

Between Tradition and Constitutionalism: Customary Justice and Human Rights in South Sudan

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Abstract

The customary justice system remains the principal mechanism for dispute resolution across many communities in South Sudan, particularly where formal justice institutions are inaccessible. Its accessibility, affordability, and restorative orientation have made it an integral component of the country's plural legal system. Yet, the continued application of certain customary norms raises significant constitutional and human rights concerns, particularly regarding the protection and promotion of the rights of women and girls. This article, therefore, critically examines the relationship between customary justice, access to justice, and human rights within South Sudan's plural legal order. Adopting a doctrinal legal research methodology, it analyses the constitutional and statutory provisions governing customary justice, together with relevant regional and international instruments, as well as academic and policy literature. The article argues that the challenge lies not in the existence of customary justice itself, but in ensuring that its operation conforms to constitutional principles and human rights standards. It concludes that meaningful harmonisation, strengthened institutional oversight, and effective implementation of existing legal safeguards are essential to preserving the legitimacy of customary justice while safeguarding fundamental rights.

Keywords: Constitution; Customary Justice; South Sudan; Legal Pluralism; Access to Justice; Human Rights; Girl Child; Customary Norms and Practices; Customary Courts; Traditional Authorities.

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INTRODUCTION

Two parallel legal systems shape justice in South Sudan, one grounded in statutory law and administered by the formal judiciary, and the other rooted in customary law and administered by traditional authorities. For hundreds of thousands of South Sudanese, justice is not found in a courtroom presided over by a judge but beneath the shade of a tree, where traditional chiefs resolve disputes under customary law. In many rural, remote, and displaced areas, customary courts are not an alternative to the formal justice system; they are the justice system. From disputes over land and cattle to matters of marriage, inheritance, and community reconciliation, customary institutions remain the primary avenue through which citizens seek justice. Their enduring relevance reflects not only the resilience of indigenous legal traditions but also the limited reach of formal state institutions in a country affected by protracted conflict, displacement, and feeble institutions.

The Transitional Constitution of South Sudan recognises customs and traditions as one of the main sources of legislation, affirming the continued relevance of customary law within the country's plural legal order. Strikingly, customary law in South Sudan is not a single, uniform body of law, given the multi-ethnic state comprising more than sixty-four (64) ethnic communities; diverse customs and traditions characterise the country, each with its own normative rules governing matters such as marriage, inheritance, land tenure, family relations, and dispute resolution. Consequently, the administration of customary justice varies across communities, reflecting South Sudan's rich cultural diversity while also presenting challenges for consistency, legal certainty, and the uniform protection of constitutional rights. Against this backdrop, customary justice occupies a rather complex position within South Sudan's legal system. While it remains an indispensable mechanism for resolving disputes and maintaining social cohesion at the community level, the diversity of customary norms and practices continues to raise important questions regarding their compatibility with constitutional principles of equality before the law and compliance with national and international legal standards.

Against this background, this article critically examines the influence of customary justice in South Sudan, focusing on its contribution to access to justice and its implications for the protection of human rights. Employing a qualitative research methodology through doctrinal legal research, this article analyses primary legal sources, including constitutional, statutory, regional, and international legal frameworks governing customary justice and access to justice, as well as relevant academic and policy reports and judicial decisions (where available). The choice of the research topic and contextual understanding of the issues discussed are informed by the author's professional experience working on access to justice, gender-based violence, and human rights in South Sudan. Through engagement with relevant actors and survivors of violence in the course of professional responsibilities, the author observed the diverse ways in which customary justice operates across different communities, including varying approaches to dispute resolution, marriage, inheritance, and compensation. These professional observations are not treated as empirical evidence for this article but provide practical context for the legal analysis, which is grounded exclusively in documentary and legal sources.

The Concept and Evolution of Customary Justice in South Sudan

Customary justice remains one of the oldest and most enduring forms of dispute resolution in Africa, predating the establishment of modern state institutions and continuing to regulate social relations in many contemporary societies. Its continued relevance reflects the reality of legal pluralism, which Tamanaha describes as the coexistence of multiple legal orders within

the same social field, challenging the notion that the State is the sole source of law. Griffiths contrasts legal pluralism with legal centralism, an ideology that regards law as deriving exclusively from the State and administered through state institutions. He argues that this conception fails to reflect the realities of many societies, particularly those in which customary and statutory legal systems coexist. This conception is particularly evident in South Sudan, where customary and statutory legal systems operate alongside one another in the administration of justice. Despite the constitutional and statutory development of the formal sector, customary justice continues to enjoy widespread legitimacy because it reflects the social values, traditions, and lived realities of the communities it serves.

Broadly understood, customary justice refers to systems of dispute resolution founded on the customs, traditions, and normative practices of a particular community. Unlike statutory law, which derives its authority from legislation enacted by the State, customary justice is rooted in community acceptance and long-established social norms that have evolved over generations. These norms are largely unwritten and are transmitted through practice, oral tradition, and collective memory, allowing customary law to evolve in response to changing social circumstances while preserving the cultural identity and values of the communities that observe it. As a system of justice, customary law regulates a broad range of social relationships, including matters relating to marriage, family relations, inheritance, land tenure, cattle ownership, and other aspects of communal life.

While the advent of colonial administration during the Anglo-Egyptian Condominium (1899-1956) transformed, it did not replace, indigenous systems of justice. Through the policy of indirect rule, colonial authorities incorporated traditional leaders into the colonial administrative structure and entrusted them with judicial and administrative responsibilities within their respective communities. Chiefs became responsible for interpreting and applying customary law in local disputes, thereby formalising institutions that had previously operated primarily through customary authority. Therefore, colonial intervention did not only reshape the structure and authority of customary institutions, but also reinforced their role in local governance and dispute resolution. Although this model of local governance has continued till date, the interpretation and application of customary norms has varied degrees throughout the period of unified Sudan.

Following South Sudan's independence in July 2011, customary justice retained its central place within the administration of justice. The limited geographical reach of formal courts, shortages of judicial personnel, inadequate infrastructure, prolonged conflict, and widespread displacement have reinforced reliance on customary institutions, particularly in rural and conflict-affected areas. In South Sudan, the administration of customary justice is vested primarily in traditional authorities, including chiefs, elders, and other recognised community leaders, whose legitimacy derives from customary acceptance of a particular community and statutory recognition. Their functions extend beyond the determination of disputes to include mediation, reconciliation, conflict prevention, and the preservation of social harmony. In carrying out their responsibilities, most traditional authorities commonly seek to restore relationships between individuals and communities through dialogue, consensus, restitution, and compensation, reflecting a restorative philosophy that underpins customary justice. This emphasis on reconciliation distinguishes customary justice from the predominantly adversarial nature of the formal judicial system and explains its continued acceptance and relevance within many South Sudanese communities.

The Legal Framework Governing Customary Justice in South Sudan

The Transitional Constitution of South Sudan

The legal foundation of customary justice in South Sudan is rooted in the country's Transitional Constitution and statutory framework, which recognise customary law as an integral component of the national legal system. This recognition reflects the country's plural legal order, in which customary and statutory legal systems operate alongside one another to administer justice. While the formal judiciary derives its authority from the Transitional Constitution and legislation, customary courts exercise jurisdiction over matters governed by customary law, subject to constitutional principles and statutory regulations.

The Transitional Constitution provides the principal legal basis for the recognition of customary law and traditional authority. *Article 5 (b)* identifies customary law as one of the sources of legislation in South Sudan, provided that it is consistent with the Constitution. This constitutional recognition affirms the legal status of customary law while simultaneously subjecting it to constitutional supremacy. Consequently, customary norms and practices that conflict with the Constitution, particularly the Bill of Rights, may be challenged and invalidated to the extent of their inconsistency.

The Local Government Act

The Local Government Act constitutes the principal statutory framework governing the administration of customary justice in South Sudan. While the Transitional Constitution recognises customs and traditions as a source of legislation, it is the Local Government Act that operationalizes this constitutional recognition by establishing customary courts and defining their jurisdiction, powers, and functions within the decentralised system of local governance. The Act therefore serves as the primary legislative instrument through which customary justice is institutionalised and integrated into South Sudan's formal legal system.

A defining feature of the Act is its recognition of South Sudan's legal and cultural diversity. *Section 98(1)* provides that customary courts shall adjudicate disputes and render judgments in accordance with the customs, traditions, norms, and ethics of the respective communities. This provision acknowledges that customary law in South Sudan is neither uniform nor codified but consists of diverse indigenous legal systems reflecting the customs and traditions of the country's many ethnic communities. Rather than imposing a single body of customary law, the Act permits customary courts to apply the normative values of the communities they serve, thereby enhancing the legitimacy, accessibility, and cultural responsiveness of customary justice.

The jurisdiction of customary courts is further elaborated under *sections 100, 101, and 102* of the Act, which define the categories of disputes that fall within the competence of customary courts and establish the limits of their authority within the broader justice system. In general, customary courts are empowered to determine disputes arising from customary law, including matters relating to marriage, divorce, inheritance, family relations, land tenure, cattle ownership, and other disputes that are traditionally governed by community customs and practices. By conferring jurisdiction over such matters, the Act recognises that many disputes are more effectively resolved through institutions that possess a detailed understanding of local customs, traditions, and social relationships. The jurisdictional framework established by the Act also reflects the restorative philosophy underpinning customary justice.

Importantly, the LGA demonstrates that Parliament intended customary justice to function not merely as a mechanism for preserving tradition but as a constitutional institution operating within the broader framework of the rule of law. This intention is reflected in *sections 95 and 96*, which establish the Customary Law Council and define its functions. On the one hand, *section 95* mandates the Council to preserve and promote the traditions, customs, cultures, values, and norms of South Sudan's diverse communities, thereby recognising customary law as an integral component of the country's legal and cultural heritage. *Section 96(4)* expressly requires the Council to ensure that the rights and freedoms enshrined in the Transitional Constitution are upheld and respected in customary courts. The significance of these provisions lies in the deliberate balance they seek to achieve between preserving indigenous legal traditions and safeguarding constitutional rights. They make clear that the legitimacy of customary justice is measured not only by its cultural acceptance but also by its compliance with constitutional principles and fundamental human rights. Consequently, the continued occurrence of human rights violations within some customary justice processes should not be attributed solely to deficiencies in the legal framework but also to the challenges associated with the effective implementation, oversight, and enforcement of the safeguards already established under the Act.

The Code of Civil Procedure Act

Notably, the statutory recognition of customary law within the formal judicial system represents one of the clearest manifestations of legal pluralism in South Sudan. Rather than confining customary law to traditional forums, the legislative expressly permits its application by civil courts in matters of personal law. In this regard, *Section 6 (a)* reflects the legislature's acknowledgement that these matters are deeply rooted in the customs, traditions, and social values of the diverse communities that constitute South Sudan. By requiring courts to apply the relevant customs of the parties, the Act seeks to ensure that the resolution of personal law disputes remains culturally relevant and responsive to the lived realities of the communities concerned. At the same time, it bridges the divide between customary and statutory justice by incorporating customary norms into the formal adjudicative process, thereby recognising customary law not merely as a social institution but as a legally cognisable source of law in specified areas of civil jurisdiction.

The Penal Code Act

The Penal Code Act (PCA) provides the principal statutory framework governing criminal offences in South Sudan while simultaneously acknowledging the continuing relevance of customary law within the administration of justice. Notably, the PCA permits courts, in the application of the Act, to consider the existing customary laws and practices prevailing in the relevant area. This provision reflects the country's plural legal system by acknowledging that criminal conduct frequently arises within social contexts governed by customary norms and traditions. It therefore enables courts to take into account local customs where appropriate, recognising that customary practices may provide important contextual guidance for understanding disputes and the social relationships from which they arise. However, the recognition of customary laws and practices under the Act does not subordinate statutory criminal law to customary norms. Rather, it preserves the primacy of the Penal Code by allowing customary considerations only insofar as they are compatible with the Act and the broader constitutional framework. Consequently, customary practices cannot be relied upon to justify conduct that constitutes a criminal offence under statutory law, nor can they override constitutional guarantees or the rights of victims.

The Land Act

The Land Act constitutes one of the most significant statutory instruments governing the relationship between customary law and the formal legal system in South Sudan. Recognising that land in South Sudan is closely intertwined with customary tenure systems, the Act acknowledges the central role of customary institutions in land administration while simultaneously establishing statutory mechanisms to regulate land governance. In doing so, it seeks to harmonise customary land practices with the broader objectives of legal certainty, sustainable land management, and equitable access to land. The Act expressly recognises customary land rights and affirms the continued application of customary law in matters relating to land ownership, classification, allocation, and use. This recognition reflects the reality that land in many parts of South Sudan is held, managed, and transferred in accordance with customary norms rather than formal registration systems.

The institutional framework established under the Act further demonstrates the integration of customary and statutory land governance. The Act provides for the establishment of County Land Authorities and Payam Land Councils, decentralised institutions responsible for land administration and dispute resolution at the local level. These bodies perform functions relating to land management, dispute resolution, and the implementation of land policies while operating within communities where customary tenure remains the dominant system of landholding. Their establishment reflects legislative recognition that effective land governance cannot be achieved without engaging local institutions familiar with customary land practices.

The Child Act of South Sudan

The Child Act provides an important statutory framework for the protection and promotion of children's rights in South Sudan and has significant implications for the operation of customary justice. A central feature of the Act is its emphasis on the best interests of the child as the primary consideration in all matters affecting children. This principle requires that decisions concerning children's welfare, custody, care, protection, and development prioritise the child's rights and well-being above competing social or cultural considerations. Consequently, customary practices affecting children must be assessed against this statutory standard to ensure that they do not undermine the rights guaranteed under the Act and the Constitution.

The Act also places specific responsibilities on public authorities to protect children from abuse, neglect, exploitation, and other forms of harm. In particular, the Act imposes duties on local government authorities to safeguard and promote children's welfare, intervene where their rights have been infringed, support family-based care, and provide protection and assistance to children in need of special care. Although these provisions are directed primarily at government authorities, they reinforce the broader statutory obligation to protect children and establish standards that should inform the resolution of disputes involving children within customary justice systems. The interaction between the Child Act and customary justice is particularly significant because many disputes concerning children, including matters relating to custody, guardianship, family relations, inheritance, and marriage, continue to be addressed through customary mechanisms.

The Role of Customary Justice in Enhancing Access to Justice

Access to justice is widely recognised as a fundamental component of the rule of law and an essential prerequisite for the protection and enjoyment of human rights. It encompasses more than the existence of courts or legal institutions; it requires that individuals can obtain timely,

affordable, effective, and impartial remedies for violations of their rights. In societies characterised by legal pluralism, access to justice may be realised through both formal and informal justice mechanisms, provided that such mechanisms operate consistently with constitutional principles and internationally recognised human rights standards. Within this context, customary justice has become an indispensable component of South Sudan's justice system, particularly in communities where formal judicial institutions remain inaccessible or entail considerable financial costs, long distances, and prolonged delays. Customary courts therefore fill an important justice gap by providing dispute resolution mechanisms that are geographically accessible, procedurally flexible, and closely embedded within local communities.

One of the principal strengths of customary justice in many communities across South Sudan is its accessibility. Unlike statutory courts, which are often concentrated in urban centres, customary courts are located within the communities they serve and are administered by traditional chiefs who possess a detailed understanding of local customs, languages, and social relationships. Their proximity enables individuals to seek justice without incurring substantial travel expenses or navigating complex procedural requirements. This accessibility is particularly important for women, older persons, persons with disabilities, internally displaced persons, and economically disadvantaged communities who may encounter significant barriers to accessing the formal justice system.

Affordability further strengthens customary justice's role in promoting access to justice. Proceedings before customary courts are generally less expensive than litigation before statutory courts, requiring limited procedural formalities and reducing the financial burden associated with legal representation, transportation, and court fees. The relative affordability of customary justice makes it a practical and often indispensable avenue for resolving disputes among communities with limited economic resources.

Customary justice also derives legitimacy from its cultural acceptance and community ownership. Because respected traditional leaders resolve disputes by applying norms familiar to the communities concerned, customary courts often command a high degree of public confidence and voluntary compliance. Proceedings are commonly conducted in local languages and involve active participation by families, elders, and other community members, thereby promoting understanding, transparency, dialogue, and community ownership of the dispute resolution process. This participatory approach contributes not only to the resolution of individual disputes but also to the restoration of social harmony and the preservation of peaceful relationships within communities.

The contribution of customary justice to access to justice therefore extends beyond the resolution of disputes. By providing accessible, affordable, culturally legitimate, and community-centred mechanisms for addressing grievances, customary justice performs an indispensable role within South Sudan's plural legal system. However, the very characteristics that contribute to its accessibility also give rise to important constitutional and human rights questions, particularly where customary norms and practices conflict with statutory law or internationally recognised human rights standards. These tensions are examined in the following section.

Customary Justice and Human Rights: A Critical Analysis

The recognition of customary justice within South Sudan's plural legal order inevitably raises a fundamental constitutional question: how can a system founded upon diverse customs and

traditions operate consistently with a constitutional framework that guarantees universal rights and freedoms? While customary justice has long served as an indispensable mechanism for maintaining social order and resolving disputes within local communities, its continued legitimacy depends not only on its cultural acceptance but also on its conformity with constitutional principles and South Sudan's regional and international human rights obligations. The central challenge, therefore, lies in reconciling respect for cultural diversity with the constitutional imperatives of equality, dignity, due process, and the rule of law.

This tension is inherent in legal pluralism itself. The coexistence of statutory and customary legal systems creates opportunities for expanding access to justice, but it also raises difficult questions regarding the hierarchy of legal norms, the uniform protection of fundamental rights, and the limits of cultural autonomy. Although the Constitution recognises customs and traditions as a source of legislation under *Article 5 (b)*, such recognition should be understood as neither absolute nor unconditional, simply because customary law derives its legitimacy within the constitutional order only to the extent that its application remains consistent with constitutional guarantees and applicable statutory law. Consequently, customary justice must be continually assessed against the standards established by the Constitution and international human rights law.

The application of customary law within South Sudan's plural legal system is not without legal limits. For instance, Section 6(a) of the Civil Procedure Act expressly provides that customary law may only be applied where it is not contrary to principles of justice, equity, or good conscience, thereby establishing an important normative framework for evaluating the compatibility of customary practices with constitutional and human rights principles. Although these concepts are not defined in the Act, Kartikeya asserts that they embody fundamental standards of fairness, impartiality, and reasonableness that have long guided judicial scrutiny of customary law in common law jurisdictions. In the context of South Sudan, these principles serve as an important safeguard against the enforcement of customary norms that produce discriminatory, oppressive, or manifestly unjust outcomes. Consequently, customary practices that perpetuate gender inequality, deny women and girls equal rights, facilitate harmful traditional practices, or undermine the rights of children cannot be justified solely based on cultural acceptance. Rather, the principles of justice, equity, and good conscience require that customary law evolve in a manner that is consistent with constitutional guarantees of equality, human dignity, and non-discrimination.

One of the most persistent areas of concern relates to gender equality in customary courts. Despite *Article 14* of the Transitional Constitution guaranteeing equality and non-discrimination, in many communities, customary norms continue to reflect patriarchal social structures that disadvantage women, particularly in matters relating to marriage, inheritance, division of matrimonial property, divorce, and participation in decision-making processes. Given the diversity of customary practices across South Sudan, many of these practices perpetuate structural inequalities that are incompatible with the constitutional guarantee of equality and undermine women's equal enjoyment of rights protected under *Article 16* of the Transitional Constitution, as well as regional and international human rights instruments. The legal challenge lies not only in the existence of customary justice as a recognised component of South Sudan's plural legal system, but in the continued application of customary norms that are incompatible with constitutional guarantees of equality and human dignity,

Another area of significant human rights concern relates to customary practices involving compensation through the transfer of girls to the victim's family following serious offences

such as homicide, particularly in Eastern Equatoria of South Sudan. Although such practices are rooted in customary notions of collective responsibility and reconciliation, they raise profound constitutional and human rights concerns, especially freedom from harmful traditional practices and the principle of the best interests of the child. Moreover, they effectively treat girls as objects of compensation rather than autonomous rights-holders, thereby undermining their dignity, equality, and personal autonomy. From a constitutional and child rights perspective, the practice is particularly objectionable where it involves a child, as it violates the protective guarantees afforded under the national laws and conflicts with South Sudan's commitments to safeguarding children under regional and international frameworks. Although customary justice is fundamentally premised on restoring communal harmony and social cohesion, such objectives cannot be pursued at the expense of the constitutional and fundamental rights of the girl child.

Moreover, the protection of children's rights constitutes a critical point of intersection between customary justice and constitutional as well as international human rights obligations. Although customary institutions continue to play a significant role in resolving disputes involving children, certain customary practices remain incompatible with the legal framework governing Children's rights in South Sudan. In particular, the persistence of child marriage in some communities exposes girls to early and forced unions, thereby violating the principle of the best interests of the child (*Section 6 CA*) and undermining their rights to opinion (*Section 17 CA*), development (*Section 12 CA*), education (*Section 14 CA*) and *Article 17* of the Transitional Constitution. Such practices not only impair their physical and psychological well-being but also impede their ability to exercise their rights as autonomous rights-holders, contrary to the protections afforded to them.

Similarly, the protection of children's inheritance rights remains an area in which certain customary norms come into direct tension with constitutional and human rights guarantees. Although inheritance practices vary considerably across South Sudan's diverse communities, girls in some customary systems continue to face discriminatory treatment in matters of succession, particularly those from polygamous families, where preference is frequently accorded to male siblings or male relatives. Such practices not only deprive girls of economic security and long-term livelihood opportunities but also entrench structural gender inequality from an early age. Consequently, customary rules that discriminate against girls in matters of inheritance are incompatible with the constitutional guarantees of equality and non-discrimination under *Article 14* and cannot be reconciled with domestic, regional, and international obligations to protect the rights of children.

Significant constitutional and human rights concerns arise from customary practices in some communities where girls and young women who refuse arranged or forced marriages are subjected to coercive measures, including arbitrary detention, confinement in police custody, and in some instances, physical violence until they submit to the proposed union. Such practices amount to an unlawful deprivation of liberty and are incompatible with the constitutional guarantees of *liberty (Article 12)*, *human dignity and bodily integrity (Article 11)*, and *freedom from torture and cruel, inhuman, or degrading treatment (Article 18)*. More fundamentally, the involvement of law enforcement authorities in facilitating or enforcing these practices represents a serious departure from the rule of law. Rather than serving as institutions for the protection and enforcement of constitutional rights, public authorities become mechanisms through which harmful customary practices are legitimised and perpetuated, thereby eroding public confidence in the administration of justice and

undermining the State's constitutional obligation to respect, protect, promote, and fulfil fundamental rights.

Closely related to this concern is the manner in which consent to marriage is understood within certain customary systems. In some communities, the validity of a marriage is determined not solely by the free and informed consent of the intended bride but also by the approval or consent of her father, brothers, uncles or other relatives, who play a central role in negotiating and authorising the marriage. While the involvement of family members in marriage negotiations is deeply embedded in many customary traditions and may serve important social and cultural functions, it becomes problematic where familial approval supersedes or effectively substitutes for the woman's own consent. In such circumstances, the woman's or the girl's autonomy and agency are significantly diminished, rendering her ability to accept or reject the proposed marriage largely illusory. This practice is difficult to reconcile with the constitutional guarantees of equality, dignity, and personal liberty, as well as South Sudan's commitments under *Article 6 (a) of the Maputo Protocol* and *Article 16 (b) of CEDAW*, which recognise free and full consent as an indispensable prerequisite to a valid marriage. Consequently, customary practices that elevate the consent of male relatives above that of the intending bride undermine both the constitutional protection of women's rights and the fundamental principle that marriage must be entered into voluntarily by both parties.

Perhaps the most contentious issue concerns the treatment of serious criminal offences by customary justice systems. Although statutory criminal law vests responsibility for prosecuting offences such as homicide under *Section 206* and sexual violence, particularly Rape under *Section 247* of the Penal Code, in the formal criminal justice system, customary mechanisms continue in some communities to facilitate reconciliation and compensation between the families of victims and offenders. These practices reflect the restorative philosophy of customary justice, which prioritises the restoration of social harmony and the prevention of retaliatory violence. Nevertheless, where such processes effectively replace criminal prosecution, they may conflict with the Penal Code Act, constitutional guarantees of the rights of a victim, and the State's obligations to investigate, prosecute, and punish serious crimes, thereby raising profound questions regarding the rights of victims, accountability of offenders, and the public interest in the administration of criminal justice.

These challenges should not be understood as a rejection of customary justice or its continued relevance within South Sudan's legal system. On the contrary, they illustrate the complexity of administering justice within a plural legal order where constitutionalism, customary law, and human rights must coexist. The objective is therefore not to replace customary justice with the formal justice system but to ensure that customary courts continue to provide accessible and culturally legitimate dispute resolution while operating within the constitutional framework and respecting the fundamental rights and freedoms guaranteed to every individual.

Towards Harmonising Customary Justice with Constitutionalism and Human Rights

The preceding analysis demonstrates that customary justice occupies an indispensable position in South Sudan's justice sector. Its accessibility, affordability, cultural legitimacy, and restorative character have enabled it to remain the principal mechanism through which many communities resolve disputes. At the same time, its operation within a constitutional democracy requires continuous efforts to ensure that customary norms and practices remain compatible with constitutional principles, statutory law, and international human rights obligations. The future of customary justice, therefore, depends not on its displacement by the

formal justice system but on the development of a coherent legal framework capable of reconciling cultural legitimacy with constitutionalism.

- **Harmonisation of customary norms and constitutional and statutory standards:** The continued legitimacy of customary justice depends upon the consistent application of customary norms in a manner that accords with the constitutional guarantees of equality, human dignity, non-discrimination, access to justice, victims' rights and fair trial, as well as applicable statutory and international human rights obligations.
- **Strengthening accountability mechanisms for the customary justice institutions:** Effective legal and administrative accountability mechanisms should be established and enforced where customary courts or chiefs knowingly exceed their statutory jurisdiction, disregard appellate decisions, or adjudicate matters reserved exclusively for the formal justice system, thereby reinforcing constitutional supremacy and the rule of law.
- **Institutional capacity-building:** Regular training for chiefs and other customary justice actors on constitutional law, statutory developments, child and women's rights, fair trial guarantees, and international and regional human rights standards should be institutionalised to promote legally compliant and rights-based decision-making while preserving the cultural legitimacy of customary justice.
- **Promoting inclusive and rights-sensitive customary justice:** Greater participation of women within customary justice should be encouraged, child-sensitive approaches to dispute resolution should be mainstreamed, and survivors of gender-based violence should have effective access to formal justice mechanisms in cases that fall outside the jurisdiction of customary courts or involve serious human rights violations.
- **Enhancing institutional oversight and coordination:** Existing oversight mechanisms should be operationalised through coordinated engagement among the Ministry of Justice and Constitutional Affairs, the Judiciary, Local Government, and other competent State institutions to ensure that customary justice operates consistently with constitutional and statutory requirements while respecting its complementary role within South Sudan's plural legal system.

CONCLUSION

This article has examined the influence of the customary justice system in South Sudan through the lens of access to justice and human rights within the country's plural legal order. It has demonstrated that customary justice remains an indispensable component of the administration of justice, particularly in communities where formal judicial institutions remain geographically, financially, or institutionally inaccessible. Rooted in the customs and traditions of South Sudan's diverse communities, customary justice continues to provide accessible, affordable, culturally legitimate, and restorative mechanisms for resolving disputes while promoting social cohesion and preserving community relationships.

The analysis has further shown that South Sudan's legal framework does not regard customary justice as operating outside the national legal system; rather, it collectively recognises and regulates the operation of customary justice within the broader constitutional and statutory framework. These legal instruments acknowledge the continued relevance of customary law

while affirming that its application must remain consistent with constitutional supremacy, the rule of law, and the protection of fundamental rights and freedoms under the Bill of Rights.

Notwithstanding its significant contribution to access to justice, the article has argued that customary justice continues to present important constitutional and human rights challenges. The diversity of customary legal systems, the absence of uniform procedures, the treatment of women and the girl child in certain customary practices, and the handling of serious criminal offences through customary mechanisms illustrate the complexities of administering justice within a plural legal system. These challenges, however, should not be interpreted as justification for diminishing the role of customary justice; rather, they underscore the need to strengthen customary institutions in a manner that preserves their restorative philosophy and community legitimacy while ensuring compliance with constitutional and international human rights standards.

The future of customary justice in South Sudan therefore lies not in its replacement by the formal judicial system but in its progressive harmonisation with constitutional principles and statutory law. A justice system that values both cultural legitimacy and the protection of fundamental rights is better positioned to respond to the realities of South Sudan's diverse communities while upholding the ideals of constitutionalism and the rule of law. Achieving this balance will require sustained legislative reform, institutional capacity-building, meaningful collaboration between customary and formal justice institutions, and continued commitment to the protection of human rights.

Ultimately, customary justice should be understood not as a competing alternative to the formal justice system but as an integral component of South Sudan's broader justice architecture. When administered consistently with constitutional values and human rights standards, it has the potential to strengthen access to justice, reinforce social cohesion, and contribute meaningfully to peacebuilding, good governance, and sustainable development. Its continued legitimacy will therefore depend not only on its historical and cultural foundations but also on its capacity to evolve alongside South Sudan's constitutional and democratic aspirations.

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APPENDIX

National Legislations

Child Act 2008 (South Sudan)

Code of Civil Procedure Act 2007 (South Sudan)

Code of Criminal Procedure Act 5 2008 (South Sudan)

The Land Act 2009 (South Sudan)

Local Government Act 2009 (South Sudan)

Penal Code Act 2008 (South Sudan)

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