CUSTOMARY AND INDIGENOUS LAW IN TRANSITIONAL POST-CONFLICT STATES: A SOUTH SUDANESE CASE STUDY

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Post-conflict societies and transitional states, including those in our region the Pacific, are increasingly seen as fertile ground for the imposition of externally designed legal systems. Imposition can occur as a result of NGO advocacy, the transposition of 'ready made' legal systems by the international civil society or by supra-national and international organisations. Not only is the existence of local customary legal systems often ignored during this process, but the strengths and inherent infrastructure of customary systems are often not capitalised on during the implementation phase of the new system, ultimately to the detriment of the state's legal system. The result of these failures is that establishment of law and order proves more elusive than it otherwise could be. Customary and traditional legal systems, in their many varied forms, continue to provide a source of social stability and a basis on which indigenous legal development could occur in numerous post-conflict and transitional states around the world. Additionally, customary law also functions as a central element of peoples' cultural integrity and heritage. By using transitional South Sudan as a research case study, important lessons are brought to the fore about the advantages and importance of both acknowledging and building on existing local legal systems in transitional states. Customary legal systems can potentially provide a key avenue through which to expedite rule of law and judicial development in post-conflict and transitional states. Insights into this process are provided by an examination of the interfaces in South Sudan between local customary legal systems, nascent statutory regimes and internationally promoted human rights standards.

I INTRODUCTION

Increasingly, post conflict and transitional states are seen as potential candidates for the imposition of externally designed legal systems. This can occur either

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under a United Nations ('UN') styled 'automatic jurisdiction',[1] through the design of 'ready made legal' systems, ready to be taken off the shelf and rapidly implemented in the aftermath of conflict or regime change,[2] or even through concerted NGO [non-government organisation] advocacy. There are undoubtedly clear benefits to being able to provide political *and* legal stability relatively quickly to a region and, in some instances, these initiatives are both suitable and desirable.

Beyond obvious questions of sustainability, however, there remain several major drawbacks to an externally-driven and unilateral imposition of an intrinsically foreign legal regime in post-conflict societies. The most important drawback identified in this article is that, unless implemented in a holistic fashion involving adequate local consultation, such imposition can easily fail to take into account the important contribution to local stability and the rule of law that existing personal, customary or traditional legal systems make. Replacing (or undermining) these systems with an under-funded and ill-advised foreign legal system can create a void where once there was order. In addition, in states where customary or personal law exists, those systems are usually central elements of a people's cultural identity or 'cultural sovereignty'. Attempting to replace or undermine these legal systems, rather than complement or build on them, is resonant of colonialist interference and undesirable cultural imperialism. Understanding how existing aspects of customary legal systems could be harnessed to complement centralisation (statute based) and internationalisation (treaty based) of indigenous legal systems is an important step in better equipping practitioners and others at the forefront in assisting with legal development in post-conflict states.

It is against the above background this article is written. In South Sudan, the role played by African customary law[3] in contributing to the regional development of legal institutions is both central and pivotal. For millennia, customary law has provided, and continues to provide, the primary source of social order and stability within South Sudan, regardless of tribal affiliations. It is also, by its nature, a symbolic affirmation of Southern Sudanese culture, tradition and indigenous identity. The situation of customary laws and practices in the context of a legally pluralistic[4] and newly invigorated statutory framework therefore is crucially important.

1 See generally Suzannah Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *Melbourne University Law Review* 122.

2 See generally United States Institute of Peace website <www.usip.org> at 17 December 2004.

3 Although customary African law traditionally includes issues associated with land law, these matters are discussed in a forthcoming paper. This is due to the centrality of both sets of laws to Southern Sudanese society and the likelihood of a relatively large degree of divergence between them under statutory land law reforms in New Sudan: interview with Michael Makuei, Commander Sudan People's Liberation Army ('SPLA') and Attorney General, Secretariat for Legal Affairs and Constitutional Development, New Sudan (Rumbek, New Sudan, October 2003).

4 For a discussion of legally pluralistic African societies see Hallie Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law' (2003) 21 *Berkeley Journal of International Law* 62.

The historical events and practices[5] which have made Southern Sudan an appropriate subject matter for post-conflict and transitionary studies date back to the Middle Ages when northern Muslim kingdoms conducted slave-raiding into southern regions. Patterns of North-South violence and exploitation further crystallised as a result of ill-advised colonial policies in the early 20th century which demarcated differences between North and South and caused under-development in the South. Sudan's post-colonial independence, therefore, was essentially conceived with the preconditions conducive to continued economic exploitation through appropriation of oil and water resources, and cultural subjugation through government policies of forced Islamisation and Arabisation.[6] Although comprised of over 50 tribal groups,[7] Southern Sudanese cultural groups tend to have commonalities which include generally analogous customary legal systems based on patriarchal animist traditions.

Geographically situated between sub-Saharan Africa and the Arab-influenced north, South Sudan comprises roughly a third of the entire Sudanese state (geographically the largest in Africa) and has contained ample resources to fuel continued northern incursions over the centuries, right up until the early 1980s when full scale civil conflict broke out once more. Despite sporadic cease-fires, conflict has generally beset the Southern regions from 1983 until June 2004 – when an internationally brokered peace process produced framework agreements within which both the Southern and Northern entities are required to operate until a referendum on secession is held, six years hence. Southern Sudan therefore currently finds itself in a relatively novel state of peace, with not only its civil infrastructure mostly wiped out, but also with many of its political and legal institutions either incredibly nascent or facing reform.

In this context, the role customary laws can play in bringing transparent, free and centralised democratic society to the approximately thirteen million inhabitants of Southern Sudan will be important. This article attempts to identify the mechanisms and avenues through which these contributions can be made. To this end, an evaluation of the legal interfaces between customary, statutory and international legal instruments is required. Part II provides a brief overview of customary law in Southern Sudan and an account of some of the more unique and foundational factors inherent to it, including a discussion of legal pluralism and the effects of war on customary institutions. Part III investigates the newly formalised interface between customary laws and the recently enacted statutory laws of the New Sudan. It also discusses both the legal and political implications likely to emerge in view of the structure of this interface. Part IV provides an analysis of the linkages and disparities between international human rights

5 For a further introduction to Southern Sudanese history see Douglas Hamilton Johnson, *The Root Causes of Sudan's Civil Wars* (2003); Heather J Sharkey, *Living With Colonialism: Nationalism and Culture in the Anglo-Egyptian Sudan* (2003); Eve Troutt Powell, *A Different Shade of Colonialism: Egypt, Great Britain, and the Mastery of the Sudan* (2003).

6 For a contextual analysis of the effect of these policies see Riek Machar, *South Sudan: A History of Political Domination – A Case of Self-Determination* (1995).

7 Interview with Alessio, Former Commander SPLA and Consultant to the Sudan Peace Fund (Nairobi, Kenya, December 2003).

standards and customary practices. It includes a critique of approaches to human rights issues in transitional or developing states and suggests that, to maximise the effectiveness and sustainability of human rights advocacy, a significant degree of well-timed institutional strengthening and a corresponding level of cultural relativism is required. This is especially the case if effective utilisation of customary institutions is to occur. The final section concludes by explaining in further detail the importance of customary laws and institutions in post-conflict states in view of the previous discussions. It also draws on the experiences of other post-conflict African states' laws and suggests several ways forward for integrated legal development to occur in partnership with existing customary institutions.

II AFRICAN CUSTOMARY LAW

The term 'African customary law' refers to the body of unwritten[8] traditions, norms, social conventions and rules that, through long usage and widespread acceptance, direct and govern traditional African society.[9] Customary 'law' therefore is as much social as it is legal. This is reflected in the Privy Council's judgment in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*,[10] in which it was held that it was the assent of the native community that gave a custom its validity.

The proposition was also affirmed in Sudanese jurisprudence under the landmark case of *Bamboulis v Bamboulis*[11] in which Lindsay CJ held that '[c]ustom in [the context of customary law] refers to local custom originating by usage in the Sudan, and is not applicable to imported rule of law of foreign origin.' Further, in a subsequent decision presaging the practicable lack of religious freedom in the Sudan, the Khartoum High Court in *Maurice Goldenburg v Rachel Goldenburg*[12] held that 'custom', for a Jewish couple living in Sudan, was ultimately determined by the Islamic community matrix in which they found themselves embedded: 'the word custom ... includes the personal law and the customs of the religious community concerned where the parties are domiciled in the Sudan'.

Judicial discord regarding the meaning of custom aside, the link between custom and customary laws is assuredly strong. So strong in fact that some commentators have argued that to view customary practices as 'law' is essentially a Western-centric approach which may not actually be the most effective approach to understanding African societies' legal systems.[13]

8 Though there have at times been attempts to both codify and restate Dinka and Nuer laws.

9 See definition in Dengtiel Kur, 'Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan' (Workshop on the Legal Protection of Children Organised by the South Sudan Law Society, Rumbek, New Sudan, 2000) 2.

10 [1931] AC 662, 670.

11 (1954) App Cas 76, AC-REV-58-1953.

12 HC-CS-441-1958 (1960) SLJR 36 (Babikir Awadalla J).

13 Sally Engle Merry, 'From Law and Colonialism to Law and Globalization' (2003) 28 *Law and Social Inquiry* 569, 573.

Nevertheless, common usage of the term 'customary law' in Southern Sudan refers to the body of custom and tradition that is utilised by, and correspondingly binds, the vast majority of citizens in that jurisdiction. Customary law or 'custom' in the South Sudanese context is equally used to refer to the practice of Islamic law by South Sudanese Muslims. In this way, religion is able to play a recognised role in the lives of citizens without involving any element of forced compulsion as has historically been the case.[14]

Any broad definition of customary law would also be incomplete without attempting to provide an explanation accounting for its dynamic and temporal nature. As societal and normative behaviour patterns change over time, so too does the legal framework which supports these practices. Some commentators[15] have described the development of customary laws within the current post-colonial era as a spectrum. At one end of the spectrum are traditional systems of social control – given time these will progressively differentiate into legally enforceable rules and other social norms. At the other end of the spectrum – and given more time – these rules and norms will finally crystallise into written law, as distilled from the decisions of courts and institutions.

A *Sources and Types of Customary Law*

In its contribution to customary law, custom is without peer. It has even been argued that the only criterion required for a particular *custom* to acquire the binding force of law is for it to pass a subjective test of reasonableness.[16] It is generally recognised[17] however that four primary sources of custom exist. The first is 'practice', defined as a custom or tradition that has been repeated over many generations at the community level. The second is binding or persuasive decisions from Courts. This source is particularly broad in that 'Courts' include not just customary courts, but statutory courts which have been empowered from time to time to preside over customary cases.[18] The third is 'religious beliefs', which is especially relevant to customary law's treatment of matters such as incest and adultery, and the fourth is 'morality' and moral principles.

Although customs per se are obviously inseparable from customary law, it is important to note there are some additional legal sources[19] contributing to customary law as it exists today in Southern Sudanese and African society. The first are colonial law codes, which have played an undeniable role, for better or worse, in shaping existing customary laws. This is looked at in further detail below. Additional sources include the original pure forms of the traditional

14 See Hamilton Johnson, above n 5.
15 C M N White, 'African Customary Law: The Problem of Concept and Definition' (1965) 28 *Journal of African Law* 86, 89.
16 John Wuol Makec, *The Customary Law of the Dinka People of Sudan: In Comparison With Some Aspects of Western and Islamic Law* (1988) 26.
17 Ibid 31.
18 See below section on History of Customary Law for further discussion regarding this source of customary law.
19 Jill Zimmerman, 'The Reconstitution of Customary Law in South Africa: Method and Discourse' (2001) 17 *Harvard Black Letter Law Journal* 197, 212.

customs discussed above and *living law*.[20] 'Living law' refers to the currently lived customs of African peoples and it is from this source that the dynamism and flexibility inherent to customary laws is derived. Accordingly customs of the time will usually be reflected in the correspondingly derived customary laws of the time. As we will see in subsequent discussions, this distinction between 'living law' and recognised customary laws occasionally results in highly tensile superior Court decisions.[21]

In theory, each different tribal group in Southern Sudan will have its own discrete body of customary law. The fact there are thought to be over 50 separate tribal groups in Southern Sudan means there are also 50 corresponding separate bodies of customary laws. Broadly speaking however, customary systems can be divided into either central authority systems, or decentralised systems.[22] Central authority systems include the Zande, Shilluk and Anyuak kingdoms which tend to be based around powerful centralised hierarchical and patrimonial structures. Decentralised customary legal systems on the other hand, include the Dinka, Nuer, Bari and Jur tribes. These typically comprise tribes or sub-tribal units in which core social and legal powers are exercised by local individuals or committees, constrained and defined through broader kinship networks. Possibly the most interesting aspect of this dichotomy is the extent to, and manner in which, each will be able to receive externally imposed statutory or international rules, and how the fundamental structures of existing customary jurisdictions contribute to either a fuller acceptance or rejection of those rules.[23]

An additional dichotomy across bodies of South Sudanese customary laws relates to the scope of its application (as distinct from the scope of the laws themselves). Some customary laws are *personal* in application, in that they will apply only to the individuals involved in a particular case. Dinka divorce laws are an example of this.[24] Although the principles of *lex fori* (the law of the forum) may apply prima facie, this presumption is rebuttable in the instance of prior agreement to the contrary or if certain individuals possess a recognised right to displace local law and utilise their own personal customary laws. Other customary laws however are *territorial* in application. These laws can include such things as incurring marriage or homicide liabilities and will apply, in theory, to any individual who invokes these laws within the jurisdiction of the relevant customary laws (ie in the case of Dinka customary law, within Dinka tribal lands).

20 Ibid.

21 See, eg, the various *Mthembu* decisions regarding the validity of customary marriage: *Mthembu v Letsela* 1997 (2) SA 936 (T); *Mthembu v Letsela* 1998 (2) SA 675 (T); *Mthembu v Letsela* 2000 (3) SA 867 (SCA).

22 See generally Kur, 'Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan', above n 9, 2.

23 In the absence of further research into this area, it is likely that the truth of this issue will reveal itself over time and through experiences on the ground.

24 Wuol Makec, *The Customary Law of the Dinka People of Sudan: In Comparison With Some Aspects of Western and Islamic Law*, above n 16, 106.

This aspect of customary laws is crucial because it essentially governs the way different bodies of customary laws interact and interface with each other. Despite this, at the time of writing, little specific research had been done on this aspect of the law in South Sudan.

A final dichotomy of customary laws involves the dichotomy between living and formal customary laws, as touched on above.

B *The Scope of Customary Law in Southern Sudan*

The subject matters and aspects of day to day life covered within the scope of customary laws are diverse in character. This section[25] does not attempt therefore to provide a comprehensive statement of the jurisdiction of customary law in Southern Sudan. Rather, it provides an example of the kind of aspects of everyday Southern Sudanese life which customary laws traditionally regulate. In doing this, it is hoped the subsequent discussion of customary laws, the greater social context in which they operate and their respective place in statutory and international regimes will be better contextualised.

Although variances across tribal bodies exist, the following areas provide the basic subject matters of customary law in Southern Sudan:

- marriage, including scope of the union, successive marriages, procreation, sexual cohabitation, marriage payments and ceremonies;
- adultery, including penalties;
- divorce, including marriage nullification criteria, consent issues and bride wealth;
- child custody, including choice of law in property distribution;
- property, including transfer of title, tracing, intestate and testated succession and inheritance, land law, personal property, resource rights (including minerals, water and animals) and loss of title;
- 'social' obligations, including contractual undertakings, tortious liabilities for homicide and liability for injury caused by animals;
- procedural laws, including foundational principles of customary case management.

This list demonstrates that customary laws do not necessarily aspire to cover all areas of law tending to exist in centralised and democratic free-market societies. The need to achieve clear complementarity between customary and statutory laws therefore is made all the more important as development occurs and legal systems become more complex and centralised.

[25] This section almost exclusively draws from two interviews conducted in Rumbek, New Sudan October 2003, see above n 3 and n 7, and the two comprehensive works in this area: P P Howell, *A Manual of Nuer Law* (1954) and Wuol Makec, *The Customary Law of the Dinka People of Sudan: In Comparison With Some Aspects of Western and Islamic Law*, above n 16.

C *The Historical Development and Treatment of Customary Law*

Before the 1820 invasion of the Sudan by Egyptian forces, custom and traditions of the Southern Sudanese tribal groups were the primary source of law to those peoples – nothing has been written to date which claims otherwise.[26] Supporting this, Roberts[27] notes also that when it comes to a Western-centric analysis of African institutions, little is actually known about governmental arrangements prevailing in different African regions prior to the colonial period and even less about the cognitive and normative maps utilised by local judges and legal officials.

The Anglo-Egyptian reconquest of the Sudan however was the first in an ongoing chain of events which would all bring their own unique influence upon traditional customary practices and laws. Successive colonial regimes under the British and the Egyptians resulted in the enactment of a series of statutory instruments designed to codify, formalise and ultimately to control the effect and permeation of customary laws throughout the Sudan. The effect of colonial domination was in fact a pivotal point for 'customary law' in Africa as it has been studied since the 1950s. This is because the legal basis and analysis of customary institutions, resulting in the area of law known as customary law, has been heavily tainted by Western preconceptions and influence, to the point that many academics argue customary law itself stems from colonial influence.[28] Nevertheless, customary laws as they exist today are undoubtedly based on traditional normative practices and culturally distinct institutions, influenced as they have been by colonial periods of domination and the receipt of foreign legal systems.

One of the earliest of such instruments[29] was the *Mohammedan Law Courts Ordinance 1902* which sought to empower Sharia Courts to entertain the following matters:

(a) any question regarding marriage, divorce, guardianship of minors or family relationship, provided that the marriage to which the question related was concluded in accordance with Mohammedan law or the parties are Mohammedans;
(b) any question regarding wakf [sic], gift, succession, wills, interdiction or guardianship of an interdicted or lost person, provided that the endower donor or the deceased or the interdicted or lost person is a Mohammedan;
(c) any question other than those mentioned in the last two successions provided that all the parties, whether being Mohammedans or not, make a formal demand signed by them asking the Court to entertain the question and stating that they agree to be bound by the ruling of Mohammedan law.

Some autonomy was also provided to formal Islamic lawmakers when the same Ordinance authorised the Grand Kadi, upon approval of the colonial Governor-

26 G A Lufti, 'The Future of English Law in the Sudan', *The Sudanese Judgment and Precedents Encyclopedia*, Sudan Judiciary, Khartoum, 2.
27 Simon Roberts, 'Some notes on "African Customary Law"' (1984) 28 *Journal of African Law* 1, 2.
28 Ibid 1.
29 Lufti, above n 26, 6.

General, to make regulations governing the decisions, procedure, constitution and jurisdiction of the Mohammedan Law Courts.[30]

In these ways, the first non-Western laws operating in Sudan were formally recognised by colonial powers. Customary laws were also addressed with the passage of the *Civil Justice Ordinance 1929* and the *Chief's Courts Ordinance 1931*. The first of these Ordinances is the original predecessor to the current s 5 of New Sudan's *Civil Procedure Act 2003* (see below). The second was a novel development which formally recognised customary Chiefs' legal authority to exercise customary jurisdiction in their traditional tribal areas. Section 7 of the *Civil Justice Ordinance 1929* provided that '[t]he Chief's Court shall administer the Native Law and Custom prevailing in the area over which the Court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order.' Thus the continuation of customary laws in the colonial era of the Sudan was affirmed. Again, little work has been done to investigate the effects these Ordinances[31] had on the practice and status of customary laws throughout Africa, although research does suggest that the status and authority of decisions in African courts during the colonial period was largely tied up with the relationship between English law and the law in Africa.[32]

The sentiments of the *Chief's Courts Ordinance 1931* and the recognition of customary laws in Southern Sudan were also reaffirmed by de-colonised and independent Sudanese central government legislators.[33] The *People's Local Courts Act 1977* repealed the original Ordinance, but replaced it with an almost identical mandate. Any beneficial effects for Southern autonomy and cultural integrity however were relatively short-lived due to the commencement of war in 1983. In this context, it is interesting to note the Sudanese *Criminal Act 1991* actually exempted Southern Sudanese persons from the application of some huddud penalties,[34] which were replaced with criminal penalties conforming to the concepts of localised customary laws. The extent to which this Northern gesture actually relieved negative effects of other forced cultural accession policies is not totally clear, and any beneficial effects of the gesture were mitigated by the inclusion of other wide-ranging Sharia provisions which Southerners were to be subjected to.

D *Legal Pluralism and the Nature of Customary Law*

A legally pluralistic system draws its 'sovereign authority', substantive laws and procedural processes from a multiplicity of original sources. Customary law as it existed prior to Western influence was pluralistic in terms of its sources of normative custom and practice from varied tribal origins. Today customary law

30 Ibid.
31 These Ordinances were not unique to Sudan. Analogous legislation was introduced into many former African colonies, including Tanzania, Uganda, Kenya and South Africa.
32 A N Allott, 'Judicial Precedent in Africa Revisited' (1968) *Journal of African Law* 3.
33 John Wuol Makec, 'The Essentials for the Re of Customary Law in the Southern Sudan', *The Sudanese Judgment and Precedents Encyclopedia*, Sudan Judiciary, Khartoum, 3.
34 Sharia penalties, including flogging, stoning and amputation.

is similarly pluralistic as a result of colonial domination and the legal influence of colonial powers.[35] In many states and regions, including South Sudan, customary law has been subsumed (or at least is being sought to be subsumed) into the overarching legal system which itself is naturally pluralistic. Allott[36] has identified two primary avenues through which pluralism in African legal systems can exert its effects. Firstly, through the authority of extraneously sourced laws used in African Courts: extraneous laws can be received into a country by general reception, formal or explicit adoption of a particular statute or branch of law, by re-enactment of a particular extraneous statute in the form of a local statute, or by the extension of a statute from the extraneous state to the receiving state (but only in a situation where it has legislative authority to enact such instruments). Further, extraneous decisions do not have to be strictly binding to exert local influence, but can be highly persuasive or persuasive.[37] Secondly, pluralism can manifest through the operation of internal aspects of the doctrine of precedent. This varies in the extent to which it has been imported, has authority for operation, has been affected by local legislative or judicial change, has been established as to whether or not courts are strictly or loosely bound by their own precedents and whether or not an 'inverted doctrine of precedent' (which treats native customary courts' findings as authoritative to superior courts) is in operation.

A common occurrence in pluralistic legal systems is the development of conflict between the varyingly sourced bodies of law – resulting in the subjugation of one to the other, though the subjugation may not necessarily be complete or in the same direction. All too often, the interfaces between varying bodies of laws are ignored when legal systems in post-conflict societies are sought to be imposed by the international community or supra-national organisations. In lieu of this approach, this article studies the interfaces between primary sources of law in post-conflict societies to better understand the legal dynamics in newly established pluralistic systems and hopefully to contribute to a more rapid establishment of law and order.

Although this topic itself is worthy of major study, within bodies of customary laws there are inherent divergences from Western-based legal systems. These contribute to a rich and diverse interface between the two systems. This is especially the case when discussing English common law, which forms the basis of the statutory framework in which customary laws typically find themselves embedded in Southern Sudan.

One primary difference between the two is the absence of distinction between the criminal and civil jurisdictions.[38] Western law views these bodies of laws as

[35] A N Allott, 'What is to be done with African Customary Law? The experience of problems and reforms in anglophone Africa from 1950' (1984) 28 *Journal of African Law* 56, 65.

[36] Allott, 'Judicial Precedent in Africa Revisited', above n 32, 4, 6.

[37] Eg, the Privy Council used to serve as the final Court of Appeal for legal matters from English colonies. Even when decisions of that Court may no longer be binding, they can still be deemed highly persuasive.

[38] However, see section below on the statutory interface for a discussion of how imposition of the statutory framework may alter this.

discrete – even going as far as to prescribe separate bodies of procedural law to govern case management. Customary laws, on the other hand, tend to combine their treatment of civil and criminal laws. The rationale for this, at least under Dinka homicide law, is a strong desire to restore social equilibrium through payment of damages.[39] This combination of civil and criminal elements does not necessarily proscribe a victim's family exercising their right of choice as to whether civil damages will be sought, or alternatively a full-scale prosecutorial action pursued.

A second key difference between Western law and African customary laws is the tendency for customary laws to adopt a conciliatory approach to dispute resolution. While Western courts typically concentrate energies around the ascertainment of truth through adversarial presentation of argument, the 'truth' under customary law may often be of secondary concern, and openly acknowledged to be so. The primary motivating factor, instead, is the achievement of satisfactory outcomes for as many parties as possible, in a manner contributing to the promotion of stability throughout the society. This principle of conciliation aims to ensure peace is restored between contesting parties through compromise and reparation for wrongs committed.[40] It is one of the four principles identified by Wuol Makec which effectively comprise the driving force of customary law practice and development.

The remaining principles[41] are, firstly, the functional role of the judge and court during the trial. As opposed to English style adversarial systems, where the judge takes what is, for all intents and purposes, an observer's role, customary law invokes an inquisitorial system with Chiefs or judges actively engaging parties during the decision-making process. The second principle is the principle of attempting to ensure as far as possible that disputes are settled outside of court. The final principle is a principle of simplicity of procedure. This principle aims to ensure parties' expenses and practical effort are minimised and that expeditious handling of cases by the courts occurs.

The far-reaching influence exerted by the principle of conciliation in different bodies of African customary law is a remarkable legal phenomenon. Modern commentators of African customary law have concluded that the goals, principles and fundamental concepts of modern-day Western alternative dispute resolution ('ADR') (a relatively new phenomenon) are strikingly similar.[42] In Western nations at least, engagement of ADR is usually linked to a mutual desire to lower legal costs and to have greater control over a streamlined process with a better chance of gaining a mutually satisfactory outcome. Within traditional African societies, however, the primary motivation for conciliatory approaches to dispute

39 Wuol Makec, *The Customary Law of the Dinka People of Sudan: In Comparison With Some Aspects of Western and Islamic Law*, above n 16, 198.
40 Ibid 220.
41 Ibid 222.
42 Minh Day, 'Alternative Dispute Resolution and Customary Law; Resolving Property Disputes in Post Conflict Nations, A Case Study of Rwanda' (2001) 16 *Georgetown Immigration Law Journal* 235, 248.

resolution has been identified as ensuring sustainable cohesion of the group.[43] African dispute resolution has been described as placing a premium on improving relations on the basis of equity, good conscience and fair play, rather than the strict legality often associated with Western justice.[44] The central niche occupied by ADR in African customary institutions was confirmed in *Agu v Ikewibe*.[45] In that case, the Nigerian Supreme Court held that outcomes from validly held customary arbitration proceedings (processes whereby parties voluntarily submit their dispute to Chiefs or community elders and agree to abide by the decision of the subsequent proceedings) were both legitimate and legally binding on the parties.[46]

Southern Sudanese customary legal systems also possess naturally advanced ADR processes and mechanisms. The repercussions of this for the greater legal and political systems in future Southern Sudan could be significant. However, much will depend on the specific judges who preside over cases at the customary-statutory interface. How these individuals interpret and develop these parallel systems of laws will ultimately determine to what degree Southern Sudanese jurisprudence accepts elements inherent to customary laws and develops them as part of the overarching legal system.

The pluralistic nature of Sudan's legal system can be traced beyond the 1898 Reconquest of the Sudan by Anglo-Egyptian forces to the religious and cultural heterogeneity[47] which has been a character of Sudan since it became a political unit in the mid 19th century. Contrary to the experience of other English colonies,[48] the reception of English law, in preference to Egyptian or Islamic law, into Sudan actually fortified Sudan's legal pluralism because careful avoidance of interference with the religion and personal affairs of the indigenous people's was sought at the highest levels of colonial government.[49]

E *Customary Law and the Effects of War*

Sudan People's Liberation Movement ('SPLM') leaders have confirmed in recent times that one of the key changes they have been fighting for during the civil war is the right to practice customary laws, beliefs and traditions without coercion or

43 Ibid 249.

44 Nsongurua J Udombana, 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2003) 28 *Brooklyn Journal of International Law* 811, 818.

45 (1991) 3 Nigerian Weekly Law Reports 385. See generally Virtus Chitoo Igbokwe, 'The Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law Issues Revisited' (1997) 41 *Journal of African Law* 201; Editorial Comment, 'Customary "Arbitrations" in Nigeria: A comment on *Agu v Ikewibe*' (1998) 42 *Journal of African Law*, 231.

46 For a discussion about how Chiefs and customary institutions can be formally rendered politically powerful as well as judicially powerful within a Constitutional framework, see generally A K Mensah-Brown, 'Chiefs and the Law in Ghana' (1969) 13 *Journal of African Law* 57.

47 Natale Olwak Akolawin, 'Personal Law in the Sudan – Trends and Developments' (1973) 17 *Journal of African Law* 149.

48 Allott, 'What is to be done with African Customary Law? The experience of problems and reforms in anglophone Africa from 1950', above n 35, 57.

49 H H Kitchener, Directive 1 to Province Governors, December 1900, reproduced in Olwak Akolawin, above n 47, 151.

undue interference from external parties.[50] In spite of this, customary institutions were undermined regularly by the actions of SPLA commanders during the most recent periods of fighting. An example of this was the implementation of military tribunals to usurp customary Courts throughout the civil war.[51] Even if this was in fact necessary, an unavoidable after-effect was a significant weakening of traditional systems. On the other hand, the genuineness of appeals for cultural sovereignty to be respected is confirmed by the fact that customary laws were recognised and given a legitimate central role in Southern Sudanese jurisprudence in the SPLM's statutory reforms of 2003. Earlier wartime actions on the part of the SPLM also confirmed the existence of an anticipated formalised role for customary law in New Sudan. One such example was the SPLM/A New Cush Civil Authority Conference in 1996 which resulted in significant restoration of customary law and justice through a formally recognised role for Chiefs within the SPLM hierarchy and processes.[52]

The clash of military and customary laws also has a social interface, exemplified by such events as the late 1990s murder by a SPLA soldier of a local Sudanese tribal youth. The SPLA Commander had the murderer executed. For the youth's family, however, this was irrelevant and their demands for traditional remedying of the wrong by way of blood money payment in the form of cattle lead to sporadic and increasing violence between them and the SPLA.[53]

III Interesting Local Customary Laws and Centralised Government Statutes

In spite of Nigerian misadventures attempting to abolish customary courts in the late 1970s,[54] customary courts as continuing entities in African jurisprudence seem to have been assured by numerous legal developments across the African continent. Even in Nigeria, customary institutions were ultimately supported by the central government despite the earlier position described above.[55]

Pan-African movements aside, in Southern Sudan specifically there are two key mechanisms which formally codify the interface between the rules, traditions and precepts of customary laws and the statutory laws of the New Sudan.[56] The first is s 5 of the *Civil Procedure Act 2003* which reads as follows:

> Rules to be Applied on Suits of Personal Law:-
> Where in any suit or other proceedings in a Civil Court, any question arises

50 Interview with Michael Makuei, above n 3.

51 Dengtiel Kur, 'Customary Law and Access to Justice in South Sudan' in A H Abdel Salem and Alex de Waal (eds), *The Phoenix State: Civil Society and the Future of Sudan* (2001) 187.

52 Ibid.

53 Interview with Alessio, above n 7.

54 See E I Nwogugu, 'Abolition of Customary Court – The Nigerian Experiment' (1976) 20 *Journal of African Law* 1.

55 See generally Chitoo Igbokwe, above n 45; Editorial Comment, above, n 45.

56 *Laws of the New Sudan*, published July 2003 by the SPLM Secretariat for Legal Affairs and Constitutional Development. These laws were enacted by the National Legislative Council in its de facto capacity as a temporary unelected legislature of the New Sudan.

> regarding succession, inheritance, legacies, gifts, marriage, divorce, family relations or the constitution of wafts, the rule of such question 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 or has not been declared void by the decision of a competent Court;
> (b) the Sharia Law in cases where the parties are Muslims except so far as it has been modified by such custom as is above referred to.

The second is s 3(2) of the *Penal Code 2003* which provides that:

> In the application of this Code, courts may consider the existing customary laws and practice prevailing in each area.

These two sections constitute the crux of the customary-statutory interface. By combined action, both civil and criminal matters are covered separately, despite customary law's simultaneous treatment of both.[57]

A *The Importance of the Interface*

In many ways, the interface between the laws and institutions of customary origin and those of statutory origin[58] in Southern Sudan is as much symbolic as it is important. The symbolism lies in the representation of a dynamic and changing society: the boundary between the new and the old, between modernity and tradition, and between two systems of government borne of disparate eras – centralised free-market democracy on the one hand and localised patrimonialism on the other.

Beyond symbolism however the technical importance of the interface is central to the development of the rule of law generally, to customary law and to a uniquely Southern Sudanese jurisprudence. It is critically important because it is at this point that customary laws, which have traditionally governed most aspects of local Southern Sudanese life, intersect with laws promulgated by powerful elites through a superior and centralised government. At this point, express wording, clarity of drafting and an understanding of both systems by the opposing proponents are crucial to ensure a successful merger of the systems. The nonsensical outcome of failing to observe these suggested practices is evidenced by the former situation in Nigeria. In that instance a statutory law purporting to bestow testamentary power subject to customary laws had the ultimate effect of denying testamentary power to those it had originally sought to empower, because of the effect of customary rules which came into effect when triggered by the wording of the progenitor statute.[59]

57 See discussion above regarding the nature of customary laws.

58 Although this paper evaluates the formal legal aspects of the interface, the interaction of central government institutions (eg. Police) and customary institutions (eg. Chiefs) is a topic worthy of study in its own right.

59 I E Sagay, 'Customary Law and Freedom of Testamentary Power' (1995) 39 *Journal of African Law* 173.

In aiming to avoid similarly negative experiences, Himsworth[60] has identified three primary questions to be considered when merging customary and statutory legal systems:

1. How would it be determined which system of law (and court) is appropriate for deciding a particular case?
2. If customary law was to be applied, which system of customary law is appropriate?
3. And, if customary law was applied, how are its rules to be ascertained consistently by the Courts?

The importance of incorporating the culturally sensitive perceptiveness of an anthropologist's viewpoint when answering these questions should also be noted.

It is of course not unknown for governments to operate outside their own laws in post-conflict societies. Nevertheless, there is an assumption here that laws promulgated by the SPLM's legislative arm (the National Liberation Council), will ultimately form the primary legal avenues through which central governments interact with local populations. As such (and as always), there is significant potential for exploitation of local indigenous peoples and their lands to occur at the hands of powerful and kleptocratically inclined centralised governments.

This risk is exacerbated if the incumbent system of government lacks adequate checks on power by way of constitutional and sub-constitutional restraints. The extent to which such exploitation is sanctioned by law will also depend on the manner in which individual lawmakers and judges interpret the legal interface and the ensuing statutory allocation of powers on the local and national levels. Interpretations also involve consideration of both technical legal drafting and the extent to which the interface is generally understood to exist within Southern Sudanese society – outside of official legal instruments.

The statutory interface is also important in that it ultimately determines the continued significance of customary law. Crucial decisions will be made regarding the current and future importance, relevance and jurisdiction of customary laws, the extent to which newly centralised government can interfere in the management and control of traditional tribal-based institutions, and the extent to which invasions of cultural and resource-management autonomy will occur by elitist politicians under the guise of law. In time, these decisions will not only have direct legal implications for the parties, but will also have fundamental social implications for life in Southern Sudan.

How individual judges choose to exercise their renascent judicial discretions, the extent to which they are influenced by political leaders, and the degree to which their judgments will be respected and enforced by the customary and statutory institutions alongside them are all critical factors shaping the future of legal development in Southern Sudan. A degree of judicial discord or activism should

[60] C M G Himsworth, 'The Botswana Customary Law Act 1969' (1972) 16 *Journal of African Law* 4.

be expected during the initial formative years as judges strongly in favour of customary laws and institutions will find ways to promote its continuation, and vice versa.[61]

As has been noted, in the transitional and unstable phases of a post-conflict society's development, it is ideal to retain the integrity and effect of as many sources of social order and stability as possible. In this way it is hoped that only conservative and respectful intrusions into customary institutions are made, therefore ensuring that leaders and central institutions are not unnecessarily undermined. However, as institutions strengthen over time, as more cases are brought before the Courts, and as access to education is increased across Southern Sudan, it is inevitable that an increased embrace of principles of domestic and international comity will occur. These developments will naturally bring with them greater judicial – and therefore governmental – scrutiny of traditional customary legal institutions, practices, leaders and Courts.

In light of this, the key challenge for judges can be summated as the need to balance the interests of cultural integrity and social stability against the benefits of centralised government and international legal standards (including human rights). Clearly, this will almost always be an extremely fine line to walk.

B *Dismantling the Interface*

There are five key observations to make regarding the customary-statutory interface as codified under the laws of New Sudan – principally, the *Civil Procedure Act 2003* and the *Penal Code Act 2003*.[62]

1 *Customary laws are confirmed as key sources of law*

Under both mechanisms, customary laws are confirmed as important and legitimate sources of laws within an over-arching statutory framework:

> The rule of such question shall be ... any custom applicable to the parties concerned or the Sharia law.[63]

> ... may consider the existing customary laws and practice.[64]

2 *Recognition of customary laws is restricted to specified areas of law*

At the civil interface recognition of customary laws is restricted to 'succession, inheritance, legacies, gifts, marriage, divorce, family relations or the constitution of wafts'.[65]

61 Eg, the East African Court of Appeal has found that blood money could be awarded under its Criminal Procedure Code which merely permitted the enforcement of a convicted criminal to pay compensation to the original party: *Nyamhanga s/o Mase v The Republic* p 113 [1973] E A 376. As discussed in H F Morris, 'The Award of Blood Money in East African Manslaughter Cases' (1974) 18 *Journal of African Law* 104.

62 See *Civil Procedure Act 2003* s 5; *Penal Code Act 2003*, s 3(2).

63 *Civil Procedure Act 2003* s 5.

64 *Penal Code Act 2003* s 3(2).

65 *Civil Procedure Act 2003* s 5.

At first glance, this seems to be a notably limited area of application. Several key subject matters traditionally governed by customary laws are absent, specifically land law (including tenure and natural resource issues) and the law of obligations (including homicide and tortious liabilities). This could potentially expose customary laws to significant danger from predatory central legislatures unilaterally enacting statutory instruments to dictate the terms of law for these subject matters without any consideration of the preexisting effects and rules of customary laws.

In the case of criminal liabilities, unification of the criminal justice system in other states has been found to be an important step towards building sustainable and established rule of law institutions and in this sense can be understood.[66] In any case, Courts exercising criminal jurisdictions are expressly empowered under the *Penal Code Act 2003* to consider customary practices and laws.

The real issue here then is the non-inclusion of laws recognising the status of customary laws as the primary body of laws governing land. This omission may be corrected in the forthcoming Land Act and some Southern leaders[67] have indicated that this will be the case. Despite this, a more sinister (and plausible) proposition is that this omission is an attempt to retain legal powers over land dealings at the central government level. Legally sanctioning such powers exponentially increases the probability of exploitation by powerful elites of local peoples and their lands.

If in fact the omission was intended to facilitate this type of exploitation, there nevertheless remain several pursuable legal avenues to ensure that significant powers over land are retained locally. For example the doctrine of *stare decisis* in the Southern Sudanese system essentially means it will be the role of an independent judiciary to ascribe meaning to the terms of legislatively enacted instruments. One such example of how this could occur is if expansive definitions of the terms 'succession, inheritance, legacies and gifts', as they are found in s 5 of the *Civil Procedure Act 2003*, was adopted. If this occurred there is a strong possibility that local and customary land rights would be legally recognised. As mentioned above, much will depend on the content of the forthcoming Land, Local Government and Investment Acts.

This point also raises the question of the status of customary laws not specifically endorsed or overridden by statutes. In view of the importance of cultural integrity and stability to Southern Sudanese persons, it is most likely these laws would retain legal force unless (and until) specifically declared otherwise by the appropriately sanctioned legal authorities.

3 *Courts are given powerful discretions to disallow customary practices and laws*

Under the *Civil Procedure Code 2003*, a Court presiding over customary matters

66 Linton, above n 1, 125.

67 It is envisaged land management will occur under tribal customary laws, although this remains to be seen: Interview with Michael Makuei, above n 3.

is empowered to declare particular customary laws or practices, within its current jurisdiction, invalid because they are 'contrary to justice, equity or good conscience'.

Although there is little definitive guidance as to the meaning of these terms in Sudanese jurisprudence, there has nevertheless been judicial indication that a narrow interpretation of the terms would be adopted in the interests of preserving local autonomy and difference. For example, it has been held that just because a rule does not apply in England, it does not mean it should be excluded,[68] neither should too much be read into the term 'morality' – the original 'good conscience' condition – because otherwise the overarching goal of the preservation of customary institutions would be defeated.[69] In addition to judicial definitions, John Wuol Makec, a respected commentator on Sudanese customary laws, has identified several factors he believes a judge should consider when evaluating customary practices in view of these criteria. They include:[70]

- the amount of social value a particular custom serves within a community;
- whether continued application of such a custom is likely to produce harmful or detrimental consequences to the members of the community;
- whether such a custom is likely to impede in any way the social and economic progress of the community; and
- if, in an examination of the first criteria, it is determined that a rejection of a custom would lead to disobedience or crisis in society, it should be allowed.

Makec's fourth criteria is analogous to the argument of this paper that within post-conflict societies and transitional states it is unwise to recklessly undermine customary laws which still provide a key (or sole) source of social order and political stability.

In view of these wide judicial discretions, it is hoped that all judicial levels within a post-conflict society would practice a healthy respect for cultural integrity and adequately consider the contribution made by customary laws to national stability before ruling invalid customary traditions under the authority of s 5 of the *Civil Procedure Act 2003*.

4 *Courts exercising criminal jurisdiction posses open-ended discretionary powers*

Under s 3(2) of the *Penal Code Act 2003*, courts exercising criminal jurisdiction are empowered to 'consider existing customary laws and practice prevailing in each area'. The broad wording of this subsection creates what is seemingly an unfettered discretion to disallow or allow any customary practice it deems appropriate. Again, there is a paucity of case law to provide guidance on this

68 *Heirs of Mariam Bint Saleeb v Heirs of Boulos Saleeb* (1933) Sudan Law Reports 17 (Owen CJ, Cutter J).

69 *Sudan Government v Rainando Legge* (1969) Sudan Law Reports 15 (R Mag Tambal).

70 Wuol Makec, *The Customary Law of the Dinka People of Sudan: In Comparison With Some Aspects of Western and Islamic* Law, above n 16, 29.

point but it would be hoped that the traditional customary principle of conciliation[71] would, at a minimum, be encouraged to strongly influence Sudanese criminal jurisprudence.

5 *The definition of custom can potentially include religious elements*

Section 5 of the *Civil Procedure Act 2003* permits Islamic law to function for Muslim South Sudanese citizens in much the same way customary laws are permitted to apply to other Southern Sudanese citizens. It is foreseeable, therefore, that in the future religious elements could be included in an assessment of a party's 'custom'. This of itself could potentially trigger novel developments within bodies of customary laws over time.

As Allott has noted,[72] law and customary law may have different meanings and may be viewed differently by different categories of concerned persons such as judges, legal practitioners, academic lawyers, anthropologists and even disputing parties. The varying understanding of these categories poses an overarching problem of how customary law will be delimited or defined when it is the subject of judicial interpretation in courts whose judgments *create* as well as apply law. This occurs under the common law system of binding judicial precedent implemented in South Sudan.

The above analysis of the customary-statutory interface exposes some of the powers individual judges and lawmakers will have over customary legal developments within the context of post-conflict South Sudan. Much of the following discussion regarding human rights advocacy is linked to these powers because they have significant potential to achieve advances in human rights standards. There is, however, as much corresponding power to destabilise Southern Sudanese society. It is therefore critical that, rather than merely making convenient decisions, judges utilise their powers to mould a uniquely Southern Sudanese jurisprudence suited to establishing over time a unique but sustainable rule of law regime, which is also cognisant of the need to recognise forms of indigenised human rights.

Judges should aspire to create a jurisprudence for the nascent State that is mindful of the importance of cultural integrity and social stability, but simultaneously supports the creation of indigenised human rights capable of preventing the exploitation of marginalised individuals.

IV Human Rights and Customary Laws: Conflicting Necessities

The status, under customary practices, of women and other marginalised groups in Southern Sudan is often below that of the human rights standards prescribed by international multilateral instruments. There have been numerous reports

[71] See above discussion.

[72] A N Allott, 'Customary Law: Its Place and Meaning in Contemporary African Legal Systems' (1965) 9 *Journal of African Law* 82, 83.

carried out by various NGOs and UN organs in recent years which focus on human rights issues and their relationship with customary systems in Southern Sudan.[73] Nearly all suggest ways forward for human rights development which are ill-timed, culturally biased and largely unattainable. For example, most suggested approaches prescribe a total re-write of laws and subsequent imposition of them – failing to utilise existing laws for reform. There is also a failure to make use of endemic Southern Sudanese customary forums. This is an example of the adoption of a *universalistic* approach to human rights. Universalism (in this context) can broadly be described as a belief that human rights law, as found in international multilateral instruments, comprises rights possessed by all persons equally, by virtue only of their existence as human beings.[74] This article instead advocates a *moderate cultural relativist* outlook on human rights which advocates change to human rights through culturally legitimate means only. This is despite the fact that some cultural differences will inevitably impede acceptance of 'universal' norms.[75] This approach differs again from a *strictly* culturally relativist approach which asserts that rights violations in one culture can legitimately be viewed as morally just in another culture.[76]

Under the Machakos Protocol governing peace negotiations, a united Sudan is guaranteed (at least in text) for a six-year period following the conclusion of the pre-interim period. In this respect, the formal relevance of international human rights standards to the legal situation in Southern Sudan can be ascertained by reference to the extent Sudan has actively engaged primary multilateral instruments within its domestic legislative and policy machinery through accession, ratification and, ultimately, enforcement. Such instruments include the *Universal Declaration of Human Rights*,[77] the *International Covenant on Civil and Political Rights*,[78] the *Convention on the Rights of the Child*[79] and the *Convention on the Elimination of All Forms of Discrimination Against Women*.[80] Although Sudan is a signatory to some of these instruments, as is commonly the case, reservations have been lodged which limit the potential extent of domestic implementation.[81]

When speaking of human rights disparities, it is necessary also to explain the context of such disparities and precisely identify what is actually sought to be

73 See, eg, Renate Winter and Alexandra Schmidt, *Model Law on Juvenile Justice*. Centre for International Crime Prevention (2000) United Nations.

74 See generally Tracy E Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89.

75 Kimberly Younce Schooley, 'Cultural Sovereignty, Islam, and Human Rights – Towards a Communitarian Revision' (1995) 25 *Cumberland Law Review* 651, 682.

76 Ibid 679.

77 *Universal Declaration of Human Rights*, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

78 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976).

79 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

80 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, [1983] ATS 9 (entered into force 3 September 1981).

81 Elena A Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 *Berkeley Journal of International Law* 277, 300.

altered or ameliorated by the NGO advocacy so often encountered in transitional states. For example, the position of women in Southern Sudanese society deeply contrasts with that of women in secular Western states. In itself, however, this is not a criticism. Societies develop in infinitely different ways and accordingly evolve a reflective diversity of mechanisms and social norms to deal with the geographic, ecological and climatic challenges and realities that may affect and shape them. It is grossly unfair to criticise the institutions, communal realities and social dynamics comprising another society through a superficial comparison to one's own, or even by reference to 'international' (read 'western'[82]) rhetoric. To do so is redolent of colonial-era imperialism and moral righteousness. What *can* be done fairly and legitimately however, without adopting an interfering and universalistic approach, is to promote wider acceptance and mutual understanding across divergent societies, based on the driving concept that existing traditions, customs and laws should not be used in ways which (1) contravene their original and accepted purpose or are motivated by a rationale foreign to, and incompatible with, the traditional rationale behind the practice in question, or (2) are unjustly exploitative of marginal groups and individuals in ways which are beyond the scope of the original bounds of the practice in question.

In this way two classes of customary laws can be identified. The first class is essentially anathema to most bodies of law including mainstream customary African law, indigenous statutes and Western human rights jurisprudence. This grouping includes customary laws which sanction physical abuse against marginalised groups.[83] Regarding these type of customary or personal laws, it is submitted that, if they do in fact exist, as with human rights within Islamic states,[84] they are not actually sourced in traditional African cultural practices but rather in illegal individual conduct, discredited in any case by the greater customary or statutory legal system.[85]

The second class of customary laws encompasses those laws and traditions which are central to everyday Southern Sudanese society and provide a key source of stability and order. It is this second class of customary laws which attracts the majority of discussion in this section.

A closer look at adultery trials in Southern Sudan can frame the discussion. Under customary adultery laws, both the adulterous spouse and the offending extra-matrimonial party are liable to punishment through the allocation of civil

[82] For an account of the origins of 'international' human rights law see Joy Gordon, 'The Concept of Human Rights: The History and Meaning of its Politicization' (1998) 23 *Brooklyn Journal of International Law* 689.

[83] Kur, 'Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan', above n 9, 11.

[84] Edna Boyle-Lewicki, 'Need World's Collide: The Hudad Crimes of Islamic Law and International Human Rights' (2000) 13 *New York International Law Review* 43, 84.

[85] In fact, such practices have already been outlawed by the statutory reforms of mid 2003. See Criminal and Penal Acts [Laws of the New Sudan]; Interview with Justice Ruben Madol, High Court Justice, New Sudan Judiciary and Rule of Law Focal Point Representative (Rumbek, New Sudan, October 2003).

penalties or, if impecunious, a limited term of imprisonment. Under a culturally relativist approach to customary laws, the actual laws generating these outcomes are respected as legitimate components of Southern Sudanese jurisprudence. What would not be respected would be manipulation of these laws by persons seeking incarceration of spouses on the basis of falsified adultery claims in order to increase livestock herds and personal wealth by way of court imposed penalties.

It is in this context, where it is not the actual traditions or customs themselves which are targeted for reform but rather the unfair exploitation of marginalised individuals by abuse of those customs. This is an important distinction to make, and one which has significant repercussions for sustainable human rights advocacy but also for reasons of cultural integrity[86] and social stability. Removing *abuses* of the practices, rather than the practices themselves, is both preferable and far more realistically achievable. As well as incurring the advantages mentioned above, it is altogether more likely to have a more sustainable and socially harmonious impact on human rights advancements within the post-conflict society.

In the context of the above discussion, the following is a non-exhaustive list of identified aspects of customary laws[87] where the contravention and exploitation of customs and traditional laws could foreseeably arise.

- Adultery laws which potentially enable female spouses to be wrongly used as wealth-creation entities by husbands through abuse of Court imposed penalties.
- Customary laws which deny women status beyond that of the status of movable property. Women are not usually equal with men in the eyes of customary courts and any number of concomitant exploitations and abuses are natural by-products of this central customary legal precept. It is particularly relevant when addressing the situation regarding slavery and forced marriages.[88] Neither of these practices is condoned by customary law necessarily, however allusion and references to this customary legal principle can be used by exploiters in an attempt to justify the outcomes of these practices (ie women held against their will). The logical approach to this issue therefore is for customary and higher courts to modify and rectify the precepts to ensure that women are accorded equal status and that customary law cannot be abused by slave-traders and others to justify what are clearly criminal actions.
- Customary laws proscribing widowed women from living on the deceased husband's estate and coercing the widow to be taken into the family of the

[86] Leigh A Trueblood, 'Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory' (2000) 28 *Denver Journal of International Law and Policy* 437, 462.

[87] Although generalisations regarding customary law can be made across tribal and sub-tribal groups, as explained above, it is impossible to fully preempt the content of customary law without further research which can shed light on the gaps in customary law understanding which currently exist.

[88] Monyluak Alor Kuol, *The Anthropology of Law and Issues of Justice in the Southern Sudan Today* (Thesis, Oxford University, 2000) 54.

nearest living male relative of her deceased husband. Although there are historical, and in some cases contemporary, social factors in Southern Sudan justifying this practice, there is also a corresponding potential for exploitation of individual females.

- Customary laws which may sanction physical abuse against women. Although, as mentioned above, these customary laws are already anathema to mainstream customary laws and have in any case been overridden by the statutory reforms of 2003. Addressing these practices therefore is a matter of strengthening existing enforcement institutions and continued civic education.
- Adultery laws which result in children being unfairly incarcerated by the action of Courts in punishing one or both of their parents.
- Betrothal of children against their will, which is motivated by personal gain, rather than the child's best interests.[89]
- Customary inheritance laws which may prevent female children inheriting property from their family.[90]

This list is exhaustive only insofar the current literature permits it to be. More research into the nuances and principles of customary law across distinct tribal bodies is required.

A *The Relevance of Cultural Sovereignty and Custom-Generated Intra-state Stability to Human Rights Advocacy in Developing States*

It should be clear from the above discussion that some aspects of customary law (in their current form) are irreconcilable with the standards prescribed by Western-centric international human rights instruments. Initially, therefore, it seems there is an obvious need for extensive reform of customary law through judicial cassation or statutory annulment. In fact this is largely impossible due to the socially entrenched nature of customary law and the major geographic obstacles to uniform regional reform. It is also a view which is both premature and superficial in that it fails to benefit from a deeper investigation into the ramifications of such sudden and ill-timed reform.

The dominance of the Christian missionary, motivated by faith in a divine message and a corresponding conversion mandate, is largely over. Those believers however were definitely not the last outsiders to bring messages and beliefs to places traditionally not open to them. The missionaries of the 21st century are not Christian men and women sporting a Bible (although sometimes that may well be the case), rather they are universalistic NGOs and governmental development bodies flaunting the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* as a two-pronged Biblical replacement. Although the message and the carriers of the message have devolved from the original spiritual beginnings into a secular doctrine, as often

89 Kur, 'Access to Traditional Justice Systems & the Rights of Women and Children in South Sudan', above n 9, 9.

90 For an investigation of this issue see Zimmerman, above n 19, 197.

as not a fundamentalist or 'non-negotiable' character accompanies the message, often to the detriment of local people. The ultimate outcomes of universalistic human rights advocacy can include widespread cultural denigration, increased social instability and identity infraction – outcomes synonymous with overly-zealous missionary efforts. These outcomes are more likely to eventuate if the message is delivered in an unbalanced and poorly timed manner by external parties, and received by internal recipients in a way which has not been indigenised or is not genuinely endemic or sustainable when considered in light of pre-existing institutions and cultural practices.

The truth of matter is supported by Trueblood in her investigative article into female genital mutilation in African states.[91] Despite this particular practice representing what could be described as the ultimate anathema to Western human rights standards, after intensive and thorough investigation of the practice and the legal and cultural context in which it is embedded, Trueblood's conclusion regarding appropriate methodology for eradication of this practice was that '[c]hange must come from within ... otherwise there will be an upheaval in society and chaos will result. Therefore it is necessary to use an educative and politically inclusive approach so change does not appear to be a mandate from outside.'[92]

The adoption of a cultural relativist approach to human rights in this discussion may seem to be an unduly harsh criticism of human rights generally. It is not intended to be. Fundamental human rights (as defined by their predominantly Western framers[93]) are an integral part of the jurisprudence of international legal instruments, of customary international law and hopefully of most domestic jurisdictions, although not necessarily the multilateral versions of them propagated by international actors. There are two key objections to unilateral and ill-considered encouragement of universalistic[94] human rights standards within transitional and fragile domestic jurisdictions.

The first is based upon the need to recognise *cultural sovereignty* and *communitarian rights* as well as individualistic human rights. 'Cultural sovereignty' is a quasi-legal doctrine based on the principle of inviolability of sovereignty,[95] and encompassing sovereign protection of domestic geographic, political *and* cultural domains,[96] as opposed to sole protection of territorial integrity. 'Communitarian rights', on the other hand, are in many ways just as important as individual rights. A right to cultural integrity is enjoyed by any group of people holding a distinctly unique cultural identity comprising factors such as race, religion, traditional practices and geo-climatic traits. The need for

91 See Trueblood, above n 86, 437.
92 Ibid 465.
93 See generally Gordon, above n 82, 689.
94 See, eg, Catherine Powell, 'Introduction: Locating Culture, Identity, and Human Rights' (1999) 30 *Columbia Human Rights Law Review* 201.
95 As affirmed under the *Charter of the United Nations*: art 2, paras. 1, 4, 7.
96 Alexander Boldizar and Outi Korhonen, 'Out of a Tangled Skein into the International: The Development of Legal Culture' (1999) 5 *Annual Survey of International & Comparative Law* 163, 198.

human rights to be developed through culturally legitimate means[97] using a moderately cultural relativistic approach is critical not only to their ultimate domestic acceptance and legal sustainability but also to their validity.

The need for indigenised versions of human rights to develop is demonstrated by the divergence of the definition of the term 'rights' in Islamic and Western communities. 'Rights' in Islamic communitarian societies are viewed as corollaries of duties owed to God and other individuals.[98] In contrast, 'rights' in Western states and in multilateral instruments are viewed as individualistic, inalienable and, by implication, universal. It is this universalism which alienates millions of people when 'human rights' rhetoric is sought to be applied to a society by external actors. There are thousands of cultural streams within the greater human family, and it follows therefore that there must equally be thousands of variations of the mechanisms which can give rise to systems to protect both communities and individuals, in balances appropriate to the society in question.

The second and more pragmatic objection relates to the inappropriateness of encouraging massive and sudden alterations to indigenous governance and rule of law systems during crucial and pivotal periods of instability and development in a state's history. As previously mentioned,[99] customary law is an integral source of social order, not only through rule of law but by virtue of its inherent social, tribal and familial nature. In the absence of an equally strong and effective centralised government undermining customary law, however, and as much as it is anathema to international human rights standards, removing or undermining existing customary practices results in a situation tending towards anarchy, lawlessness and ultimately, even greater human rights abuses. Sustainability and substantiation of real human rights in a society must come from within,[100] ultimately forming a global approach to human rights through a multitude of differing and pluralistic approaches.[101] Unfortunately a natural repercussion of universalistic human rights encouragement is the weakening of traditional customary laws, institutions and leaders.[102]

In view of the need to give rights a legal substance, the most effective way to build rule of law institutions in Southern Sudan is to capitalise and develop existing laws. Reforming customary law therefore goes beyond 'law reform' and encompasses social reform. This in turn demands a more moderate approach to change through education, voluntarism and indigenous choice.

97 Younce Schooley, above n 75, 682.
98 Ibid 666.
99 See Section 2 of this paper; Trueblood, above n 86, 466; Wuol Makec, *The Customary Law of the Dinka People of Sudan: In Comparison With Some Aspects of Western and Islamic* Law, above n 16, 29.
100 See generally Michael Ignatieff, 'No Exceptions? The United States' Pick and Choose Approach to Human Rights is Hypocritical. But that's not a Good Reason to Condemn it' (2002) *Legal Affairs* 59.
101 See generally Michel Rosenfeld, 'Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities' (1999) *Columbia Human Rights Law Review* 249.
102 Interview with Michael Makuei, above n 3.

None of this is to say that human rights and customary law and practices are mutually exclusive. In nascent states like Southern Sudan, both must play an important role in preventing exploitation of individuals and maintaining social order. The key issue is that human rights development in Southern Sudan and analogous regions should only – and in reality, can only – occur within a stable framework legitimately empowered through a centralised government to actually give those rights substance.[103] Equally important is the fact that such development should occur in ways which give citizens 'ownership' of the process through utilisation of indigenous forums and leaders.

By blindly promoting human rights without reference to their sustainability in the bigger picture (or with due respect to cultural sovereignty), the needs being serviced are compellingly just as much those emotional and financial needs[104] of the advocates rather than the substantive lives of the people they seek to help. In concluding the discussion on the intersection of human rights with customary laws, the previously canvassed tripartite link between statutory, customary and human rights laws should not be overlooked. Two rephrased reminders hopefully provide guidance to actors finding themselves at the crossroads of these three bodies of law in any post-conflict state.

B *Utilising Statutory Mechanisms In the Context of a Culturally Relativist Approach to Human Rights*

The above discussion indirectly highlighted the need for civic education to be utilised at grass roots levels[105] to achieve sustainable legal development. In the case of customary law, legally based civic education is only properly possible through parallel social development. The human rights challenge in Southern Sudan and other post-conflict states therefore lies in the ability of parties to cooperatively engage civic education programmes which both respect cultural sovereignty and maintain maximised stability by virtue of existing customary laws.

In addition to educational approaches, indigenous statutory avenues can theoretically be utilised[106] (as previously discussed), to achieve advancement of human rights in the customary legal context. In view of the cultural relativist thrust of discussions in this article however, there are two crucial points to re-emphasise when considering using local statutory vehicles for legal development:

1. Before recourse to the jurisdiction of higher courts[107] to remedy human rights violations, parties bringing such cases should ensure the court is actually capacitated to deal with such cases. Prematurely bringing cases is

[103] Michael Ignatieff, 'Human Rights as Idolatry' (Speech delivered at the Tanner Lectures on Human Values, Princeton University, April 2000).

[104] Financial, in the sense that funding for NGO programmes from government and private donors may often be forthcoming in greater amounts if human rights are seen to be a component of it.

[105] See generally Stephen Golub, 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' (Rule of Law series no. 41, Carnegie Endowment for International Peace, October 2003.

[106] By virtue of *Civil Procedure Act 2003* s 5. See above discussion.

[107] By virtue of *Judiciary Act 2003*.

a wasteful utilisation of temporal and financial resources if the appropriate infrastructure does not exist to ensure decisions are recorded, respected and ultimately enforced in society and in future sittings of inferior Courts.

2. External non-government organisations, indigenous community-based organsiations and public interest clearing houses which plan on utilising the statutory mechanisms available should be reminded that, in the short term, it is not necessarily the actual customary law or practice which should be sought to be eradicated. Rather it is the abuse and ancillary exploitation of these laws which should be the target of human rights activism.

V Customary Law and Post-Conflict Societies

In contemporary Southern Sudan, as with other transitional states, the importance of customary law or other pre-existing indigenous laws has been identified in this paper as being twofold.

A *Cultural Integrity and Customary Law*

Firstly, customary laws are indicative of Southern Sudanese cultural diversity, richness and identity. From a practical perspective, the importance of such factors in nation-building should not be underestimated, while from an anthropological perspective, it is a key element of the Southern Sudanese people's cultural sovereignty.[108]

B *Social Stability, Order and Customary Law*

Secondly, the influence of these laws in contributing to a continued state of order, stability and legal clarity is crucial and should not be misjudged. Customary laws have successfully governed Southern Sudanese societies from ancient times, and although undermined repeatedly by colonial influences and in more recent times by SPLA military leaders,[109] this is still largely the case. There remains irrefutable evidence that customary laws are and will remain a critical source of law, social order, and stability to the people of Southern Sudan for the foreseeable future.

The chief dilemma this presents to external developmental agencies and the international community is that many customary practices are abhorrent to the 'international' human rights standards so often championed by those same agencies. As discussed above, for a legal right to be reified and move beyond the abstract, there must exist a plethora of social, legal and political institutions capable of crystallising those rights and giving them enforceable and tangible substance.

Right now in Southern Sudan, those institutions – including the executive and judicial arms of government – are at an embryonic stage of maturation. They lack

[108] See above discussion and generally Trueblood, above n 86, 437.
[109] Kur, 'Customary Law and Access to Justice in South Sudan', above n 51, 187.

the capacities required to give those legal rights substance. In this absence, untimely advocacy for external legal systems serves to decrease community respect for the few stability-providing organs which do exist and does not necessarily serve the long-term interests of the citizens. Given this dual importance, the challenge for lawmakers at the statutory and customary levels is to be able to harness the influence and power of customary laws to contribute to the development of a stable, centralised and ultimately democratic autonomous region or state.

C *Moving Forward as a Democratic State with Customary Law*

Identifying the elements of South Sudanese society and jurisprudence which, if supported or developed properly, could enable positive action to reinforce destabilised customary precepts and reduce the weakening of customary institutions is a necessary first step in long term legal development in post-conflict societies.

In compiling the following list of recommendations, both original insight into the Sudanese situation and the experience of other post-conflict states is drawn upon. The recommendations aspire to strengthen customary laws through independent or overlapping effect in one or more of the following three categories: (1) by working to prevent initial undermining of customary laws and institutions; (2) by working to immediately strengthen existing customary laws and institutions; or (3) by working to develop customary laws within the overarching statutory and constitutional framework of a modern democratic state.

1 *Preventing Initial Weakening of Customary Laws and Institutions*

- Educating external organisations as to the importance of customary laws and the dangers of excessive undermining of them. Special emphasis should be placed on the concept of cultural sovereignty and the stability-providing role played by customary laws.
- Working towards the creation of a military code of conduct for warring parties transitioning to peace to ensure customary leaders and institutions are not usurped by the random actions of individual military leaders.[110]
- Assisting with infrastructure and transport issues to ensure judges and legislators are familiarised with both the legal status of customary laws under the New Sudanese legislation and also with the important social role of customary laws. This is especially important because many younger judges in New Sudan have lacked adequate exposure to customary laws over time and bring a customary-free perspective to the legal system.[111]
- Broad-spread legally based civic education aimed at all levels of society, not just marginalised groups, but also at traditional legal actors.
- Ensuring that customary land rights issues are adequately addressed.

[110] Robert Leitch, Interview with John Garang, Chairman, SPLM (New Site, New Sudan, September 2003).

[111] Interview with unnamed, Executive Director of Civil Administration, Rumbek County (Rumbek, New Sudan, October 2003).

- Ensuring that constitutional safe-guards for the protection and preservation of customary laws and tribal institutions exist.[112]

2 *Strengthening Existing Customary Laws and Institutions*

- Provision of infrastructure and legal training resources to local level courts which process the bulk of customary cases. These include the Executive Chiefs' Court, the Regional Boma Court and the Payam Court. Training should include topics such as the difference between 'official' and 'living' customary laws and their treatment in courts, as mentioned above. Failure to distinguish between these types of laws can result in legal outcomes which actually exert negative effects on marginalised groups, as occurred in *Mthembu v Letsela*.[113]
- Provision of legal training to customary leaders, primarily Chiefs, but also leaders from youth and women groups.
- Providing a means by which customary legal developments can be reported, recorded and disseminated to all stakeholders, including Chiefs and lower level judges.[114]
- Strengthening centralised institutions so they can better manage and support customary laws and cases at the lower jurisdictional levels.[115]
- Strengthening law enforcement institutions to enable adequate enforcement of laws and thereby reducing potential abuses of customary laws.
- Widespread, legally based civic education aimed at all levels of society, not just marginalised groups but also traditional legal actors.

3 *Developing Customary Laws within an Overarching Statutory Framework*

- Creation of a public interest clearing house to bring controversial human rights-based customary cases to courts. This places customary issues squarely in a Southern Sudanese forum to achieve debate, consensus and ultimately development. The Kenyan case of *Otieno v Ougo*,[116] is an example of the benefits to customary law that can flow from centralised judicial debate.[117]
- Utilisation of customary and other forums (or a merged formation).[118]
- Widespread legally based civic education aimed at all levels of society, not just marginalised groups, but traditional legal actors.

[112] See previous constitutional discussion. Examples are provided in both the Ugandan and South African constitutions.
[113] (2000) 3 SA 867 (Mpati J).
[114] The implementation of the South Sudan Law Society Law Reporting Initiative is an initial movement in this direction.
[115] The implementation of the New Sudan Judiciary Case Tracking and Management Initiative is an initial movement in this direction.
[116] (High Court of Kenya, Bosire J, 13 February 1987).
[117] For a discussion of the effects of this case, see generally Ambreena Manji, 'Of the Laws of Kenya and Burials and All That' (2002) 14 *Law and Literature* 463.
[118] See generally Day, above n 42, 235.

- Restatement of separate bodies of customary laws. Restatement is preferable to codification because it does not necessitate permanent crystallisation of the laws. Codification of customary laws inevitably results in the loss of legal (and in the case of customary laws also social) flexibility. Restatement on the other hand is a potentially informal means of ascertaining the law at a given time, in written form. Codification is usually undertaken by Western states (for example the Code Napoleon of France) to update law and remove uncertainties stemming from centuries of scholarly debate.[119] The inappropriateness of such a process for customary laws should be obvious.
- In time, encouraging the use of centralised statutory procedures to govern particularly controversial customary laws. This was successfully done in South Africa with the *Witchcraft Suppression Act 3 of 1957*, as amended in 1970 and 1999.[120]
- Judicial reasoning which enables central principles of customary law to overlap into statutory interpretation and application.

By putting forward these recommendations, it is hoped that a balanced and sustainable way forward for strengthening customary laws and the rule of law generally in any post-conflict society in which traditional institutions have been eroded during times of violence has been suggested. The strategy hopefully ensures that customary laws continue to provide a source of social stability and cultural identity to the citizens of Southern Sudan, as they have done since ancient times. As argued throughout this article however, this should occur within the context of the parallel goal of achieving the construction of a centralised free society based on the twin ideals of democracy and greater respect for indigenised versions of human rights.

[119] T W Bennett and T Vermeulen, 'Codification of Customary Law' (1980) 24 *Journal of African Law* 206, 207.

[120] See generally Ludsin, above n 4, 62.