the Mahdist state in 1898, the British-dominated Anglo-Egyptian administration ruled the country until independence on January 1, 1956. From the start, the British introduced a formal system based on English common law, flexibly adapted to the conditions of the country. The British, careful not to offend the religious sensitivities of the Muslims in the North, recognized sharia as applying in personal matters. Realizing, however, that most of the North observed customary practices that differed from orthodox sharia, they established a system of informal justice to administer customary law. In the South, where the societies were largely unaffected by Islam, a purer version of African customary law applied.

A penal code and a code of criminal procedure were adopted, to be applied by the state courts. Local courts, which primarily applied customary law, were also guided by statutory law in criminal matters. At the same time, the code of civil justice empowered state courts to apply customary law as appropriate to the parties concerned. Since all these systems were
recognized components of the law of the land, it can be argued that they became part of the formal system. The fourth section describes this unique tripartite system in more detail.

In due course, Sudan established a legal system as formal and effective as any in sub-Saharan Africa. Legal education started early under the British, in what was then known as the Gordon Memorial College and eventually became the University of Khartoum. Its Faculty of Law was among the best on the African continent. It graduated about twenty-five students a year, most of whom joined the judiciary. Over the years, graduates went to top law schools, first in the UK and later in the United States, for post-graduate studies.

By the time Sudan became independent, it had a well-established and effective system of justice. The independence of the judiciary was highly prized, observed, and effectively invoked, even against the government. The bar association was a vibrant body that acted in the defense of civil rights and freedoms. Sudan even provided other African countries with legal professionals, judges, lawyers, and teachers. Today, however, the legal system has fallen into disarray and is described by legal professionals as “really chaotic and confused.” In many ways, this deterioration reflects the conflict of identities that has characterized post-independence Sudan and has led both to the undermining of the role of customary law and to recent revivalist sentiments concerning it.

Instability, Islamization, and Civil War

Since independence, three related factors have plummeted Sudan into a state of fragmentation and a crisis of identity. The first is the periodic military usurpation of power, usually followed by a purging of professionals to favor the policies of the military rulers. Coups took place in 1958, 1969, 1985, and 1989. The intervening civilian governments either tried to introduce changes favorable to their own partisan objectives or lacked the capacity for effective reform to undo the damage done by the military.

The second factor has been the government’s persistent efforts to reverse the policies of British colonial rule, which administered the country as two separate entities in a framework of loose unity, and replace them with the policies of Arabization and Islamization. These policies began to gain practical ground with the 1983 introduction, by President Jaafar Nimeiri, of the so-called September Laws, which imposed Islamic law

throughout Sudan. Prominent Muslim leaders saw the September Laws not as a reflection of true sharia but rather as an opportunistic ploy by a man who had been anything but a good Muslim. Nevertheless, the laws were not abrogated when Nimeiri was overthrown. Instead, the National Islamic Front, which seized power in a military coup in 1989, began to expand and entrench the wholesale application of sharia. Many legal professionals who had been trained in the common-law system became obsolete or defiant in continuing to apply the old law. Even in the Faculty of Law, pressures for teaching sharia as the dominant framework only introduced confusion, as professors continued to teach the law they knew. The academic staff began to leave the country en masse.

Perhaps the factor with the most pervasive and debilitating impact has been the civil war. The first phase, from 1955 to 1972, was primarily a struggle for the South’s independence. That war ended in 1972, with a compromise that granted the South regional autonomy, recognizing the dominant belief systems of Christianity and traditional religions. Following eleven years of relative peace, the war resumed in 1983, as a direct result of Nimeiri’s imposition of Islamic law, which, along with the division of the South into three weak regions, constituted a unilateral abrogation of the peace agreement. This triggered a return to armed struggle under the SPLM/A. The conflict initially pitted the North, whose dominant Arab, Islamic leadership projected its identity as monolithic, against the indigenously African and partly Christian South.

The SPLM/A’s declared objective, unlike in the first war, was not the secession of the South from the North, but the liberation of the whole country from Arab-Islamic domination, and the creation of a “New Sudan,” in which there would be no discrimination according to race, ethnicity, culture, religion, or gender. This recasting of the conflict began to appeal to the marginalized regions of the North, which remained African in race, ethnicity, and culture but with an Africanized version of Islam. In the mid-1980s, the Nuba of Southern Kordofan and the Ingessana, or Funj, of Southern Blue Nile joined the South in the struggle.

The war has cost the country dearly. The government, in addition to ruthlessly using its own forces against the rebels and their sources of support, recruited and deployed Arab and other tribal militias, which inflicted terrible atrocities on the civilian population of the South, burning villages, killing indiscriminately, looting, and otherwise terrorizing the people. With the war, millions of Southern internally displaced persons migrated to the North seeking safety, with another half million fleeing as refugees to neighboring countries. Thousands of children and women were abducted and sold into slavery in the North, and over two million people died of war-related causes.
War's Impact on Formal and Customary Legal Systems

Because of this turbulent series of events, Sudan’s history of constitutional development and the rule of law is a tortured one. The series of military regimes suspended or abolished previous constitutions, imposed states of emergency, granted extensive powers to security organs, shut down media outlets, and detained civil society activists. On the first day of the 1989 coup by the National Islamic Front, the bar association was dissolved and hundreds of judges, police, army officers, and civil servants were dismissed. The war in the South intensified into a jihad—a holy war against the “infidels” and enemies of Islam. Repression, persecution, and egregious violations of human rights became a pattern. Khartoum prisons were overcrowded with Southerners detained for years without trial, while Southern women were lashed and imprisoned for such minor offenses as brewing local alcoholic beverages to support themselves under hardship conditions.2

The imposition of sharia involved the creation of “public order courts,” which dealt with breaches such as drunkenness and noncompliance with the Islamic dress code.3

In 2005, the minister of justice argued that although the criminal law incorporated the Islamic hudud penalties, which entail amputation of hands for theft, stoning to death for adultery, and flogging for distribution or consumption of alcohol, the process of Islamization of the legal system did not substantially change the substance of the common law.4 Omar el-Farouk Shoumena and Amin Mekki Medani, two prominent legal scholars and practicing attorneys, affirmed the minister’s position regarding continuing application of English common law but noted that the result was significant confusion and uncertainty.

According to Amin Medani, “You read judgments, some people will quote Egyptian scholars, some will quote Abu Hanifa and others Savigny and now Deng. So the law is really in a state of flux. You don’t know what the applicable law is. That is my opinion. And because of the recruitment of these (sharia) judges, courts will recite the Koran instead of other legal sources. It is a matter of religion rather than law. This is what has happened to the law; it is a total confusion.”5

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2. The information about Southerners languishing in Northern prisons came from none other than the Islamic leader Hassan Turabi, who himself had been imprisoned. Another former prisoner, a general in the army, who became an ambassador, gave a similar report when the author was minister of state for foreign affairs.
3. Ibid.
It must be emphasized that the issue of Islamic law has become an acutely divisive identity factor. Even if the legal system were 99.9 percent Islamic but described as secular, it would be objectionable to the Islamists; and conversely, even if it were 99.9 percent secular and described as Islamic, it would be objectionable to non-Muslim secularists. The issue is symbolism, not the substance of the law.

Indeed, the perspective of the aggrieved regions of the country, in particular the South, highlights the extent to which Islam, together with Arabism, connoting a combination of race, ethnicity, and culture, has been used as a basis for discrimination and for fashioning a national identity framework that is intrinsically discriminatory. It is in this context that the imposition of sharia law has been emotionally charged beyond the actual substance and merit of the law. This has made the South embrace secularism and see its own identity as closely connected with African customary law, as a counterforce to sharia.

The CPA and Implications for the Legal System

After more than twenty years of brutal war, the Intergovernmental Authority on Development, a subregional organization, with the support of the U.S. government and the international community, helped the government of Sudan and the SPLM/A negotiate the CPA. The agreement accommodates the differences between North and South but lays down a foundation for promoting the vision of the New Sudan, a country reconstructed to uphold the ideals of freedom, justice, democracy, and equity for all. The CPA gives the people of the South the right to decide by referendum, after a six-year interim period, whether to remain within a united Sudan or secede and form an independent state. According to the interim arrangements based on the principles of “one country, two systems,” Islamic law will apply in the North, while the South will have a secular democratic system, in which the source of legislation will be “the values and customs of the people.”

The power-sharing arrangements give the South a large measure of autonomy, with its own legislative and judicial branches, and provide for participation on an equitable basis in the government of National Unity, with the president of the South becoming first vice president of the republic in a collegial presidency. Security arrangements give the South the right to keep its own army (SPLA) at par with the Sudan Armed Forces of the central government and provide for “joint integrated units,” which would constitute a nucleus for the future national army should the South vote for unity—which, apparently, it has now done. Wealth-sharing arrangements give the North half of revenues from oil produced in the South and half of national nonoil revenues generated in the South. A third source
of revenue will be taxation by the government of Southern Sudan. There will be a national central bank, but the South will have its own branch, which will follow a conventional financial system, while the Northern branch of the bank will continue to follow the Islamic banking system. The CPA also makes special arrangements for the Abyei, Nuba Mountains, and Southern Blue Nile areas, which were allied with the South in the SPLM/A.

As the late Dr. John Garang de Mabior, former leader of the SPLM/A, put it, “The CPA is a unique Sudanese achievement that I believe shall forever change Sudan as well as have a fundamental and positive impact on our region and Africa.”6

The CPA and the Interim National Constitution introduced values that provide promising bases for the rule of law, despite the anomalies of the sharia legal system in the North and its built-in discrimination against non-Muslims and women. Nevertheless, the lack of certainty about the legal situation in general, particularly in the context of the CPA, will continue to pose pressing concerns. In particular, the situation of non-Muslims in the North and Muslims in the South is left uncertain. In an interview with the author, Omar Shoumena emphasized, “There is real confusion now. You cannot speak about the judiciary when the chief justice is from sharia and you want a fusion between the systems in the South and in the North. You tell me that the chief justice is a sharia judge and at the same time you have a Supreme Court for both the North and the South. How can that be?”

Achievement of the vision of a New Sudan depends to a significant degree on whether Sudan will succeed in creating a constitutive and legal framework that will accommodate all the diverse trends and transcend the divisions based on race, ethnicity, religion, culture, and gender. This requires that the North understand and appreciate the cultural values behind customary law, which, for the South, are central to the identity that it fought to defend and promote. As the transitional period nears closure, prospects for such understanding are dim.

As the former Southern chief justice, Ambrose Riiny Thiiik, pointed out, “Customary law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we have fought for these past twenty years. It is self-evident that customary law will underpin our society, its legal institutions and laws for the future.”7 In the interviews

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the author conducted with judges and attorneys in Southern Sudan in February 2005, this was a recurrent theme. Deng Biong Mijak, who chairs the Customary Law Steering Committee, charged with the development of customary law in the Southern Sudan, had this to say: “The war we have just ended was a cultural war... The North thought the South was suffering from a cultural vacuum, in Arabic, el faragh el thagafy... The system in the Sudan was trying, of course, to build itself on... Arab and Islamic culture and our argument in the South is definitely that we are a people with cultures.”8 Former Attorney General Michael Makuei noted, “It was the policy... to see to it that customary law did not find any home and should not be developed. Our customary law is rich... Time has come now for us to develop it.”9 The following sections explore the challenges involved in realizing this ideal.

Customary Law in Its Cultural Context

Law is not an abstract concept, neutrally poised above political, social, and cultural realities of a given community, but a normative framework that regulates the society’s constitutive processes. These processes themselves are guided by overriding postulates that determine the distribution of power and other values, both substantively and procedurally. Law is, thus, an instrument of power for regulating relations between people, promoting values, and managing resources. This is why the study of customary law must go beyond legalistic principles to probe the complexities of the social order and its determinants. This section seeks to identify and elucidate the cultural concepts most necessary to understanding customary law in the South, as well as the needed reforms to adapt the law to today’s changing conditions.

A methodological note is necessary here: many ethnic groups live in the South, with varying degrees of diversity in their cultures and customary laws, and it would be impossible to do justice to them all. And yet, despite significant differences among the various ethnic groups, the customary laws of the South hold much in common.10

Procreational Immortality: Women, Children, and Clan Identity

Virtually all traditional African cultures are deeply entrenched in the lineage system, in which the ancestors, seen as close to other deities and,
ultimately, to God, play a pivotal role. This is a concept of immortalization that aims at ensuring the continuity of every person after death, with a permanent identity and influence that is reflected in the dual but interconnected worlds of the dead and the living. This is what the Dinka, Sudan’s largest ethnic group, call koc e nhom, or “standing the head (of the dead man) upright.” It is responsible for what anthropologists call “ghost marriage” (marrying for a dead man so that children can be born to his name) and the levirate (widow inheritance by which a widow of childbearing age lives with a relative of the deceased to produce children in the name of the dead husband).

Although this concept favors the male line, the role of women is pivotal, not only through the physical dimension of procreation but also because it is the mother who inculcates in the child the ancestral value system. Despite the acceptance of male dominance in the public forum, the influence of the mother is considered so great that it must be contained by encouraging loyalty to the agnatic group. The place and influence of women in many African societies is therefore extremely complex and more nuanced than appears to many outsiders.

Children are most prized, for they provide the pillars on which the ancestral line is built and maintained. Boys add their names to the line, while girls, through the bride wealth, provide the means for their brothers to marry and beget children to perpetuate the ancestral line. The son is more directly identified with the father, while the daughter is permitted to be closer to the mother. To be called a son of a woman, which implies being close to the mother and under her influence, is a serious insult that no child wants to risk. In polygynous societies, children are encouraged to show affection to their stepmothers and should be seen to be even closer to them than to their own mother. They must also demonstrate solidarity with their half-brothers and -sisters.

The nuclear family then expands into the extended family and on to the lineage and its largest expansion, the clan, comprising all those who can trace their descent to an original ancestor, from whom the clan gets its name. Beyond the clan, identity becomes primarily territorial: the principles that govern family relations become interfused with those of the territorially based relations through the section, the subtribes, or the entire tribe, which become viewed as a virtual family.

Unity and Harmony: The Concept of Cieng

The lineage system has an overriding goal of combining individual and group identity. This requires an emphasis on unity, solidarity, and harmony from the members of the group. This set of values involves the Dinkas’ concept of cieng, which occupies a pivotal position in their processes. The
Nuer have an identical concept known as ciang. According to Lienhardt, “The Dinka . . . have notions . . . of what their society ought, ideally, to be like. They have a word, cieng or cieng baai (baai means home, family, village, community, tribe or country), which used as a verb has the sense of ‘to look after’ or ‘to order,’ and in its noun form means ‘the custom’ or ‘the rule.’” But cieng is far more complex: as a transitive verb, it also means “to inhabit,” “to treat (a person),” “to dominate,” or “to wear (clothes or ornaments);” as an intransitive verb, it means “to last long.” As a noun, it means “conduct,” “human relations,” “way of life,” or “culture.” Wherever the word “law” would apply, the Dinka use cieng, usually with an emphasis on “our cieng.” These usages represent a multiplicity and a unity, which may be either descriptive or prescriptive, combining what “is” with what “ought to be.”

Every individual relies on other members of the family, the lineage, or the clan for his own prospects of being immortalized into a permanent identity and influence. Thus, his group is indispensable to his destiny. Likewise, since it is the sum total of individuals that forms the ancestral line, the individual is vital to the group’s interest as a family, a lineage, a clan, and the wider community.

At the top of the hierarchy of individuals and groups involved in shaping and sharing values within the traditional system are God and the other deities conceived of as being “above.” The ancestors, though buried in the ground, are also seen as spiritually close to God, the deities, and the spirits in the sky. In various ways and forms, these spiritual entities are in continuous contact with the living. They can be approached through prayer and sacrifices and asked to provide protection and, if necessary, intercede with other spirits and with God. The deities, too, make their demands in a variety of ways, sometimes through dreams or by afflicting a person with a condition that brings illness or a positive manifestation of spiritual power in that person. Divination by credible spiritual functionaries is also a way of revealing the wishes of the supernatural actors in the worldly political, social, and economic processes. Among the living, the oldest members of the clan are viewed as the closest to the world of the ancestors, the spirits, and God. They manage family affairs in an autonomous decision-making process that aims at observing the ancestral values and reinforcing the unity, solidarity, and harmony of the family and the extended groups. Only major conflicts on which consensus within the family or extended groups is not possible are taken to territorial leaders—the hierarchy of chiefs and the elders in council.

Individual and Collective Dignity: The Concept of Dheeng

Another value predicated on the overriding postulate of continuity is respect for every individual as a revitalization of the ancestral line. Dignity, on which respect is premised, ensures that the name, the image, and the overall reputation of every individual are valued assets to the group, just as the group is an asset to the individual. “Dheeng” is a word of multiple meanings, all positive. As a noun, it refers to nobility, beauty, handsomeness, elegance, charm, grace, gentleness, hospitality, generosity, good manners, discretion, and kindness. Except in prayer or on certain religious occasions, singing and dancing are dheeng. Personal decoration, initiation ceremonies, celebration of marriages, the display of “personality oxen”—indeed, any demonstrations of aesthetic value—are considered dheeng. The social background of a man, his physical appearance, the way he walks, talks, eats, or dresses, and the way he behaves toward others all weigh in determining his dheeng.

Youth, both male and female, are organized into an age-set system. Young men are initiated into adulthood as adheeng (sing. adheng), “gentlemen” warriors. The corresponding age set of women are partners who follow men in war, provide them with food, reinforce them with spears, the traditional weapons of war, and provide support and humanitarian cover for the wounded and the fallen, who, according to traditional war ethics, must no longer be harmed. The age set system provides a lifelong camaraderie that transcends narrow family loyalties and provides corporate identity and partnership in social, economic, and cultural aspects of life.

Every individual strives to represent his or her group with dignity and to protect and serve the interest of the community, just as the community protects the welfare and security of its individual members. This intra-group value system is projected to the relations between component groups in the wider community, without which the society’s integrity and security cannot be safeguarded.

Moral Attributes of Leadership

A final set of concepts crucial to the values of leadership comprises dom, establishing control over a group; muk, maintaining and sustaining the group; and guier, improving the lot of the group. Each of these concepts connotes the observance of the principles of cieng and dheeng. These values are mutually reinforcing and cyclic in nature. When a chief has taken over the reins of power (dom), has stabilized his benevolent control over the situation (muk), and has introduced reforms to ensure a constructive and stable leadership (guier), he is described as having held (dom) the land.
These elements of the normative worldview, which are widely shared in Southern Sudan, mean that the temporal and spiritual worlds are closely interconnected. The chief, believed to be endowed with spiritual powers to see right and wrong, is a man with “a cool heart” (raan lir piou) inspired by God to seek and find divine wisdom, and guided by God and the ancestral spirits to lead his people in the path of righteousness and societal ideals. But his virtues are unique in degree only and not in kind, since every person shares something of the divine, spiritual, and moral order. This is what makes the Dinka and other indigenous Africans, as individuals and as a people, profoundly religious, though without formalized or institutionalized religion. To Southern Sudanese societies, legal norms are intrinsic components of culture, and so is religion, and all are part and parcel of their way of life.

The Value System’s Implications for Customary Law

The Dinka never claim to live up to the ideals of their cultural values. This is not simply a gap between idealism and reality; it is the offshoot of the family orientation of society. Unity of purpose conflicts with divisive personal interests, inevitably generating tensions and conflicts, which threaten to undermine the ideals of unity and harmony. It is by reference to both the successes and the failures, an appraisal often expressed in songs, that these values are reaffirmed. The value system has several noteworthy implications for customary law and managing conflict.

First, customary law itself is an integral aspect of the traditional way of life, with well-established normative principles that are widely recognized, respected, and generally observed by society. While specialized decision makers, such as chiefs and elders, know the law better than ordinary people, almost every adult in the community understands the principles. And while these principles are flexible enough to adapt to the needs of the changing times, they give a degree of stability and predictability to the law.

The law may be regulatory in that it provides guidance on how to facilitate harmonious human relations—how to do what is permitted, such as marriage. The law may also be prohibitive in that it forbids certain acts or behaviors perceived as wrong and injurious to others in society—what should not be done, such as homicide, adultery, or defamatory insults. Offenses such as homicide, adultery, and incest also involve a spiritual contamination, which must be removed before a case can be completely settled. The spiritual and judicial elements of cases are interwoven to such an extent that there is little differentiation between them.

Breaches of both regulatory and prohibitive rules may result in wrongs that could be considered “criminal or civil,” depending on the gravity of the injury to others involved. In reality, because of traditional society’s
segmentary structure and emphasis on intimate groups, public and private interests are largely undifferentiated, and the punitive aspect of sanctions is intertwined with the restitutive aspect.

Second, while the community at the broadest level of organization is governed by a code of conduct in the shaping and sharing of power, wealth, and other values, every level down to the family and even to the individual is autonomous and self-determining. The role of the authoritative decision makers is merely to regulate relations and resolve conflicts between and among the diverse groups, without interfering in the management of internal affairs. The objective of such intervention is not punishment in the Western sense but the achievement of an outcome that both sides would accept as a fair basis for a settlement and the restoration of the unity and harmony that has been disrupted. Reconciliation is a cardinal principle of the traditional method of dispute settlement. Restitution by the culprit is nearly always the desired outcome. Severe punishment is resorted to only when the individual disregards the sense of the community after a lengthy attempt at persuasion, thus alienating the group. Such a punishment entails ostracism and isolation that may force the individual into self-exile—traditionally viewed as the worst possible fate short of death.

Third, the importance of the group means that kinship loyalties behind individual disputants are crucial to dispute resolution. To impose judgment without mobilizing the public sentiment, including that of the wrongdoer’s group, could intensify rather than settle the conflict between the groups. Indeed, cases usually take the form of groups versus groups—an insult aimed at an individual quickly becomes a slander against the group and can provoke intergroup hostilities—although this does not mean that individuals do not litigate or suffer the consequences of their wrongdoing personally. Also, problems for litigation usually concern personal matters, particularly those resulting from a complex network of marriage affinities. These issues, being of a domestic nature, involve people who often must return to the same “doorway” (ghot thok) or “fireplace” (mac thok)—words patently definitive of family bonds. Emphasis is therefore on reconciliation to bring about the harmony necessary for maintaining minimal tranquility and order within the immediate and expanded communities.

This emphasis on reconciliation does not fit well with more formal legal systems. Douglas Johnson reports that the Dinka of the Bahr-al-Ghazal in the 1940s expressed dissatisfaction with “the haste at which courts reached decisions, before persons were reconciled.”12 Ironically, speedy resolutions

may actually prolong conflict, as kinship obligations keep relationships alive. Moreover, insisting on full and immediate payment of debts is a sign that relationships are broken. This, presumably, is why there is no time limitation to claims in customary law and why obligations can be passed on from generation to generation. As Johnson explains, “The courts’ insistence on a precise and punctual repayment of obligations seems to have emphasised, in practice, what was owed the individual rather than the community . . . In this way the legal system imposed strains on Nuer society in the very process of trying to strengthen it.”13

Fourth, the legal system is geared toward a conservative preservation of the value system. Since the core elements of the worldview and ancestral values are cyclical, interrelating life with death and continuity in the hereafter, the notion of a linear approach to development or progress is unknown to traditional society. The principle objectives of life are achievable and, for the most part, actually achieved. One may have few or many children to continue one’s name. The unity and harmony of the family and the community could always be better. And so could the status of the family, whether derived from its wealth or its ancestral image. One could be more or less endowed with material wealth or other resources, accumulate large herds of cattle, cultivate bigger plots of land, or build better and larger homes, but those are all within the capacity of members of society.

Certainly, to the extent that the overriding values aim first and foremost at the perpetuation of the male line, they discriminate against women and children. By the same token, these otherwise disadvantaged groups receive special compensatory privileges, which mitigate but can also disguise the inequities against them. Among the Nilotics, members of youth warrior age sets, for instance, preoccupy themselves with aesthetics of cattle camping, singing, and dancing and are prone to excessive use of force as attributes of their distinctive identity and avenue to dignity. Women, on the other hand, find their principal source of dignity in identifying themselves with the status of their husbands and formally recognized male friends, so much so that in their songs of self-exaltation, a woman alternately refers to her husband or sweetheart as “I” and takes special pride in his wealth or social prestige, which she sees as also hers.

Since there were hardly any alternatives outside the system during the colonial period, the forces favoring conformity were almost insurmountable. A close probing will lead to the conclusion that even though there appears to be a consensus behind fundamental values and the normative framework they shape, there is an awareness of the inequities of the system, which are accepted or, perhaps, tolerated presumably because

13. Ibid., 74.
alternatives do not seem feasible in a close and relatively isolated society. The only alternative that was traditionally available was self-exile into the unknown world of a potentially more hostile environment—a risk only the foolhardy or the most daring would choose. Because of the subtleties of the traditional stratification and discrimination, the more assertive modern promotion of universal human rights and humanitarian standards is viewed with unease, as founded on a misunderstanding of cultural values and the benefits they accord women and children. A later section explores the challenges this attitude poses to current efforts to reform customary law.

The Process of Selecting Decision Makers

Since colonial times, legislation has provided for the appointment and dismissal of the members of the traditional courts. And yet, these typically are traditional leaders, selected using the traditional rules of succession, with authority embedded in their own legitimacy among their people, conforming with indigenous values for leadership. While the principles involved have been significantly affected by change and the modern state’s requirements, they persist, making the situation a blend of tradition and modernity, with ambivalences, dilemmas, and paradoxes. That said, despite the modern tendency toward democratic election of leaders, the ideals of ancestral supremacy and continuity through the male line still favor not only the leadership of certain clans or lineages, but also men over women and children. This means that the leaders, whether administrators or judges, are mostly men, although efforts are now being made to promote the representation of women in the political and judicial organs.

A significant aspect of the traditional system is that decision-making functions are integrated. There has been a trend toward separating the roles of traditional leaders as political authorities, administrators, and judges, but traditional societies still perceive these functions as intrinsically interconnected. Sometimes, though the functions are separated, they are still exercised by the same personalities. And even when the personalities are separated according to function, there is still a tendency to see administrators and judges all as “chiefs.”

In traditional society, the authority of the clans that produced leaders was derived from the divine powers inherited from their ancestors and, ultimately, from God. Colonial rule undermined traditional leaders by turning them into agents of the state, but it also empowered them through

14. The Chiefs’ Courts Ordinance of 1931 and the Native Courts Ordinance of 1932 were succeeded by the People’s Local Courts Act of 1977.
the coercive force of the state. In many cases traditional leaders were replaced by salaried government chiefs whose sole source of authority was the secular force of the state. But even then, myths of the divine origins of their authority would develop to support their legitimacy.

Traditionally, leadership was hereditary and held for life. Under colonial rule, some form of election was introduced, by which the will of the community was ascertained through consultations with representatives of the different segments of the tribal structure. In most cases, elections took place when the person entitled to succeed was viewed as incapable of leadership, or in the event of ambiguity about who was the rightful heir. Increasingly, there is a tendency to subject the position of chief to election, albeit within the family of the deceased leader. Although these are much influenced by government authorities, people have come to regard some form of election as normal. The method of election is usually collective, that is, by families, clans, sections, or subtribes, and a consensus is usually reached through broad consultation. More and more, people not the eldest son of the most senior wife, and not of a line that once held the disputed chieftainship but lost it for one reason or another, are now entitled to compete. Yet, the importance of descent in the eyes of the people remains intact. Authority based solely on personal attributes is still unknown.15

Interviews conducted with judges and lawyers in Southern Sudan show strong skepticism of the emerging tendency toward a Western-style electoral system. According to Deng Biong, Western-style democracy creates tensions because “the chief who is elected will not be at peace with some of the people who did not support him. The traditional notion of democracy is that people sit, they nominate the candidates, and people debate through dialogue, until they come to a consensus, and select one of them.”16 Michael Makuei, the former attorney general of Southern Sudan, described how the traditional way of selecting leaders led to a consensus: “The elders would be observing what the young people are doing. At the end of the day, when they come to the selection of a leader, they will not ask you, the young people; they will just say that so and so is the chief. And that’s that. Nobody will question their wisdom, because if I am selected from amongst my age-mates, they already have known the role I play among them.”17

15. As Monyluak Alor Kuol observes, “The elections have not yet transformed the system of inheritance associated with chieftainships. Local people, in most cases, still choose the sons of former chiefs and court members to fill the positions.” Monyluak Alor Kuol, “The Anthropology of Law and Issues of Justice in the Southern Sudan Today” (thesis, Oxford University, 2000), 44.
The Process of Dispute Resolution

Because the aim of customary law is reconciliation, a guiding principle is that disputes should be settled out of court whenever possible. Family disputes are ideally resolved within the family or at lower levels of the leadership hierarchy, outside formal court. The initiative to mediate such disputes may be taken by one of the parties—probably the aggrieved or the wrongdoer, eager to resolve the matter and be reconciled with the wronged. Any other member of the family or the local community who is aware of the conflict may also initiate the process.

The mediation process will then require convening a council or a meeting of a limited number of elders in a body similar to a chief’s court though limited in size. If the initiator is the wrongdoer, he or she will state the case with an admission of the wrong, a willingness to address the wrong in an amicable manner, and a plea to the elders for arbitration and reconciliation. The wronged party will then state its case, initially without directly responding to the offer of redress or reconciliation. A lengthy process ensues, in which those present contribute their own statements, all aimed at facilitating a settlement. In this type of mediation, an agamlong, whose role is to repeat, clarify, and summarize statements in a raised voice for the benefit of the court, is not involved.

However, mediation out of court may also be much more expanded and formal, depending on the seriousness of the issues or the status of the individuals involved. Such processes are not significantly different from formal court procedures, and an agamlong is engaged, although records, required by the regulations of the formal courts, are not made. The customary law principles applied in the resolution of such conflicts are essentially the same as those applied by formal courts, although the nature of the relationship and the added importance of restoring unity, harmony, and amicable family relations naturally influence the outcome and the value of the settlement.

Even when the case goes to court, the possibility that a settlement can be negotiated outside the court is always an option. Elders may try to persuade the court to refer the matter back to them for settlement, or they may urge the court to persuade the parties to compromise. The desire for conciliation is so strong that courts may decide to revise their own judicial decisions on that basis.18

In formal court proceedings, customary law does not see the judge as an umpire in an adversarial process between parties represented by partisan attorneys. Indeed, for many Southern Sudanese, the whole notion of

adversarial procedure is alien. In one well-known case, a Dinka witness, frustrated by the bizarre behavior of the hired attorney in speaking solely in favor of the accused, burst out, “The way you are talking, you must have been bribed.”

To the Dinka, justice means that anyone involved in the settlement of a dispute must balance the opposing positions and try to reconcile them. The objective is a genuine search for the truth in the interest of justice. The procedure under customary law makes the judge the investigator of facts during a trial, eliciting the best evidence from the litigants in order to pass a fair and mutually acceptable judgment.

According to Makec, “No trial or hearing takes place unless [the agam-] is present to play his . . . role . . . Every person who speaks in court, including the President and court members, speaks through him . . . He is an orator who has a command of the language of the court. He is capable of reducing the long and clumsy statement of a speaker into a precise and comprehensive sentence. Apart from repeating the words aloud and precisely, it is a part of his duty to direct the parties, witnesses and the court as to what steps to take at the next stage of the proceedings. He is well-versed in court procedure.”19

The statements of the parties, their witnesses, and the court members are often lengthy. Speakers often digress into stories, proverbs, and even jokes, but they always connect them to the point at issue. Lienhardt described the process: “The Dinka and the Nuer are a warlike people; and have never been slow to assert their rights as they see them by physical force. Yet, if one sees Dinka trying to resolve a dispute, according to their own customary law, there is often a reasonableness and a gentleness in their demeanour, a courtesy and a quietness in the speech of those elder men superior in status and wisdom, an attempt to get at the whole truth of the situation before them.”20

While the range of admissible evidence is wide, there is a general bias against any evidence that tends to aggravate the indignation of litigants and thereby impede settlement. Direct evidence is preferred to circumstantial evidence, which has a greater possibility of error. An interested person may speak but is usually expected to emphasize the wrong of the side he favors. Of course, a person the judges are related to, or at least interested in, has a higher expectation of winning the case. A tactful judge or elder can best favor his relative by condemning him; unless the wrong is too apparent, such an attitude often encourages the court as a whole to find in favor of the relative. Even when the wrong is apparent, the indignation

19. Ibid., 234.
of both the wronged person and the court is mitigated by the alignment of the chief with them against his own relative.

As the case concludes, court members pass their judgment in ascending order, beginning with the junior judges and ending with the president of the court, usually the most senior chief. Having listened to the views of the other court members, the president pronounces what he sees as the closest to a court consensus, whose wisdom the litigants would accept. Where the case involves a president lower ranking than paramount chief, a dissatisfied litigant can always appeal to the latter. There is also the possibility of an appeal to the formal judicial authorities, although those authorities are likely to uphold the judgment of the paramount chief. Also, the court proceedings are now recorded by a court clerk and can then be forwarded to the appellate authority.

Customary Law and Legal Pluralism

As briefly described earlier, the British introduced a system of legal pluralism consisting of three divisions: Islamic law, local (customary) law, and civil (English common) law. The Islamic division consisted of Islamic, or sharia, courts, established under the Sudan Mohammedan Law Courts Ordinance of 1902, formed an independent hierarchy headed by the grand gadi. They were empowered to apply the authoritative doctrines of the Hanafi jurisprudential school unless the grand gadi directed that other doctrines of the Hanafia or other Mohammedan jurists be applied. The courts covered such personal matters as succession, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of *wakfs* (Muslim trusts). This applied where both parties were Muslims or, in the case of mixed or non-Muslim parties, where both parties consented to the jurisdiction.

Although the majority of Sudanese are Muslims, sharia courts functioned within a relatively small community, since most Muslims fell under the jurisdiction of tribal, or native, courts. Native courts had jurisdiction in the six provinces of the North except among the Ngok Dinka of Abyei, in the Northern province of Kordofan, which, along with the Southern provinces, was under the jurisdiction of chiefs’ courts. Despite having different names and being set up under different ordinances—the Native Courts Ordinance of 1932 and the Chiefs’ Courts Ordinance of 1931—these served the same function. The ordinances empowered them to try criminal and civil cases involving natives of the territory according to the customary

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21. Regulation 53 of the Sudan Mohammedan Law Courts Ordinance of 1902, which established the present system of Islamic courts.
22. The sharia courts’ jurisdiction is similar to that of the civil courts under Section 5 of the Civil Justice Ordinance.
law prevailing in that territory, provided it was not repugnant to justice, morality, and order. In both North and South, the chiefs’ and native courts were manned by judges, chiefs, and elders who were mostly illiterate. Chiefs received salaries from the state, although their financial burdens as tribal leaders exceeded their official means and they had to depend on the traditional support system.

The idea behind the chiefs’ and native courts was pragmatic: to make use of existing local structures of authority while, through the repugnancy clauses, giving the more enlightened local administrators freedom to reform the substance of customary law. Douglas Johnson explains the thinking:

There were two aspects to “indirect rule” as it applied to the Sudan: (1) it was intended to keep costs down and administrative organization simple by allowing the Sudanese to get on with “non-essentials”; (2) it had an evolutionary aim to develop native institutions through “the inevitability of gradualness,” shedding what was “evil and barbarous,” but nurturing those aspects which administrators deemed locally valuable. In this system courts were to provide both cathartic entertainment and justice in order to improve public security. 23

The civil division consisted of common law courts and were the broadest in terms of the people and territory they governed. These courts applied statutes and English common law but deferred to Islamic and customary law on certain matters, mostly those affecting personal status. Section 5 of the Civil Justice Ordinance of 1900, reenacted in 1929, provided:

Where in any suit or other proceeding in a civil court any question arises regarding succession, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of Wakfs, the rule of decision shall be:

a. Any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished and has not been declared void by the decision of any competent court.

b. The Mohammedan law in cases where the parties are Mohammedan, except insofar as that law has been modified by such custom as is above referred to.

Subsection (b) was a device to cover tribal communities in the North that, though Muslim, applied an eclectic amalgamation of indigenous customs and Islamic principles. Under the provision, pure Islamic law would not apply to those people to whom customary law is applicable; rather, Islamic law as modified by their customs would apply.

The People’s Local Courts Act of 1977, revised in 1981, repealed both the Chiefs’ Courts Ordinance of 1931 and the Native Courts Ordinance of 1932, although it was essentially a continuation of the British system. The Act stipulates in article 11(1) the composition of a people’s local court,

consisting of a president, a vice president, and “sufficient number of members to be selected by the Chief Justice.” Nonetheless, most of the judges, particularly at the higher levels, such as president and vice president, are hereditary leaders, whose legitimacy in the eyes of their people devolves from that background. Decisions of people’s local courts could be appealed up a chain of local courts and, ultimately, to magistrates and the statutory court of appeal.

Perhaps the most contentious issue involving the people’s local courts concerns the so-called repugnancy clause. The qualification that customary law may be applied only insofar as it conforms to “justice, equity, and good conscience” implies not only control over local custom but also the relegation of customary law to a lower status than statutory law or Islamic law.\(^{24}\) The standard of reasonableness and its equivalents in the Sudanese administration of justice pose serious cross-cultural problems since, as Makec has noted, a custom, by its very nature, must be reasonable to the people who observe it and must be presumed to be in conformity with “justice, equity, and good conscience.” The question arises only if those making the judgment are unfamiliar with the value system represented by that custom. During the colonial period, most judges in Sudan were English; after independence, most were Northern Sudanese Muslims. Southern Sudanese legal scholar Natale Olwak Akolawin notes, “There is in each one of us an underlying philosophy of life which gives coherence and discretion to our thought and action. This philosophy of life is an outcome of inherited instincts. Traditional beliefs and acquired conviction and what one may consider just and equitable or in accordance with good conscience is necessarily limited by the above factors.”\(^{25}\) In one case, a young judge with Khartoum legal training was shocked by the Ngok Dinka custom of compensating the husband of an adulterous wife. Clearly unaware of the local values and meaning behind this custom, he argued that it was an equitable maxim that a wrongdoer could not benefit from his own wrong, and, according to him, the interests of husband and wife were so connected that for the husband to recover for his wife’s wrong was to benefit wrongfully.

Ignorance of customary law can cut both ways. I had a personal encounter with this problem during my research into the customary law of the Ngok Dinka of Abyei. While I was interning with the district judge,\(^{24}\) For a comprehensive discussion of the principles of “justice, equity, and good conscience” and the kindred concept of “justice, morality, and order” and their reception in Sudan’s legal system, See Zaki Mustafa, *The Common Law in the Sudan: An Account of the "Justice, Equity, and Good Conscience" Provision* (Oxford: Clarendon Press, 1971).
he told me that I could attend his court of appeal but should not expect to learn from it, since even though he was the appellate authority, he knew nothing about Dinka law. He explained further that in any case, since he did not want to embarrass or undermine the chiefs, he would usually allow their judgments to prevail. It is true that the influence of the chief depended largely on the extent to which his judgments were respected by higher authorities, but the concept of appeal would be meaningless if this concession were carried to an extreme. A happy medium cannot be reached in ignorance of the law.

Since the imposition of sharia, Muslim judges have generally contended that such repugnancy clauses as were applicable to customary law could not be applied to Islamic law, since it is God’s prescription. This problem, from the Southern Sudanese perspective, has been very much aggravated by the attempt to impose Islamic law on the whole country, including the non-Muslim South. To the extent that sharia is favored, customary law is disfavored. Customary law is seen as opposing Islamic law and is therefore resented. In the North, not only is customary law considered inferior, but the mere knowledge of it is seen as something to be ashamed of—and not to be encouraged by any means. And yet, an estimated 80 percent of the population is still governed by customary law, and because of original jurisdiction, revision, and appeals, civil courts are continuously confronted with it.

Southerners, despite their objection to colonial rule, now look back on the British administration with favor when compared to the Arab-Islamic domination of the independence era. As a senior Southern judge put it, “The first colonialists—the British were to some extent [more] lenient, merciful and sympathetic to our traditions than our second colonialists—the Arab, Muslim minority clique based in the capital Khartoum. I for one, thank the British for protecting our culture, identity, and customs.”

Although the place of customary law may appear to be part of a cohesive Sudanese national legal system, the situation today has been much affected not only by the incremental Islamization of the system since independence, but also by the devastating civil war in the South, which has precipitated an erosion of the principles of the rule of law.

**Customary Law, War, and Social Transformation**

Customary law, as described in this chapter, is something that was and, to a degree, still is, though in many respects it is subject to the dynamics of

the radical changes the society has been undergoing. The impact of change on customary law has several sources, including the general process of modernization, which implies transition out of the traditional social context, and reactions to the inequities of the traditional system. But perhaps the most radical transformation stems from the war that has raged in the country for decades.

Overview of Social Change

Although Sudanese society as a whole still acknowledges and respects the overarching cultural values, the specific principles emanating from them, especially as they relate to the stratifications based on descent, gender, and age, are being questioned and even openly challenged and violated in practice. Social change is, of course, a natural phenomenon. In today’s Africa, this is closely connected with modernization, a process that has been largely a function of education, conversion to Christianity or Islam, occupational opportunities, and emigration out of the traditional context. Education challenged the traditional value systems as it opened minds to a radically different worldview. The self-contained, largely homogeneous and cohesive social order of tradition became exposed to diverse perspectives. Conversion to Christianity or Islam undermined the fundamentals of the indigenous cultural value system, especially concerning ancestral continuity and its religious implications. Opportunities for employment, ranging from urban labor to professional careers, opened doors to new sources of income, which inevitably had an impact on traditional obligations and dependencies on which conformity was grounded.

All these changes combined have challenged the traditional structures and hierarchies for shaping and sharing values. Power structures based on descent are increasingly contested. Gender roles are being seriously scrutinized, especially as women under the destabilizing circumstances of war have proved more resilient and productive than men and have assumed greater responsibilities than those assigned under the traditional system. The same is true for youth, many of whom acquired modern skills, more earning capacity than their elders, and greater independence.

The civil war has profoundly affected traditional values in a wide variety of ways. People have been displaced en masse, both internally and outside the country. In some cases, people have been exposed to modern values that undermine their belief or adherence to indigenous norms. Within Southern Sudan, the conflict entailed much intercommunal contact, with unavoidable conflicts between local cultures. As a result, the normative standards of ancestral continuity, unity, and harmony through cieng, personal and collective dignity through dheeng, and combined temporal and spiritual authority of traditional leaders are evidently losing ground.
Biong Bol Bulabek, an elder of a Ngok Dinka community that has been largely displaced to northern Sudan, describes the impact of the war on the Ngok society:

When your cow is robbed and you are not allowed to cultivate otherwise you are killed, then your home has completely been destroyed to the extent that you cannot live in it any longer. Our people fled their homes for those very reasons. Some ran away pinning their hope on their daughters thinking that they could bring for them cattle in the future. But after they have grown up in northern Sudan most of the girls do not even listen to their mothers. If a mother tells her daughter to behave herself in order not to spoil her chances of marriage, the daughter would dismiss her mother as being out of date and that the days have changed. And even if the girl was lucky to be married then only little cash is given to the father with an agreement that cattle would be sorted out if people return home. . . . Even at home now people have no cattle any more. Only very few people escaped the raids of the government militia. Therefore if somebody approached you with 5 heads of cattle then you have to give away your daughter in marriage. The question is no more about the number of cattle but of a person who can look after your daughter during this difficult time.27

These developments have been immensely complicated and aggravated by the militarization of society. The introduction of guns has affected the spiritual values that were associated with the rituals and methods of resolving homicide cases. According to John Luk, “Previously, with spears and sticks, you knew your victim immediately; you were immediately identified. These days, how do you get the evidence? Who did this? It is a problem.”28

In some ways, the SPLM/A sought to engage local communities constructively by recognizing their customary laws and traditional social structures. However, whereas traditional authorities have rendered a highly valued service to the rebel movement, commanding officers and soldiers have not always been deferential to them or to the civilian population that offered them grassroots support. Violations of human rights and humanitarian law have been reported, although they are typically perceived as the result of individual misconduct rather than of SPLM/A policies.29 This is, of course, quite distinct from the egregious violations of human rights by the national authorities, which have been well documented.

According to Alor Kuol, the traditional leaders’ demand for respect toward cultural values transcended concerns about their individual powers.

29. Monyaak Alor Kuol has documented with remarkable candor some of the human rights abuses perpetrated by SPLM/A commanders and officials, although he also shows the stringent measures that the SPLM/A took against the violators. The cases he documents also demonstrate how customary law was used in the adjudication of such crimes. Alor Kuol, “The Anthropology of Law.”
Their concerns were over the breakdown of the social order and the declining morality, especially among the youth. Traditional societies were suddenly experiencing an unfamiliar rise in crime rates, destruction of property during intertribal fighting, and the killing of women and children, which was previously unknown. They saw these developments as endangering the integrity of their society and attributed them to the failure of the SPLM/A to cooperate with the local leadership on matters of public concern. During the 1994 SPLM/A national convention, the traditional leadership was able to forge a united front and ask the political and military leaders to reassert a positive role among local communities. Measures to establish civilian, as distinct from military, administration were adopted, but the SPLM/A’s need to use the limited resources available to achieve certain military and political objectives restricted its flexibility.

**Customary Law and Traditional Authority in the New Order**

Despite these negative trends, the role of customary law appears to remain vitally important, even while threatened by all the negative consequences of the war. In fact, customary laws were always in force in the liberated areas. Section 2 of the SPLM laws of 1984 recognized the application of the local custom of each community within the SPLA-liberated areas. Although the military established a hierarchy of military courts, it recognized the ordinary courts in force before the establishment of SPLA authority. Sudan government laws were rendered irrelevant in SPLA areas, and only the customary laws of the Southern communities were upheld. The customary laws of Bahr-el-Ghazal, codified before the war, under the leadership of the speaker of the Bahr-el-Ghazal regional assembly, John Wuol Makec, remained in force under the name “Re-Statement of Bahr-el-Ghazal Region Customary Law (Amendment) Act 1984.”

In line with the growing sentiments of cultural revival, customary law was further given unequivocal recognition in the SPLM’s statutory reforms of 2003. Section 3(2) of the New Sudan Penal Code, 2003, provides, “In the application of this Code, courts may consider the existing customary laws and practices prevailing in each area.” The civilian court system established by the SPLM in 1999–2000 incorporated customary courts as the two lowest levels of the six-tier judicial hierarchy. With the establishment of the government of Southern Sudan in 2005, court jurisdictions were modified to reflect new geographic boundaries, with a single Supreme Court, three regional courts of appeal, high courts for

30. Section 251 of the New Sudan Penal Code 2003 explicitly incorporates traditional methods of resolving murder cases by providing that relatives of the victim may opt for blood compensation (*dia*) in lieu of a death sentence for the perpetrator.
each of the ten states, and county courts. Below the county courts are the
payam courts, each with three members. Below these remain the two
levels of traditional courts. The regional courts, now called boma courts,
of five members drawn from two or more chieftancies, have regional as
well as appellate jurisdiction over the chiefs’ courts. The latter, the lowest
in the hierarchy, consist of the chief of each tribal jurisdiction, as presi-
dent of the court, assisted by four members. Chiefs’ courts are empowered
to deal with both criminal and civil cases as dictated in the warrant of
establishment issued by the chief justice, in much the same way as the old
system. Given the severe personnel and infrastructure shortages in the
formal courts, as well as the lack of a formal legislative framework, nearly
all disputes are resolved in customary courts.

There is also genuine cause to believe that the government of Southern
Sudan will reverse the trend in the war that had led to the weakening of
traditional authority. Despite the encroachment on traditional authority
and the occasional abuse of military power by some field commanders and
some of the military rank and file, there is general appreciation of the role
played by the traditional leaders. This was demonstrated by the Confer-
ence of Chiefs and Traditional Leaders, held in New Site in June 2004.
John Luk observed,

The Movement in fact recognizes the very important role they have played since the
inception of this war. They have preserved the integrity of the society. They have fed
our army. They have contributed selflessly to the struggle. During this the hour of
peace, are we going to discard these leaders, and you forget them? And are your
structures, which start with the boma [the lowest administrative level], going up to
the payam and the county, going to establish a system of local administration that
will tend to push the traditional authorities away? Will they be replaced by other
bodies, or will these others coexist with them in exercising the authority of govern-
nance at that level? These traditional authorities, who have persevered our institu-
tions of indigenous governance during all these years—what are we going to do
with them to make them part and parcel of our governance structures, and part and
parcel of the peace that we have achieved, their share in the victory of peace

A number of leading thinkers and policymakers made similar com-
ments on the role of traditional leaders. Commenting on the anticipated
reform of the system, with particular reference to the role of leadership,
Paul Mayom envisaged a system in which the traditional leaders absorb
the modern system of local administration instead of the other way around:
“Instead of bringing the local authority to absorb traditional authority, let
the traditional authority absorb the elements of the local administration,
which should strengthen, and create systems that can be efficient in service

delivery as well as keeping the traditional values that we would want to preserve.”

It is obvious that the war has had mixed results on customary law. On the one hand, the pervasive dominance of the military, which was dictated by the war, has undermined and weakened traditional authority. On the other hand, the support that these leaders gave the cause of the liberation struggle generally and the SPLM/A specifically, in addition to their contribution to the administration of justice under challenging circumstances, has been and still is much appreciated. Traditional authorities have also benefited from the sentiments and aspirations for cultural revivalism associated with the struggle. The post-conflict challenge now is to develop a practical program for reforming the legal system, both formal and informal, and to address the role the traditional authority is expected to play in administering justice.

The Challenges of Reform

Among intellectuals and policy leaders in Southern Sudan, given the culturally based denigration, humiliation, and domination that the South has long suffered, there is an understandable defensive response to criticism of traditional values and customary law. There is a revivalist sense of attachment to the culture as a component of a highly valued identity, for which the South fought a prolonged war in which millions died. There is also ambivalence about the human rights pressures for reform related to the status of women and children, for which traditional practices have been strongly and rightly criticized. And yet, despite the consensus in support of customary law, there is a realization that change to customs, beliefs, and practices throughout Southern Sudan is inevitable.

This calls for a delicate balance between the stability of conforming to traditional norms, and adjustment to changing conditions, perspectives, and expectations. Some of these changes are already dictating themselves, and the law needs to catch up with the realities on the ground. In other areas, the law needs to play an educational role by prescribing normative standards that transcend the traditional code. The precise details for bridging the traditional code with a new framework corresponding to modern imperatives and principles of nondiscrimination based on gender or age still need to be worked out. Because of the delicacy of the issues, change must be a self-propelled process of improvement from within rather than an imposition from without.

A realistic approach would involve three interactive processes:

- resolution of the formal national legal system, presumably of common-law origins, to meet the needs of the emerging modern society
- classification of the principles of the informal system needed to address the needs of the indigenous community at the transitional phases
- development of an integrated national legal system that would build on the principles of both informal and formal systems, ultimately producing a national code that would synthesize the most desirable principles of both systems

**Challenges of Integrating the Formal and Informal Justice Systems**

The challenges of reform are compounded by the coexistence of English common law, Islamic law, and customary law. Moreover, the dichotomy between the formal and informal systems has never been clear-cut. The Comprehensive Peace Agreement and the Interim Constitution of Southern Sudan recognize custom and popular consensus as the principal sources of legislation in the South, raising questions whether formal and informal law will remain separate or be integrated into one national legal system.

Adding to the challenge is the fact that the formal system of justice administration needs to be built from the ground up. Although the government of Southern Sudan now has the rudiments of a judicial system, capacity is lacking in all sectors. According to a recent study, “The judiciary at every level lacks trained judges, support staff or resources. Courts are rudimentary and lack even the basic essentials, like recorders and clerks. Records of proceedings are written in long hand often by the judge. Many judges admit to having limited knowledge of the customary law of the area in which they are serving. Cases outside the remit of the customary law courts or on appeal from those courts are not dealt with promptly.”

As the backlog grows, so does discontent, and distrust of the system.

The police forces that must enforce the law are in an even worse state. Many able-bodied young men from the civil police joined the liberation struggle and were replaced by men too old or too injured for combat. Training in policing skills remains minimal. The result of all this is that few police know how to investigate crime or preserve and prepare evidence for trial.

There are also serious logistical difficulties in enforcing sentences. But for those who do end up in prison, conditions are abysmal. Women prisoners are particularly affected, as their incarceration usually means rejection.

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by their families, leaving them without even the basic means of survival. Not surprisingly, there is public complaint about the lack of justice.

Against these realities, policymakers must consider how the formal and informal systems might be integrated and what law to apply. The general view among leading policymakers is that customary law should not only be recognized and applied by the traditional institutions but should be the main source of legislation and governance in all areas except those where modern exigencies require adopting from outside sources. This is a radical departure from earlier approaches that relegated customary law to a subordinate status. A major challenge in the expected tension between the two systems will be the extent to which the adversarial nature of the formal system will accommodate the conciliatory orientation of the informal system.

Key to resolving areas of tension between the two systems will be the education of the judiciary in the various customary law systems of Southern Sudan. Also vital will be a system that records and distributes case reports, to enable use of precedents in both the formal and informal systems. Deng Biong strongly endorsed the need for training of judges: “And apart from training in substantive customary law as a sitting judge, there is the question of how you allow a custom to govern a case. In case of conflict of customs, what custom should apply to a suit that is a suit of personal matter.”

Areas of Customary Law Needing Reform

In the reform of customary law, the primary focus of outside observers tends to be on human rights, particularly those of women and children. As noted in section three, the role of women is seen as one of wealth generation and distribution as well as cementing family ties through “bride wealth” and producing children. Although these cultural practices have evolved over countless generations and survived half a century of war, those whose culture is based on protecting the rights of the individual view the status of women in this system as approximating that of property. There is a demand for reform, which many women are championing.

Several areas of customary law clearly discriminate against women. The institution of marriage—including “ghost marriages” and the levirate—are primarily for the perpetuation of the male line, sometimes with little regard for the position of the woman concerned. And even though the woman’s consent is often sought for practical purposes, it is not a legal requirement, and pressure is often exerted on her to conform to the will of the family. The area of ownership of property, moveable and immoveable, in the form of cattle and land, also subordinates the position of women.

34. Author interview with Deng Biong, Rumbek, South Sudan, Feb. 2005.
Justice Chan Reec Madut, currently of the Supreme Court of Southern Sudan, sees the disadvantages associated with women’s status as outweighing the positives: “There are myriad stereotypes about women which tend to belittle them in the society and the men, whether husbands or male relatives tend to be domineering in their attitude vis-à-vis women. What is more, customs do not seem to provide sufficient protection of their rights.”

Justice Madut notes, “It is not uncommon to find families marrying off their daughters against their will.” The rules relating to divorce are also gender-biased: “Women find it increasingly difficult to divorce even cruel husbands unless the wife’s life is really threatened. . . . Generally families are less inclined to approve divorce because they will lose bridewealth, and also because they prefer to maintain the social relations created by marriage.”

Similar ambivalence applies to the status of children in traditional society. On the one hand, children are at the core of procreative continuity and are considered a blessing and social insurance for their aging parents. But certain practices violate children’s rights—for example, corporal punishment, unequal educational opportunities for girls, early marriage for daughters, school dropouts because of pregnancy, favoring paternal over maternal custody of children in the event of divorce, and scarification and other harmful practices.

In the past, these inequities were widely accepted, including by the women, as an integral part of a culture that was esteemed and, in any case, inescapable. With changes dictated not only by the normal process of development and women’s education but also by the demands of international human rights standards, the pressure on the informal justice system is mounting. Deputy Chief Justice Bullen Pancol says of the need for gender equality, “Women are known to have suffered in the past, even in Europe and America. Now women are claiming their rights. . . . We Sudanese must recognize that women must be brought up to equality with men. This should be the position of the law. . . . We should abrogate, modernize, or otherwise reform those areas of the law that seem to discriminate against women.”

Adultery is another area of discrimination. In customary law in the past, adultery was an offense committed by men, who were made to pay compensation to the husband. Today it seems that women are bearing the brunt of the punishment. Kuyang Anade, a female attorney, notes that although

36. Ibid., 10.
37. Ibid.
38. Ibid., 12–14.
there are arguments in favor of the custom of widow inheritance—it provides for continuity in the family and for the widow’s livelihood—it is also a factor in spreading HIV/AIDS. Kuyang also raises the issue of inheritance in the event of the husband’s death, when “women in the family become beggars,” saying, “We are looking at a culture that looks at the men as a superior group of persons.”40 The challenge is to change traditional attitudes—a process that will have to come from within. This can be done in the short run only by public debate, and in the mid to long run through policy-oriented education, both formal and informal.

More general criticisms of the chiefs’ courts include allegations of miscarriage of justice, favoritism, coercion, arbitrary imprisonment, or extended detention without trial. Traditionally such abuses were repugnant under the indigenous moral code. Under the modern system, when imprisonment and other means of state coercion have been made available to the chiefs’ courts, they have been subject to the supervision of government judges higher up the chain of authority. These abuses are part of the overall breakdown of the justice system associated with the war and disintegration of the traditional order. Where they persist, whether because of structural deficiencies or personal inadequacies of the court members, they need to be remedied through better discipline or training of the traditional authorities managing the courts.

A third area of concern is the issue of land ownership and use, where Western concepts of individual ownership come into conflict with the traditional African concept of communal ownership. Peter Nyot argues, “The government will have to deal with the question of collective ownership in a more understandable way than is being done at present. On the one hand, important investors will be interested, definitely. They will want security of tenure from the government to hold the land long enough to make economic sense. On the other hand, there are culturally prescribed principles of land tenure, which are very sensitive and to which people adhere religiously. How are these conflicting considerations going to be managed?”41 The approach to this problem must be phased. In the short term, it is important to protect communal rights and grant limited rights of use to outside investors. In the longer term, opening up land ownership to investors must continue to place the interests of the community above commercial exploitation of the land. The community members must continue to be seen as the owners and the primary beneficiaries from any returns from investment in their land, and the rise in their standard of living must be visibly commensurate with the profits made.

40. Author interview with Kuyang Anade, Rumbek, South Sudan, Feb. 2005.
The Reform Process: Bridging the Gap between Enthusiasm and Knowledge

A glaring feature in the discussion of customary law among leading policymakers is the wide gap between rhetoric and practice. Customary law is held up as an integral part of Southern identity, and yet, its nature and content are not widely understood. Compounding the knowledge gap, there are thought to be over fifty separate tribal groups in Southern Sudan, each with its own discrete body of customary laws.

Thus, there is some ambiguity in the advocacy: between reinventing or rediscovering customary law and recognizing and upholding a system that has long been in use and might now be adapted and reformed to meet emergent circumstances. Reform policies should stem from an in-depth understanding of the political, social, cultural, and economic processes that underpin the traditional legal system. They should consider the fundamental norms of the society, patterns of distribution, who benefits most from the system, who benefits least, and who suffers gross injustice in the system.

Michael Makuei acknowledged this up front:

In fact, if you go to our own documents, we talk about customary law being the source of legislation. But we have not even gone down to know it. What is that customary law, which we are making our source of legislation? We need to study it thoroughly. Then we can develop it, so that we make it a source of legislation based on a particular understanding. We have a great deal to learn. The field of customary law in the South is vast. And there is a lot to learn. In some areas, there is even a conflict of customary laws. These need to be recorded. We need to identify their origins, record them, and then harmonize between them. After harmonization, we need to go down to enacting them. . . . There is need for us to adopt these customs, so that they become our source of legislation.42

Recording, analyzing, comparing, and synthesizing customary law of the various tribes is widely recognized as perhaps the most compelling and urgent first step on the reform agenda. Some useful work has already been done. In the 1970s and 1980s, chiefs in what was then the province of Bahr-el-Ghazal used conferences to overcome differences in application of their customary rules and restate them in a code of law on personal status, property, personal injury, defamation, and other areas. These rules are commonly applied in the courts to this day. The most notable and productive efforts have been those of the current chief justice of Southern Sudan, John Wuol Makec. As speaker of the Bahr-el-Ghazal People’s Regional Assembly, Makec helped draft and enact the Bahr-el-Ghazal Customary Law Act of 1984, comprising the customary law of three groups: Dinka,

42. Author interview with Michael Makuei, Rumbek, Southern Sudan, Feb. 2005.
Luo, and Fertit. In 1984, the three principal tribes of Upper Nile—the Dinka, Nuer, and Shilluk—recorded their customary laws in written form, although revision and elaboration is needed. In 1998, a conference was held in Aweil, Bahr-el-Ghazal, at which the Dinka and the Luo agreed that their codes should be harmonized into one body of law.

There is also a written body of customary law that serves a number of ethnic groups of the Central Sudanic people: the Kakwa, Kuku, Pajulu, Kaliko, and Luguara tribes in Yei and Kajo-Keji Counties of Equatoria Region. The document is said to have an approximate but unverifiable date of 1996 and, in the expert opinion of one of the authors of the World Vision study, is probably outdated, although it remains a key tool for county court judges in the region.

Nevertheless, the idea of codifying customary law is still a controversial issue. It is important to note the distinction between the recording and the codification of customary law. Recording is merely making the law available in written form. Codification through a legislative act makes the law formally binding. There is broad consensus on the need for recording customary law, but there is resistance to codification. Indeed, some see codification as antithetical to the essence of customary law as a living, dynamic system. To codify it would be to freeze it and impede its capacity to adapt to changing conditions. According to Monyluak Alor, “The experience in some parts of Bahr-el-Ghazal Region proves the indifference of leaders of such local communities to the idea of codification and, indeed, their insistence to interpret the application of the rules of social control in a way that would serve the timely interest of the community.”

Recognizing the need to take a systematic and comprehensive approach to customary law, the SPLM created the Customary Law Steering Committee in 2004 to formulate and guide the process. The committee, currently under the Ministry of Legal Affairs and Constitutional Development and chaired by Justice Deng Biong, is charged with determining how to incorporate customary law into the modern state. As a first step, the committee is planning a comprehensive coverage in recording the customary law of about fifteen ethnic group clusters, with a view to ascertaining the law, harmonizing it among the ethnic groups, determining where there are gaps or inconsistencies with modern life and human rights, and, ultimately, incorporating what is acceptable into legislation. Deng Biong outlined his main reasons for recording and developing

customary law in Southern Sudan. First, since customary rules are the main source of law under the new legal system, there is a duty to ascertain, establish, and write down the customary rules; otherwise, one can claim anything to be a customary rule. Second, the civil war has claimed the lives of many of the elders who carried the content of the law in their minds; if what the remaining elders know is not written down, their knowledge may be lost forever. Third, many people have been displaced by the war and are living on other communities’ land, so when disputes arise, diverse customary rules conflict. There is a need to establish which customs should have precedence. This is especially difficult when deciding on compensation for the life of a person killed by someone from a different community. Fourth, unlike in the past, the laws of Southern Sudan do not confine the application of customary law to matters of personal status, but allow them to cover crimes and torts, thus necessitating a thorough understanding of the rules in those areas. Fifth, unification of customary rules is essential if they are to form a basis of legislation. And finally, in order to reform practices that are contrary to human rights, such as discriminatory practices, it is necessary first to know with accuracy what such practices are.46

The process of recording, analyzing, synthesizing, restating, and perhaps unifying and codifying the customary laws of the various ethnic groups is bound to be difficult and time consuming. If the law is an expression of societal values, institutions, and practices, then each system must be approached in depth, and its inner logic and integrity properly understood and built on, not to perpetuate it in full but to introduce well-considered reforms addressing the inequities or shortcomings of the traditional system. The process must therefore be well planned. Perhaps what is needed is a phased process that will allow what is learned to be applied even as more information continues to be collected and processed. Whether the ultimate goal should be the full integration of the customary laws of the country, or a separate development of each of the major regimes, with an appropriate comparative approach in their application, is a question that can be addressed only after a thorough appreciation of the situation.

The Role of International Partnership

A central theme is that Southern Sudanese leaders appear to be torn between wanting to control their own reform process and welcoming cooperation with international partners. There is ambivalence about the way international humanitarian organizations have supported pioneering

indigenous NGOs that campaign for women’s rights. But the Southern Sudanese authorities are very open to, even solicitous of, international cooperation in developing and reforming the legal system. Michael Makuei, the former minister of legal affairs and constitutional development, notes that external assistance with research into customary law must be coordinated: “You find that most of the NGOs will rush in with their money and they come and say, ‘We are conducting research in this field’ . . . After finishing the research, they don’t know where to present it.” He sees setting up the Customary Law Steering Committee as a remedy. The policy now is that whatever organization has interest in the study of customary law should liaise with the committee: “There is no way we will allow people to conduct research here and there, which is not controlled. People come up with very wild conclusions. This has been putting us into crisis with some of our constituencies. So, this customary law research should be organized, systematized.”

The Customary Law Steering Committee involves representatives from the judiciary, legal affairs, women’s and children’s welfare, local government, and law society. Sooner or later, this body is expected to develop into an institution more established than a committee.

There is much more clarity on the need for reform, and even on the principles on which the reform agenda should be based, than on the practical means of achieving those reforms. This is perhaps where collaborators could help chart the way forward and, within available means, provide material support and expertise. The final section offers some thoughts in that direction.

**Program of Action**

A program of action could be divided into several areas: fieldwork, desk work, discussion groups, and documentation of outcomes for the consideration of policy formulators and decision makers, whether legislators, administrators, or judges.

Fieldwork would involve engaging a team of researchers to record the customary law of the fifteen groups that have already been identified by the Customary Law Steering Committee. According to Deng Biong, chair of the Steering Committee, “These fifteen groups, we have proposed, will be covered by fifteen or so teams of researchers. Each research team will have one international expert, depending on the area occupied by that cultural group. So, they will be supported by the data collectors, about four or five depending on the size of the area . . . We want to target every group in Southern Sudan, and then we will ascertain and record all

the customs related to many aspects of life, issues to do with marriage, or
with family law in general, torts, and all that.48

Deskwork, wherever it is carried out, will entail collecting the results of
the fieldwork and other, already available materials on customary law, ana-
lyzing the data, identifying areas of agreement and conflict among the vari-
ous customary law regimes, and exploring a framework of uniformity, while
allowing some room for local diversity in the administration of justice.

Discussion groups are a step removed from desk work, for what is en-
visioned is a roundtable discussion of the results of fieldwork and desk
work, with a view to generating ideas that can help policymakers, admin-
istrators, and judicial authorities make informed decisions.

Documenting outcomes means preparing reports from the fieldwork,
desk work, and discussion groups to produce documents that are authori-
tative and usable by legal professionals. Connected with this would be
organizing legal training sessions to familiarize the legal profession with
the available knowledge and the challenges facing their profession.

The broader issue of the relevancy of customary law to legislation, gov-
ernance, and constitutionalism needs an investment of more thought and
dialogue. There is still the conventional view of customary law as “an in-
formal system” that contrasts with the “formal system,” with the connota-
tion that the customary is marginal and subordinate. And yet, Southerners
of every region and ethnic group take pride in their customary law as a
part of their identity and self-determination that should influence all
levels of their life, informal and formal, private and public. It is seen al-
most as a mirror image of the Muslim view of sharia as “the path,” which
the South has been violently resisting. Whether customary law or, more
broadly, traditional culture will be able to provide a practical and viable
normative framework for legislation, good governance, and effective ad-
ministration remains to be seen.

There is certainly room for international partnership, but this must be
delicately forged, with due sensitivity to cross-cultural perspectives on the
issues involved. Apart from support in funding some of the activities out-
lined above, there is also a call for international support in the training of
judges, attorneys, and police, the preparation and evaluation of the Con-
stitutions of Sudan and Southern Sudan, and the drafting of the laws of
the Southern Sudan government, as well as support for conferences and
workshops to discuss the various products and ideas generated by the re-
form process.

The recommendations made by the various studies (including this one)
and interviewees fall into two groups: generic recommendations for the

government of Southern Sudan, and those related to partnership with the international community.

For the government of Southern Sudan, reform involves several challenges:

• clarify policy on the role of customary law in the administration of justice, legislation, governance, and constitutionalism
• determine what making customary law a basis for legislation means, and whether this means integrating it into the entire system or keeping it separate and using it as a source and an inspiration for legislation
• record the customary laws of the various ethnic groups in Southern Sudan, analyze them comparatively, synthesize them, and restate them with a view to reforming them
• analyze existing laws with a view to harmonizing them with the terms of the Comprehensive Peace Agreement and the Interim Constitutions of Sudan and Southern Sudan, including the place of customary law
• from existing studies and documents, prepare materials for training judges, lawyers, and police on customary law and its place in the Southern Sudan legal system
• conduct special training programs for traditional authorities to understand their role in the overall administration of justice
• determine whether, and how, the rules of customary law and the traditional authority will remain a separate branch of the system or be integrated into the Southern Sudan legal system
• prepare materials on the extent to which the rules of customary law support or oppose international human rights standards, and make them available both to the traditional authorities (in the language they understand) and to national authorities in the relevant branches of government

International partners can help in several ways:

• fund government policies that promote constructive development of the formal system and linkages with the informal system
• help train judges, lawyers, and administrators on the generic function of the informal system (customary law) in partnership with the formal system (statutory law), building on the experiences of other countries
• provide expertise in drafting the laws of the government of Southern Sudan to deal with generic problems that confront a modern state, to manage the diversity within the South, to forge a culturally sensitive democratic system, and to promote a human rights agenda that builds on the values of the indigenous society
• support brainstorming conferences, workshops, and discussion groups involving scholars, policymakers, and practitioners, to discuss the results
of research, policy analysis, and recommendations and to generate further recommendations for the government of Southern Sudan and the international community.

While these recommendations point to areas of obvious need where action is required, the challenge of developing and reforming customary law is a complex and daunting one that cannot be reduced to a few sets of disparate recommendations. These recommendations, and others from various sources, should be viewed as merely providing material and a framework for discussion with experts and practitioners, in Sudan and other countries, who have faced similar challenges in developing and reforming customary law. It is from such discussions that a well-thought-out conceptual framework and plan of action can evolve.