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Prospects for the Rule of Law in South Sudan

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Prospects for the Rule of Law in South Sudan

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JURIST Guest Columnist **David Pimentel** of Ohio Northern University's Pettit College of Law argues that South Sudan's rule of law challenges remain a stumbling block to its development and to its capacity for addressing internal conflicts and continuing violence ...

The prevailing mood in **South Sudan** in 2005 was optimism: the **Comprehensive Peace**



Agreement (CPA) had been signed, ending the North-South Civil War, and the UN was there to help with its implementation. The people were celebrating liberation from the oppression of the Islamist Khartoum government, and an end to the bloody conflict against it.

South Sudan was not yet an independent state (that would come in 2011), but under the terms of the CPA, it enjoyed an unprecedented level of regional autonomy. The Sudan People's Liberation Army (SPLA), now recast as a civilian government, was busily establishing a new political structure to govern the sovereign south, including the creation of a legislature, a judiciary and all the other organs of government. The long history of inter-tribal conflict in the south—even that of the Dinkas and the Nuers, the two largest groups—had been largely pushed aside as Southerners united in their resistance to Khartoum's stranglehold on the region. Even after the war ended, hopes remained high that the hard-won autonomy and regional pride would continue to promote unity and harmony among the various ethnic groups.

Leadership of the SPLA was dominated by the Dinka after Nuer leader Riek Machar split with the SPLA in the 1990s and founded his own rebel group. After independence, and a reconciliation of sorts, Machar assumed the Vice-Presidency of South Sudan, serving alongside President Salva Kiir to form a presidency with both Nuer and Dinka representation; a promising development for promoting peace and cooperation within the newly independent country.

The honeymoon did not last long, however, as Kiir dismissed Machar in July 2013, along with the rest of his cabinet, reorganizing his government and, according to critics, consolidating his power. In December 2013, violence erupted again, this time between the Nuer loyal to Machar and the Kiir regime. This conflict killed thousands, and displaced half a million civilians before a tenuous cease-fire in January 2014 suspended hostilities.

So the region remains volatile; peace and security remain elusive goals. The question is whether the rule of law can help a place like South Sudan, and the degree to which the lack of the rule of law has engendered the conflict-laden status quo.

I arrived in South Sudan in 2006, as the Head of **Rule of Law for South Sudan in the United Nations Mission** [PDF] there, with responsibility to help the new South Sudanese government establish its legal system and legal institutions. The CPA had liberated the south from the north's power and influence: South Sudan quickly rejected the Arabic language and the Islamic legal regime that the Khartoum government had, for decades, forced upon them. They adopted English as their official language and scrapped Shari'a altogether. South Sudanese officials announced that they would adopt a common law system, mirroring their southern neighbors and potential trade partners, Kenya and Uganda. The decision to embrace British traditions was ironic, given Africans' general sensibilities about the legacy of colonialism. To the South Sudanese at the time, however, Western European influence seemed benign compared to the oppression they had endured from the Islamists in Khartoum.

But these choices brought a host of challenges that South Sudan was ill-equipped to address. First, necessary human resources were lacking. When the initial judicial appointments were made back in 2006, only about half the vacancies could be filled because of the limited number of trained lawyers

qualified for the posts. Later the remaining vacancies were filled, after a second recruitment, but the problems persist. Once all the skilled legal practitioners are placed on the bench, who is left to represent litigants in these courts?

At the same time the majority of these judges and lawyers were schooled solely in Islamic law and were Arabic-speaking (the only law school in South Sudan had been maintained by the Khartoum government not as a College “of Law” but “of Shari’a”). They were entirely unacquainted with common law principles, or how to argue or decide cases in a common law environment. Indeed, without a body of judicial precedent to draw upon, the concept of the “common law” was entirely without foundation. Not surprisingly, the level of dysfunction in these courts—lacking the physical and financial resources, the human resources, the knowledge base and the body of precedent necessary to make a common law system work—has been high. The result has been a system that falls far short of hopes and expectations.

But even before the war, the overwhelming majority of legal disputes in South Sudan were, and still are, decided by tribal elders and chiefs in the various ethnic communities scattered across the rural countryside. Villagers bring their disputes to their traditional leaders, who resolve them under principles of “customary law,” an oral tradition handed down through the elders of those communities for unnumbered generations.

The customary law regime has been controversial in the human rights community because often these systems fall short of internationally accepted standards of human rights, particularly with respect to the protection of women and children. Some have called for the customary law to be swept aside, and replaced wholesale by a new statutory regime, enforced by regularly constituted statutory courts.

And yet, for most South Sudanese people the customary justice system provides the only access to justice they will ever see. A new common-law-based, adversarial system can do little for the overwhelming majority of South Sudanese, who could never afford legal representation, if they could even manage the travel from their rural villages to the regional centers where such courts are based.

The **Constitution of South Sudan** [PDF] raises compelling jurisdictional tensions and choice of law questions as well. The constitution recognizes the legitimacy “of Traditional Authority, according to customary law”—as do many African constitutions, in an effort to dignify and legitimize indigenous law even as they were casting off the chains of colonial oppression. At the same time, the constitution sets forth a bill of rights that guarantees women “full and equal dignity ... with men.” So the tribal elder’s decision under customary law has the force of law but, at the same time, may violate the constitution. To enforce the constitutional rights, these cases must end up in statutory courts, at least the Supreme Court, which according to the constitution is “the court of final judicial instance in respect of ... National or state law, including statutory and customary law.” Whether this is done by appeal or, as I have strongly **advocated**, by collateral review, the procedure has yet to be worked out.

But it is clear that the rule of law in South Sudan depends on the strength and functionality of customary justice. The overwhelming majority of individuals seeking justice, and the society as a whole, lack the resources necessary to make a Western-style common law system effective in addressing the justice needs of the community. Customary law, in contrast, not only is responsive to community needs, but also respects and is respected by local culture. When the war in South Sudan ended in 2005, there was great anticipation of a “peace dividend.” Those who had suffered so much during the war, expected their lives to improve when the hostilities stopped. In this, they were largely disappointed. Although there was greater freedom of movement, the most pressing problems in their lives—hunger, disease, unemployment, poor (if any) public education, bad roads (many of which were heavily mined)—remained unaffected by the signing of the CPA.

To some degree, the frustration and resentment shifted, therefore, from the Khartoum government, to the leadership of the Government of South Sudan, dominated once again by the Dinka. As early as 2006, there was a popular perception in South Sudan that they were reserving plum government posts for fellow Dinka and feathering their own nests at public expense. Although it is hard to assess the merits of such complaints, the perception alone reinforces the idea that there is no justice even in a newly liberated South Sudan.

The dysfunction that reigns in South Sudan’s legal system is hardly the source of the country’s problems—the lack of economic opportunity or infrastructure are hardly the fault of a leadership that inherited a ravaged and war torn society—but it certainly impedes meaningful solutions. The legal system is but one of many public institutions that are failing to meet society’s needs, reinforcing perceptions that those in power enjoy a privileged status at the expense of other ethnic communities in the region. In the presence of such inequality, and a legal system perceived as either unwilling or unable to correct it, it is hardly surprising that the internal conflicts will persist in a place like South Sudan; a society where violent protest and conflict have long been seen as the path to justice, security and prosperity. Hope lies in the commitment of South Sudan’s leaders, and given the magnitude of the challenges, in the patience of its people.

David Pimentel is Director of the Center for Democratic Governance and Rule of Law at Ohio Northern University and Visiting Associate Professor of Law at its College of Law. Prior to his academic career, Professor Pimentel headed the Rule of Law efforts in South Sudan for the UN Mission in Sudan. He has led court reforms in post-conflict Bosnia and Romania as well and spent four years as the Chief of Court Management at the UN International Criminal Tribunal for the former Yugoslavia in the Netherlands.

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