



INTERNATIONAL HUMAN RIGHTS PROGRAM  
UNIVERSITY OF TORONTO FACULTY OF LAW

Law and Armed Conflict  
Working Group Report

# Gender-Based Violence in Southern Sudan

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Report prepared for War Child Canada by the Law & Armed Conflict Working Group at the Faculty of Law, University of Toronto.<sup>1</sup>

## Executive Summary

For the almost 20 million women and girls living in Sudan, the legal protections afforded through statute and customary laws are failing to provide sufficient legal recourse. The *Interim Constitution of Southern Sudan* addresses a history of discrimination by committing Southern Sudan to “upholding values of human dignity and equal rights and duties of men and women”.<sup>2</sup> The current challenge is to give effect to constitutional values, especially in the practices of customary decision-makers.

The *Penal Code* defines rape as sexual intercourse without the woman’s consent, which cannot be given under duress, with unsoundness of mind or intoxication. Marital rape is not recognised as a crime in Southern Sudan.

Domestic violence is addressed criminally through the offences of assault and the use of criminal force, however it is not clear how frequently these offenses are prosecuted. Domestic violence does constitute grounds for divorce under customary law regimes.

Divorce is primarily governed by customary law. The governing legal regime, whether customary or *sharia*, depends on the area in which the divorce proceedings are commenced. Appeals can be made from these decisions to the formal court system, however, the general inaccessibility of formal courts in rural areas limits the availability of this avenue of redress. Access to divorce is tempered by the socio-economic ramifications for the woman and her family in the event of separation.

The custody of children is governed by customary law, which is heavily influenced by principles of Southern Sudan’s patrilineal society. Children are expected to remain with their mother until seven years old, at which time they are legally in their father’s custody. There have been developments in the customary law tradition to protect young girls from being claimed by their previously absentee fathers in order to gain the dowry paid upon her marriage.

In the area of women’s legal rights there is an intertwined network of statutory and customary law, the relationship of which remains undetermined. The largest challenge to bringing effective legal protection to women’s rights lies in delineating the areas and expertise of statutory and customary decision-makers, and making the statutory legal system more accessible, especially to the rural population.

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<sup>1</sup> Karim Amiani, Lindsay Beck, Harry Cho, Abrar Huq, Samantha Seabrook, Jared Spindel, Mai Taha Anneesa Waliji, Erica Young, Chris Yung

<sup>2</sup> *The Interim Constitution of Southern Sudan*,

[http://www.gurtong.org/ResourceCenter/documents/constitution/Interim\\_Constitution\\_SS.pdf](http://www.gurtong.org/ResourceCenter/documents/constitution/Interim_Constitution_SS.pdf) (accessed: Dec 15, 2008) at 1

<b>EXECUTIVE SUMMARY.....</b>	<b>1</b>
<b>I. RAPE AND OTHER SEXUAL ASSAULT .....</b>	<b>4</b>
1.1 SOURCES OF LAW REGULATING RAPE.....	4
1.2 ELEMENTS OF THE CRIME OF RAPE UNDER CUSTOMARY AND STATUTE LAW .....	4
1.2.1 Statute – Northern Sudan.....	4
Penetration.....	5
Marital Rape.....	5
Consent.....	5
1.2.2 Statute – Southern Sudan.....	5
Consent.....	6
Anal Sex.....	6
Sexual Intercourse with Girls.....	6
Adultery.....	6
1.2.3 Customary Law.....	7
1.3 BURDEN OF PROOF/EVIDENCE REQUIRED FOR CONVICTION.....	7
1.3.1 Witnesses and Proof of Resistance.....	7
1.3.2 Rape Shield Laws.....	8
1.5 JURISDICTION FOR RAPE AND OTHER SEXUAL ASSAULT .....	8
1.5.1 Reporting.....	8
1.5.2 Customary Courts.....	8
1.6 FOLLOW UP QUESTIONS .....	8
<b>II. DOMESTIC VIOLENCE .....</b>	<b>10</b>
2.1 SOURCES OF LAW REGULATING DOMESTIC VIOLENCE.....	10
2.1.1 Laws of Southern Sudan.....	10
2.1.2 Customary Law in Contemporary Southern Sudan .....	10
2.1.3 The New Interim Constitution of Southern Sudan, 2005 .....	10
2.2 DEFINITION OF DOMESTIC VIOLENCE AND REGULATORY REGIME .....	11
2.3 ELEMENTS OF THE CRIME UNDER STATUTORY AND CUSTOMARY LAW .....	11
2.3.1 Assault and Criminal Force.....	11
2.4 BURDEN OF PROOF/EVIDENCE REQUIRED FOR CONVICTION .....	11
2.4.1 Witnesses.....	12
2.5 JURISDICTION FOR ASSAULT AND CRIMINAL FORCE .....	12
2.5.1 Jurisdiction of specific courts.....	12
2.6 FOLLOW-UP QUESTIONS.....	13
<b>III. STANDARD PROCEDURE FOR FILING COMPLAINTS .....</b>	<b>14</b>
<b>IV. DIVORCE .....</b>	<b>15</b>
4.1 SOURCES OF LAW REGULATING DIVORCE .....	15
4.1.1 Customary Law.....	15
4.2 ACCESSIBILITY OF DIVORCE.....	16
4.2.1 No-Fault Divorce .....	16
4.2.2 Restrictions on the availability of divorce.....	16
Sharia Law .....	16
4.2.3. Accessibility of Divorce for Men and Women .....	17
4.5 DIVISION OF PROPERTY .....	17
4.5.1 Assessment of the current state of law.....	17
4.6 JURISDICTION FOR DIVORCE .....	18
4.6.1 Formal Courts .....	18
4.6.2 Actual Jurisdiction .....	18
4.7 FOLLOW-UP QUESTIONS.....	18
<b>V. CUSTODY .....</b>	<b>19</b>
5.1 SOURCES OF LAW GOVERNING THE CUSTODY OF CHILDREN .....	19
5.2 TESTS TO DETERMINE CUSTODY .....	19

5.2.1 <i>Age of the Child</i> .....	19
5.2.2 <i>Interests of the Child</i> .....	19
5.2.3 <i>Financial Considerations</i> .....	20
5.3 COMMON OUTCOME FOR CUSTODY DECISIONS.....	20
5.4 FOLLOW-UP QUESTIONS.....	21

## I. Rape and Other Sexual Assault

### 1.1 Sources of law regulating rape

In the northern region of Sudan, the criminal rape is governed by the *Criminal Act, 1991*,<sup>3</sup> based largely on *sharia* law.<sup>4</sup> It is unclear what role traditional *sharia* elements of the law continue to play in affecting the decisions of a conservative judiciary.

In the southern region of Sudan, criminal rape is governed both by *The Penal Code, 2003* and by customary law.<sup>5</sup> The strength of statutory provisions is that they are written down and can be scrutinized. However, due to poor court infrastructure and resources, statutory rape provisions do not play a significant role in the regulation of the everyday lives of citizens.<sup>6</sup>

Customary law, on the other hand, plays a significant role in the daily lives of individuals. Because customary laws are localized and largely informal, there is a dearth of critical research and consistency.

The role of *sharia* law in southern Sudan is unclear. Prior to the signing of the *Comprehensive Peace Agreement* in 2005, attempts to impose *sharia* law in the south were the subject of widespread concern and violence.<sup>7</sup> Similarly, it is unclear what role the provisions guaranteeing the equality of men and women are contained in the *Bill of Rights of the Interim Constitution of Southern Sudan* will play in the development of the law of rape.<sup>8</sup>

### 1.2 Elements of the crime of rape under customary and statute law

#### 1.2.1 Statute – Northern Sudan

In the northern region of Sudan the relevant statute is the *Criminal Act, 1991* which defines criminal rape as follows:

149(1) There shall be deemed to commit the offence of rape, whoever makes sexual intercourse, by way of adultery, or sodomy, with any person without his consent.

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<sup>3</sup> *The Criminal Act, 1991*, available in English at

[http://www.mpil.de/shared/data/pdf/national\\_penal\\_code\\_1991.pdf](http://www.mpil.de/shared/data/pdf/national_penal_code_1991.pdf) (accessed: Dec 15, 2008)

<sup>4</sup> Sharanjeet Parmar, *An Overview of the Sudanese Legal System and Legal Research*, available at [http://www.nyulawglobal.org/globallex/Sudan.htm#\\_Criminal\\_Law](http://www.nyulawglobal.org/globallex/Sudan.htm#_Criminal_Law). (accessed: Dec 15, 2008)

<sup>5</sup> *The Penal Code, 2003*, available at [http://www.mpil.de/shared/data/pdf/new\\_sudan\\_penal\\_law.pdf](http://www.mpil.de/shared/data/pdf/new_sudan_penal_law.pdf) (accessed: Dec 15, 2008)

<sup>6</sup> Justice A.A. Jok, R.A. Leitch & C. Vandewint, “Customary Law Overview in South Sudan” (March 2004) World Vision International, available at

[http://www.gurtong.org/ResourceCenter/laws/Customary%20Law%20Overview%20in%20South%20Sudan%20March%202004\\_compressed.doc](http://www.gurtong.org/ResourceCenter/laws/Customary%20Law%20Overview%20in%20South%20Sudan%20March%202004_compressed.doc) (accessed Dec 15, 2008) at 6

<sup>7</sup> Marie-Aimée Hélie-Lucas, *Women Living Under Muslim Laws, Dossier 18*, (July, 1997) at 64-65.

<sup>8</sup> *The Interim Constitution of Southern Sudan*, supra note 2

- (2) consent shall not be recognized, where the offender has custody, or authority over the victim.
- (3) Whoever commits the offence of rape, shall be punished, with whipping a hundred lashes, and with imprisonment, for a term, not exceeding ten years, unless rape constitutes the offence of adultery, or sodomy, punishable with death.

#### Penetration

The *actus reus* of the crime of rape is defined in terms of “adultery, or sodomy.” Adultery is dealt with in s. 145(1), and defines sexual intercourse as taking place when “the penetration of the whole glans, or its equivalent into the vulva” occurs. S. 148(1) defines sodomy as “every man who penetrates his glans, or the equivalent thereof, in the anus of a woman, or another man’s, or permits another man to penetrate his glans, or its equivalent, in his anus.”<sup>9</sup>

#### Marital Rape

The existence of a “lawful bond” between a husband and wife precludes the charge of adultery, which in turn would seem to preclude the charge of rape. By defining rape “by way of adultery, or sodomy” a husband who engages in vaginal sex with his wife without her consent does not meet the requirement to constitute criminal rape.

#### Consent

S. 3 of the *Criminal Act, 1991* lays out a number of terms used throughout the statute, and defines consent as synonymous with “acceptance.” Consent, however, is limited in three situations. First, if a person is “under the influence of compulsion or mistake of fact” where the other person involved knows that consent was only given on the basis of that compulsion or mistake of fact, then consent was not given. Second, consent can only be given by an adult, which is defined in the same section as any person who is over the age of 15 and whose puberty can be established by definite natural features, or any person who is over the age of 18. Third, consent cannot be given by a person who, due to mental or psychological instability, cannot understand nature or consequence of what he has given his consent to. Additionally, S. 149(2) places a fourth restriction on consent for the crime of rape, stating that consent will not be recognized where “the offender has custody, or authority over the victim.”<sup>10</sup>

#### *1.2.2 Statute – Southern Sudan*

According to s. 316 of *The Penal Code, 2003* effective in southern Sudan, criminal rape is when a man “has sexual intercourse with a woman against her will or without her consent.” Penetration is the minimum threshold required to constitute sexual intercourse.<sup>11</sup> Note that a woman is incapable of raping a man, and that same-sex intercourse is not rape, pursuant to s. 316 of *The Penal Code, 2003*.

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<sup>9</sup> *The Criminal Act, 1991*, *supra* note 2 at 41

<sup>10</sup> *Ibid*

<sup>11</sup> *The Penal Code, 2003*, *supra* note 5 at 86

## 6 Gender-Based Violence in South Sudan

It is specifically mentioned in s. 316 that sexual intercourse between a man and his wife cannot constitute rape.<sup>12</sup>

### Consent

Mirroring the *Criminal Act, 1991*, s. 39 of *The Penal Code, 2003* specifies three limitations on when consent can be given. First, consent cannot be given by anyone who is “under fear of injury, or under a misconception of fact” where the other person has reason to believe that consent was given as a consequence of that fear or misconception. Second, consent cannot be given by a person who from “unsoundness of mind or intoxication is unable to understand the nature and consequence of that to which he gives consent.”

Third, a person under sixteen years of age cannot give consent. Additionally, and somewhat paradoxically, s. 316 states that consent by “a woman below the age of eighteen years shall not be a consent.”<sup>13</sup> It is unclear whether the age of sixteen mentioned in s. 39 or eighteen mentioned in s. 316 takes precedence. s.39 defines consent given under fear or misrepresentation, while s.316 is specific to rape. This distinction strongly suggests the use of the age eighteen as the threshold. It is possible that s. 39 and s. 316 can be distinguished on the basis of gender. S. 316 uses the word “woman” which is specifically defined in s.8 as denoting a “female human being of any age.” S. 39 on the other hand uses the pronoun “he” which is defined in the legislation as a gender neutral term, thus applying to both men and women. This would suggest that the age of consent for men may be sixteen, and the age of consent for women, eighteen.

### Anal Sex

It is unclear whether sexual intercourse, as it is defined in s. 316 includes anal sex, which is dealt with separately in s. 318 (specifically criminalizing anal sex without consent). It is conceivable that anal sex without consent is considered a separate offence from rape. However, the punishments for both crimes are identical (maximum of fourteen years in prison and the possibility of a fine) which implies that they are parallel crimes.<sup>14</sup> This is based on the assumption that the term “carnal intercourse against the order of nature” in s. 318 denotes anal sex.

### Sexual Intercourse with Girls

“Sexual intercourse with girls” is a separate offence under s. 316(A) of *The Penal Code, 2003*. A man commits the offence if he has consensual sexual intercourse with a woman under the age of 18 years.

### Adultery

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<sup>12</sup> *Ibid*

<sup>13</sup> Parmar, *supra* note 4

<sup>14</sup> *Ibid*

S. 428 of *The Penal Code, 2003* makes it an offense for a woman who is married to have “sexual intercourse with another man” (Adultery by Married Woman). Therefore, if a woman’s complaint that she is a survivor of rape is not proven beyond a reasonable doubt, her own complaint may be evidence of the offence of adultery.

### 1.2.3 Customary Law

As mentioned above, due to the relatively recent emergence of *The Penal Code, 2003* and practical restrictions on the availability of court systems to hear cases regarding it, customary law plays a major role in governing rape in the lives of women.<sup>15</sup> Section 3(2) of *The Penal Code, 2003* states that “[i]n application of this Code, courts may consider the existing customary laws and practice prevailing in each area.”<sup>16</sup>

Unfortunately, information regarding customary law is difficult to find in particular as customary laws differ by region within South Sudan. Across the various regions, however, punishments for rape tend to include compensation to the father of the raped woman in the form of money or cattle (depending on the region), as well imprisonment.<sup>17</sup>

## 1.3 Burden of proof/evidence required for conviction

The burden of proof required for a conviction under s. 316 of *The Penal Code, 2003* falls on the prosecution. See s. 107 of *The Evidence Act, 2003*, under the laws of the New Sudan (South Sudan)

The standard of proof is the criminal standard, requiring proof of the essential elements of the offence beyond a reasonable doubt, per s. 111(1) of *The Evidence Act, 2003* and s. 3 of *The Code of Criminal Procedure, 2003*.

The prosecution must prove beyond a reasonable doubt that a man had non-consensual sexual intercourse with a woman who is not his wife. A woman below the age of 18 years is deemed to be incapable of giving consent. Penetration is sufficient to constitute the sexual intercourse element necessary to establish rape.

### 1.3.1 Witnesses and Proof of Resistance

No specific rule exists in *The Penal Code, 2003*, *The Evidence Act, 2003* or *The Code of Criminal Procedure, 2003* regarding the number of witnesses, or proof of resistance, required to establish the essential elements of the offence.

However, customary law may require the production of independent witnesses beyond the complainant, subject to s. 2 of *The Evidence Act, 2003*, which provides that the Act applies “to

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<sup>15</sup> *The Penal Code, 2003*, *supra* note 5 at 1

<sup>16</sup> *Ibid*

<sup>17</sup> Jok, *supra* note 6 at 57

all judicial proceedings in or before any court, but not to proceedings before an Arbitrator.” Jurisprudence to determine whether s. 2 of *The Evidence Act, 2003* allows customary courts to apply evidentiary requirements in addition to those within the Act was unavailable, nor was information on whether customary law specifically requires witnesses for the offence of rape.

### 1.3.2 Rape Shield Laws

There are no specific provision related to the protection of rape or sexual assault complainants in *The Penal Code, 2003*, *The Evidence Act, 2003*, or *The Code of Criminal Procedure, 2003*. To the contrary, *The Evidence Act, 2003*, s.162 (d) (Evidence to Impeach the Credit of a Witness) states, “when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.”

## 1.5 Jurisdiction for rape and other sexual assault

### 1.5.1 Reporting

Section 109 of *The Code of Criminal Procedure, 2003* places a positive duty on people to report certain offences to the “nearest Magistrate, police or chief if not a chief himself.” It is uncertain whether offences not listed in s. 109 of *The Code of Criminal Procedure, 2003* (including the offence of rape) may also be reported to one of a Magistrate, police or chief.

### 1.5.2 Customary Courts

The role of customary law with respect to the offence of rape is unclear. Schedule 1 of *The Penal Code, 2003* purportedly lists those offences that can be tried before a customary court. Unfortunately, Schedule 1 was not available in our research. Again, the question is whether customary courts may exercise jurisdiction over complaints concerning the offence of rape.

Beyond the issue of whether customary courts can exercise jurisdiction over *The Penal Code, 2003* offence of rape, it is certain that customary courts have jurisdiction over legal issues related to the family, including the offence of Adultery by Married Woman (s. 428 of *The Penal Code, 2003*), or a comparable offence under customary law.<sup>18</sup> As noted above, it is possible that a woman, whose complaint of the offence of rape is not proven beyond a reasonable doubt, may expose herself to prosecution under s. 428 – or a comparable customary law – by either a statutory or customary court. Obviously, this causes a chilling effect in complaints brought under s. 316 of *The Penal Code, 2003*.

## 1.6 Follow Up Questions

1. What is the age of consent for men and for women?
2. Do the rape provisions under s.316 include anal sex?
3. Does customary law require evidence outside of the provisions specified under the Evidence Act?

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<sup>18</sup> Jok, *supra* note 6 at 13.

4. What offences are listed as permissible customary court matters under Schedule 1 of *The Penal Code, 2003*? Can customary courts exercise jurisdiction over rape?
5. Are there any advocacy projects addressing s. 162(d) of the Evidence Act, which allows rape complainants to be discredited if they are of a generally “immoral character:?”

## II. Domestic Violence

### 2.1 Sources of law regulating domestic violence

#### 2.1.1 *Laws of Southern Sudan*

In the laws of Southern Sudan, there are no specific laws regarding domestic violence, which is governed by more general offences. Sections 273 & 277 of the penal code refer to the offence of “causing hurt.” Sections 296 & 297 refer to “assault or use of criminal force.”<sup>19</sup> There is no special reference to the use of physical force within the household.

#### 2.1.2 *Customary Law in Contemporary Southern Sudan*

One of the grounds for divorce under customary law is “physical cruelty and general breakdown of the marriage.”<sup>20</sup> It is unclear what level of physical cruelty can lead to divorce. At the same time, the study made on customary laws of Southern Sudan recommends “outlawing customary laws, which sanction physical abuse of women,” which implies that the physical abuse of women is permitted in certain circumstances.<sup>21</sup>

#### 2.1.3 *The New Interim Constitution of Southern Sudan, 2005*

The new Interim Constitution emphasizes the rights of women in a specific section dealing with women’s equality rights, as well as in the constitutional preamble. The preamble states that it is “[f]urther committed ... to upholding values of human dignity and equal rights and duties of men and women.”<sup>22</sup>

Section 20 (1) of the constitution states that “[w]omen shall be accorded full and equal dignity of the person with men.”<sup>23</sup> Section 20 (4) (a) calls on all levels of government in Southern Sudan to promote women’s participation in public life by a quota of 25% “as an affirmative action to redress the imbalances created by history, customs and traditions.” Sub-section (b) institutes a positive obligation on the side of the government to “enact laws to combat harmful customs and traditions which undermine the dignity and status of women.”

The Interim Constitution also provides for special protection for children in Section 43. Sub-section 43(a) requires all levels of government to adopt policies for the welfare of children and ensure their physical and moral development. More directly, this section obliges the government to protect children from “moral and physical abuse and abandonment.”

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<sup>19</sup> *The Penal Code, 2003, supra* note 5 at 82

<sup>20</sup> Jok, *supra* note 6 at 16

<sup>21</sup> *Ibid* at 49

<sup>22</sup> *The Interim Constitution of Southern Sudan, supra* note 2 at 1

<sup>23</sup> *Ibid* at 7

## 2.2 Definition of domestic violence and regulatory regime

There is no clear definition of domestic violence or abuse, particularly as a crime per say. The only direct reference to domestic violence (“physical cruelty”) is under the divorce section of the customary laws.<sup>24</sup>

### 2.2.1 Non-Punitive Reconciliation

There is a great emphasis in customary law on non-punitive reconciliation. According to A Study of Customary Law: “The single most important commonality is the basis of all customary law, the need to achieve reconciliation and to ensure inter-community harmony rather than to punish.”<sup>25</sup> Only the most serious and “heinous” crimes are directly sent to court, otherwise all efforts are made to settle disputes outside the court.<sup>26</sup> The main goal is to establish social equilibrium rather than punish the wrong-doer.<sup>27</sup>

## 2.3 Elements of the crime under statutory and customary law

As previously stated, domestic violence is not defined as a crime under the current statutes or customary laws of Southern Sudan. The closest analogous crime would be assault or criminal force. These provisions are discussed in greater detail below.

### 2.3.1 Assault and Criminal Force

*The Penal Code, 2003* contains provisions pertaining to assault or criminal force without provocation (s.296) and assault or criminal force with provocation (s.297). Section 294 defines criminal force as “...force to any to commit any offence or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used”. Section 295 defines assault as making “any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that the person making it is about to use criminal force...”

## 2.4 Burden of proof/evidence required for conviction

There is no special burden of proof for the conviction of assault or criminal force as specified by statute. Instead, we look towards the *Evidence Act* of 2003, where it is stated that the burden of proof lies with the plaintiff.<sup>28</sup> Section 111 of the act sheds light on this burden of proof, stating that the accused is entitled to acquittal if the court is satisfied that

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<sup>24</sup> Jok, *supra* note 6 at 21

<sup>25</sup> Ibid

<sup>26</sup> Ibid at 16

<sup>27</sup> Ibid at 39

<sup>28</sup> *The Evidence Act, 2003*, available at [http://www.mpil.de/shared/data/pdf/new\\_sudan\\_the\\_evidence\\_act\\_2003.pdf](http://www.mpil.de/shared/data/pdf/new_sudan_the_evidence_act_2003.pdf) (accessed December 15, 2008) at 27

## 12 Gender-Based Violence in South Sudan

the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused.<sup>29</sup> Section 107 (1) of the act specifies that the plaintiff must prove that the facts in question exist. When a specific fact is brought up in trial, it is up to the person “who wishes the court to believe its existence” to prove the fact, unless it is otherwise provided by law that the burden should lie with another particular person.<sup>30</sup>

### 2.4.1 Witnesses

There does not appear to be any requirement that witnesses testify for conviction of assault or criminal force. Section 142 of the *Evidence Act* indicates that no particular number of witnesses will be required for proof of a fact as long as there are no provisions to the contrary.<sup>31</sup> The laws regarding assault or criminal force in the *Penal Code* of Southern Sudan do not specifically indicate any number of witnesses, so following the *Evidence Act*, there would be no requirement for witnesses.

## 2.5 Jurisdiction for assault and criminal force

Jurisdiction for domestic violence is established under the *Code of Criminal Procedure* in order to determine how jurisdiction is determined.

In terms of geographic jurisdiction, the *Code of Criminal Procedure* specifies that the offence will be tried in the local limits of the jurisdiction where either: the offence was wholly or in part committed, or some act forming part of the offence was done; some consequence of the offence ensued; some offence was committed by reference to which the offence is defined; some person against whom, or property in respect of which, the offence was committed is found, having been transported there by the offender or by some person knowing of the offence.<sup>32</sup> Section 5(1)(g) of the *Code of Criminal Procedure* defines the ‘local limits of a jurisdiction of a Magistrate or Court’ as:

the local limits of Region, County or Payam in which the Magistrate or Court ordinarily exercises his or its functions, but a Magistrate except in so far as his powers are limited by the terms of his appointment or otherwise may exercise his powers in any part of the New Sudan in which he happens to be.<sup>33</sup>

### 2.5.1 Jurisdiction of specific courts

Looking generally at the jurisdiction of offenses under the *Penal Code*, section 13 of the *Code of Criminal Procedure* specifies that any offense under the *Penal Code* can be tried in any court.<sup>34</sup> However, it is important to note the extent to which each court is limited in their ability to

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<sup>29</sup> Ibid at 28

<sup>30</sup> Ibid

<sup>31</sup> Ibid at 34

<sup>32</sup> *The Code of Criminal Procedure, 2003, supra* note 19 at 44

<sup>33</sup> Ibid at 2

<sup>34</sup> Ibid at 4

apply penalties given that these penalties may not always reflect the *Penal Code* maximum sentencing provisions.

For example, the County Court of Magistrate of Second Class is restricted to sentences of imprisonment not exceeding two years,<sup>35</sup> whereas the County Court of Magistrate of First Class is restricted to sentences of imprisonment not exceeding five years.<sup>36</sup> Payam Courts (district courts) on the other hand, are restricted to sentences of imprisonment not exceeding one year.<sup>37</sup> The interaction and possible conflict between the sentencing restrictions imposed on the courts and the *Penal Code* sentencing provisions is an important consideration when deciding which level of court in which to launch an action.

## 2.6 Follow-Up Questions

1. Is there available jurisprudence which applies the *Penal Code* provisions of assault or criminal force to domestic violence?
2. What level of physical cruelty must be demonstrated to obtain a divorce under the laws of Southern Sudan?
3. How has evidence of domestic violence been used in divorce proceedings under customary law?

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<sup>35</sup> Ibid at 5

<sup>36</sup> Ibid

<sup>37</sup> Ibid

### III. Standard Procedure for Filing Complaints

The standard procedure for filing a complaint for all offences under the *Penal Code* depends on the nature of the complaint and which specific *Penal Code* provisions apply. Certain provisions regarding hurt, criminal force and assault give rise to a duty to the public to report such acts to the nearest magistrate, policeman or chief.<sup>38</sup> There are also certain offences that allow the police to arrest without a warrant.<sup>39</sup>

In such a case, when information regarding a *Penal Code* offence is given to a police officer, the officer must reduce the information to writing in a First Information Report. The report is then signed and sealed, and filed in the Register of Information.<sup>40</sup> The report is also sent to the magistrate.<sup>41</sup> The officer then has the ability to take steps towards the discovery and arrest of the offender in question with the aim of taking the offender into custody. The officer must then keep a case diary recording any information that he has received, any inquiries he has made, any reports from policemen, and statements from any witnesses.<sup>42</sup> This diary is not admissible evidence during trial.<sup>43</sup>

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<sup>38</sup> Ibid at 34

<sup>39</sup> Ibid at 36; Schedule 1 is not available, therefore the listed offences are unknown.

<sup>40</sup> Ibid

<sup>41</sup> Ibid at 37

<sup>42</sup> Ibid at 38

<sup>43</sup> Ibid

## IV. Divorce

### 4.1 Sources of law regulating divorce

Divorce is governed primarily by customary law.<sup>44</sup> According to author Sharanjeet Parmar, under the Comprehensive Peace Agreement with Sudan, customary law is to “dominate” in Southern Sudan.<sup>45</sup> Section 174(1) of the *Interim Constitution of Southern Sudan* (ICSS) recognizes customary law. Section 173(3) provides that the courts will apply customary law.<sup>46</sup>

Although it is unclear how customary law will interact with the common law, it is clear that currently the common law does not play a significant role in divorce proceedings. While one can still find influences of the English common law system, “the role of ... Common Law in the Sudanese legal tradition is clearly in its decline.”<sup>47</sup>

It is noteworthy that despite the official dominance of customary law in Southern Sudan, Islamic *sharia* law continues to be applied by Northern judges in Southern courts.<sup>48</sup>

#### 4.1.1 Customary Law

Divorce is adjudicated in similar fashion under all customary systems.<sup>49</sup> The *Study of Customary Law in Contemporary Sudan* states that grounds for divorce include:

- Repeated infidelity
- Neglect of family duties by either party
- Gross misconduct by the wife
- Impotence of the husband
- Physical cruelty; General breakdown of the marriage.<sup>50</sup>

The purpose of divorce under the customary law system is the return of ‘bride wealth’ (a dowry). The return of a dowry in the event of divorce often causes severe family tensions and thus acts as a deterrent to divorce.<sup>51</sup> Justice Jok further states that “any action, which threatens family cohesion, is viewed with great disdain within the community and dealt with harshly under customary law.”<sup>52</sup>

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<sup>44</sup> Jok, *supra* note 6 at 13

<sup>45</sup> Parmar, *supra* note 4

<sup>46</sup> *The Interim Constitution of Southern Sudan*, *supra* note 2 at 69

<sup>47</sup> Thomas H. Reynolds and Arturo A. Flores, *Foreign Law Guide* (12/01/08), online: <http://www.foreignlawguide.com/ip/> (accessed: Dec 15, 2008)

<sup>48</sup> Sabrino Majok Majok, “A call to Abolish Sha’ria Law in South Sudan: GOSS must take a Lead” (12 October 2006), available at [http://www.sudaneseonline.com/en/article\\_1599.shtml](http://www.sudaneseonline.com/en/article_1599.shtml). (accessed: Dec 15, 2008)

<sup>49</sup> Jok, *supra* note 6 at 21

<sup>50</sup> *Ibid*

<sup>51</sup> *Ibid* at 34.

<sup>52</sup> *Ibid* at 35.

## 4.2 Accessibility of Divorce

### 4.2.1. No-Fault Divorce

No-fault divorce is not available in Southern Sudan under customary law. No fault divorce refers to the legal dissolution of a marriage contract requiring no evidentiary proceedings or proof of wrong-doing by either party. Again, while customary law places restrictions on the availability of divorce for each spouse, *sharia* law continues to be applied in Southern Sudan by Northern judges. Under *sharia* law, the husband may unilaterally divorce his wife through *talaq*.<sup>53</sup> A *talaq* divorce is achieved by pronouncing the words “I divorce you” three times. Each repudiation is followed by a separate *iddat* period (a period of waiting).<sup>54</sup> Following this procedure, the court will prepare official documents to legally recognize the divorce.

### 4.2.2 Restrictions on the availability of divorce

Customary law restrictions are indeterminate, but they are considered more restrictive than those required for a divorce under *sharia* law<sup>55</sup>. It is thus important to consider the restrictions of *sharia* law.

#### Sharia Law

Under *sharia* law, a man may unilaterally divorce his wife (see above). A woman can obtain a divorce through *tatliq*, granted by a judge, if she can prove that her husband:

- Failed to fulfil his obligations to support her<sup>56</sup>
- Did not treat all his wives justly<sup>57</sup>
- Suffered from defect that she did not know about before marriage<sup>58</sup>
- Is suffering from incurable physical or mental illness that renders it impossible for the wife to continue to live with him without harm<sup>59</sup>
- Is impotent<sup>60</sup>
- Behaves in a physically or emotionally cruel manner<sup>61</sup>
- Is imprisoned or absent without reason for more than one year<sup>62</sup>

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<sup>53</sup> US Department of State, “Personal Status Laws – Divorce” (February 2001), online: Embassy of the United States Khartoum Sudan <<http://sudan.usembassy.gov/divorce.html>>. (accessed: Dec 15, 2008)

<sup>54</sup> Ibid

<sup>55</sup> Liv Tønnessen, “Gendered Citizenship in Sudan: Competing Perceptions of Women’s Civil Rights within the Family Laws among Northern and Southern Elites in Khartoum” (2007), available at <http://www.cmi.no/sudan/doc/?id=975> at 7. (accessed: Dec 15, 2008)

<sup>56</sup> Ibid at 8

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Parmar, *supra* note 4

<sup>60</sup> Ibid

<sup>61</sup> US Department of State, *supra* note 53

<sup>62</sup> Ibid

#### 4.2.3. *Accessibility of Divorce for Men and Women*

While women can initiate a divorce on certain grounds (see above) it is still easier for a man to obtain a divorce. Further, social pressures inhibit accessibility of divorce for women. According to Joketal (2004), however, in addition to the grounds of divorce detailed above, both spouses can claim general breakdown of the marriage, neglect of family duties by either party or repeated infidelity.<sup>63</sup>

### 4.5 Division of Property

Property is redistributed upon divorce. However, redistribution is done in a manner that favours the husband and his family. Customary law itself is varied based on the diversity of tribal and religious groups with over sixty different customary law systems.<sup>64</sup> However, the laws surrounding divorce are very similar across these groups.<sup>65</sup>

Generally, according to customary law, a woman has no right to inherit any property from her husband upon divorce. In fact, upon divorce, as noted above, her family must *return* the dowry, in full or in part.<sup>66</sup> The reason for divorce makes no difference.<sup>67</sup>

Under the custom of *levirate*, a woman remains married when her husband passes away. If a widow decides to divorce her husband who is now deceased, her family must similarly return the dowry they received at marriage to the other family.<sup>68</sup> Furthermore, the woman “must give up any part of the estate she has inherited.”<sup>69</sup>

#### 4.5.1 *Assessment of the current state of law*

The return of dowry from a woman’s family to the husband negatively affects her extended family and thus makes it difficult for her to initiate and obtain a divorce.<sup>70</sup> For example, “[w]here cattle are the currency [of the dowry], this is a hugely costly and disruptive affair, frequently leading to damaging dispute and even conflict between and within family groups.”<sup>71</sup> Due in part to the lack of inheritance and rules regarding the return of dowry, customary laws have been critiqued as being more detrimental for women’s rights than is *sharia* law.<sup>72</sup>

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<sup>63</sup> Jok, *supra* note 4 at 13

<sup>64</sup> *Ibid* at 21

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid* at 35

<sup>67</sup> Tønnessen, *supra* note 55 at 8

<sup>68</sup> *Ibid* at 7

<sup>69</sup> Jok, *supra* note 4 at 37

<sup>70</sup> Tønnessen, *supra* note 55 at 8

<sup>71</sup> Jok, *supra* note 4 at 35

<sup>72</sup> Tønnessen, *supra* note 55 at 7-8

## 4.6 Jurisdiction for divorce

Traditional authorities (e.g. elders, local chiefs) as well as formal courts have jurisdiction to hear disputes regarding divorce. Section 175 of the *Interim Constitution* acknowledges the continued role of traditional authorities and provides that their work will be governed by federal and state level legislation. Traditional authorities are thus recognized by the formal system and “integrated” within it.<sup>73</sup>

### 4.6.1 Formal Courts

There is a right to appeal from a customary court to a formal court. However, there are no reports that indicate that this right to appeal is ever exercised or recognized.<sup>74</sup> The Chiefs’ Court and the Regional Court are both mandated to deal largely with issues of customary law. These courts hear cases of divorce. In practice, appeals from both these courts are heard by the Payam Court.<sup>75</sup>

### 4.6.2 Actual Jurisdiction

Customary courts commonly assume jurisdiction. There are areas in Southern Sudan where formal judicial institutions do not operate due to factors such as a lack of infrastructure and funding.<sup>76</sup> Given that formal courts are usually found in urban areas and have high costs associated with them, there have been strong critiques that there is a lack of accessibility to divorce.<sup>77</sup>

## 4.7 Follow-Up Questions

1. To what extent is *sharia* law applied under customary law in Southern Sudan?
2. How often are customary divorce decisions appealed to the formal courts?

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<sup>73</sup> US Department of State, *supra* note 53

<sup>74</sup> *Ibid*

<sup>75</sup> Jok, *supra* note 4 at 46

<sup>76</sup> US Department of State, *supra* note 53

<sup>77</sup> Parmar, *supra* note 4

## V. CUSTODY

### 5.1 Sources of law governing the custody of children

Under the terms of the Comprehensive Peace Agreement, customary law will dominate in the south.<sup>78</sup> However, there are also constitutional frameworks in play, including the *Interim Constitution of Southern Sudan* and the *Interim National Constitution*.<sup>79</sup> To complicate matters, in the North, family law issues have been governed by the *Muslim Personal Law Act, 1991*. This is also the Act that governs family law under the formal judicial system, which is a combination of British common law and Islamic law<sup>80</sup>. In the case of the South's two biggest ethnic groups, the Dinka have codified tribal laws, which include family issues. Child custody also falls under the ambit of customary law for the Nuer.<sup>81</sup>

### 5.2 Tests to determine custody

There are several tests used to determine child custody, although it is not entirely clear how they interact or which test will take precedence in the case of a conflict.

#### 5.2.1 Age of the Child

The basic rule most often stated pertains to the age of the child. According to the *Muslim Personal Law Act*, a divorced mother is entitled to custody of male children until they are seven and female children until they are nine.<sup>82</sup> An exception to the age rule may be made in cases where a divorced woman remarries, in which case the father may assume custody of his children immediately.<sup>83</sup> Although this law stems from Khartoum, given the frequency with which it is mentioned in literature on the South, it also appears to apply in the South. It is unclear if this is because such rules have been adopted in the South as the de facto customary arrangement or because Southern customary rules have always been in harmony with the laws of the North.

#### 5.2.2 Interests of the Child

The interests of the child are also taken into account in determining custody. S. 21(2) of the *Interim Constitution of Southern Sudan* states that:

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<sup>78</sup> Parmar, *supra* note 4; R. Thibodeaux, "Desire to Divorce Leads Sudan Wives to Adultery, and Jail" *The Boston Globe* (2 October 2005), says that in South Sudan, more than 90 percent of cases involving marriage, divorce and child custody are handled by customary laws.

<sup>79</sup> Tiernan Mennen, "Legal Pluralism in Southern Sudan: Can the Rest of Africa Show the Way?" (Spring 2007) 3 *African Policy Journal* <[www.hks.harvard.edu/kssgorg/apj/issues/spring\\_2007\\_issue/pdfs/Tiernan.article.pdf](http://www.hks.harvard.edu/kssgorg/apj/issues/spring_2007_issue/pdfs/Tiernan.article.pdf)>. (accessed: Dec 15, 2008)

<sup>80</sup> Parmar, *supra* note 4

<sup>81</sup> Jok, *supra* note 6 at 13

<sup>82</sup> Parmar, *supra* note 4

<sup>83</sup> John Wuol Makec, *The Customary Law of the Dinka People of Sudan*, (London: Afroworld Publishing Co, 1988) at 101

In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.<sup>84</sup>

The *Child Act 2004* (promulgated from Khartoum) establishes that protection and the best interests of the child will be priority in decisions concerning “childhood, family or environment.”<sup>85</sup> Similarly, *Dinka* law holds that if the child’s welfare cannot be guaranteed in the mother’s care, the father may take the child as soon as they are weaned<sup>86</sup>. According to *sharia* law, custody may be extended until boys reach puberty and girls consummate marriage if it is proved to be in the best interests of the child.<sup>87</sup> Whether this law is applied in Southern Sudan is unclear.

### 5.2.3 Financial Considerations

The financial considerations that in part determine in custody of children do not relate to financial abilities to care for the children. S.41(v) of the *Bhar el Ghazal Region Customary Law Act, 1984* (Bhar el Ghazal being a predominantly *Dinka* region of South Sudan) grants the husband the right to take the children in case of divorce, provided that he pays a price in cattle known as *aruok* to the relatives of his divorced wife<sup>88</sup> (usually maternal uncles). S.10 of the General Explanations and Definition of the legal terms in the *Code of Dinka Law* states the same general principle – that the right of the husband to custody of the children is dependent on a payment of cattle.<sup>89</sup> Another source states that it is only *after* the age limits set out above that the financial considerations come into play, meaning that after the ages of seven and nine for boys and girls respectively, the father will have the right to the children on the condition he has paid the mother’s family a dowry of sorts for her children. If he has not, the children will remain in the custody of the mother’s family, formally through maternal uncles.<sup>90</sup>

## 5.3 Common outcome for custody decisions

Custody is more contentious in the South than in the North, where *sharia* law is much clearer on the issue.<sup>91</sup> It is not clear how the various and sometimes conflicting sources of law play out in practice in Southern Sudan. However, the courts have taken steps to prevent absent fathers from taking custody of girl children when they reach puberty in order to benefit from the dowry that may be paid to her family when she marries. The following scenario is from a case in Rumbek County in 2002:

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<sup>84</sup> *The Interim Constitution of Southern Sudan*, *supra* note 2 at 8

<sup>85</sup> Parmar, *supra* note 4

<sup>86</sup> Makee, *supra* note 83 at 101

<sup>87</sup> Emory School of Law Legal Profiles <<http://www.law.emory.edu/ifl/legal/sudan.htm>> (accessed: Dec 15, 2008)

<sup>88</sup> Makee, *supra* note 83 at 90. Bhar el Ghazal is one of the regions of South Sudan, inhabited mainly by *Dinka*.

<sup>89</sup> *Ibid* at 91

<sup>90</sup> Jok, *supra* note 6 at 21

<sup>91</sup> *Ibid*

- A girl becomes pregnant and the father refuses to marry her. She has the child and both the mother and child live with the mother's parents
- As the child reaches marriageable age, her biological father tries to claim her
- After several appeals, the court in this case found in favour of the mother.
- The findings set a caveat that a time limit of 10 years be placed on claims for paternity and return of children. The rationale behind the time limit is to discourage men from neglecting their biological children until they are able to make a financial gain from them<sup>92</sup>

Regardless of the particulars of the situation, it does not seem that the child itself has a say in custody. *The Child Act* contains no provisions regarding the voice of the child in child protective proceedings.<sup>93</sup>

#### 5.4 Follow-Up Questions

1. Is the best interest of the child test applicable in Southern Sudan?
2. Although there are no formal provisions for children to participate in child protection proceedings, in practice, are children able to participate in the proceedings?

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<sup>92</sup> Ibid at 47

<sup>93</sup> Yale Law School Survey, "Representing Children Worldwide"  
<http://www.law.yale.edu/RCW/new/jurisdictions/afn/sudan/frontpage1.htm> (accessed: December 15, 2008)