



# Community Mediators in South Sudan: Empirical Legitimacy and Post-conflict Rule of Law Building

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## ARTICLE

## ABSTRACT

The scholarship on legitimacy of dispute settlement institutions has largely ignored community mediation institutions operating in the global south. This article aims to remedy that gap, through a case study of community mediation groups in South Sudan, a state emerging from large-scale conflict where formal courts are only marginally able to fulfill their assigned roles and the rule of law needs to be built almost from the ground-up. The article studies both the empirical legitimacy of the community mediation groups and how they relate to the rule of law building project in the country. Is the empirical legitimacy of formal and informal dispute settlement institutions as a zero-sum relationship, where increasing popularity and use of informal dispute settlement institutions detract from the popularity and empirical legitimacy of formal institutions, inhibiting the maturation of the legal system and a rule of law? Or could informal dispute settlement institutions – with proper linkages to the formal system – strengthen formal institutions, both judicial and administrative? These are highly relevant questions for post-conflict states where building a well-functioning legal system is seen as a precondition for sustainable peace and development.

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South Sudan has a long history of violent conflict, occurring both before and since its independence in 2011. Disputes over land have been a prominent source of tension and conflict in the country, and the return of refugees and the settlement of internally displaced persons further exacerbated these tensions. Land governance issues, such as haphazard land demarcation compound these tensions.<sup>1</sup> Furthermore, land ‘acts as an identifier of community, belonging and place’<sup>2</sup> and is ‘ripe for political manipulation’.<sup>3</sup> As such, land conflicts in South Sudan are very volatile and pose a serious challenge to peacebuilding and nation-building.

Addressing disputes over land is challenging due to serious problems experienced by the state legal system.<sup>4</sup> The number of state courts is still low,<sup>5</sup> and hefty court fees<sup>6</sup> and the complexity and duration of court processes make the existing ones largely inaccessible to most people.<sup>7</sup> Customary courts, recognized by law,<sup>8</sup> are a crucial forum for justice provision due to their familiarity, easy and low-cost process, speediness, and proximity to the people.<sup>9</sup> However, they do not have jurisdiction over disputes involving demarcated land, leaving a justice gap in one of the most prevalent types of disputes in urban and peri-urban areas. One response of non-governmental organizations to this justice gap has been to create community mediation groups (CMGs) in several cities of South Sudan to deal with housing, land and property issues.

This article focuses on these new institutions, their empirical legitimacy, the challenges to their functioning, and their impact on the empirical legitimacy of the wider legal system of South Sudan. The literature distinguishes legal, normative and empirical legitimacy. Legal legitimacy simply reflects whether a power holder has the legal right to rule. Normative legitimacy focuses on which power holder *ought* to be accepted by its subordinates according to various normative principles. Empirical legitimacy refers to the population’s sense of willingness to accept the authority of a governance actor or institution.<sup>10</sup> In this article, we will focus on

<sup>1</sup> B Braak, *Overcoming Ruptures. Zande identity, governance, and tradition during cycles of war and displacement in South Sudan and Uganda (2014–2019)* (PhD dissertation, Leiden University 2021) 86.

<sup>2</sup> A Stone, *Nowhere to Go: Displaced and Returnee Women Seeking Housing, Land and Property Rights in South Sudan* (Norwegian Refugee Council 2014) 16.

<sup>3</sup> S Pantuliano, *The Land Question: Sudan’s Peace Nemesis* (Humanitarian Policy Group Working Paper, December 2007) 9.

<sup>4</sup> Since the signing of the 2005 Comprehensive Peace Agreement, much effort and money has been invested to develop the judiciary. However, the various waves of conflict have severely damaged the already fragile state institutions involved in the justice sector (N Kindersley, ‘Rule of Whose Law? The Geography of Authority in Juba, South Sudan’ (2019) 57(1) *The Journal of Modern African Studies* 61, 66; C Van Cutsem and R Galand, *Equal Access to Justice in Southern Sudan Assessment Report 2007* (Advocats sans Frontières and RCN Justice & Démocratie); R Ibreck, H Logan and N Pendle, *Negotiating Justice: Courts as Local Civil Authority during the Conflict in South Sudan* (LSE, The Justice and Security Research Programme 2017) 1).

<sup>5</sup> Statutory courts are regulated by the Judiciary Act of 2008, which mentions Payam and County Courts, one High Court in each of the 10 states of the country, 3 Courts of Appeal, and the Supreme Court located in Juba. However, the implementation of statutory courts varies from region to region. In some areas, particularly in more remote locations of the country, there is simply no statutory court to go to (B Braak and C Jacobs, *Literature Review: Justice in South Sudan* (Van Vollenhoven Institute 2016) 9, 15; D Deng, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan* (South Sudan Law Society and Pact 2013) 20; International Commission of Jurists, *South Sudan; Country Profile prepared by ICJ for the Independence of Judges and Lawyers* (ICJ, 2014) 5; C Leonardi, L Moro, M Santschi and D Isser, *Local Justice in South Sudan* (United States Institute of Peace & Rift Valley Institute 2010) 21).

<sup>6</sup> Court fees in land-related cases amount to 10 percent of the land value, and on top of that, people have to consider the costs of hiring a lawyer, whose employment can considerably impact the chances of winning a case in the South Sudanese adversarial system.

<sup>7</sup> cf B Braak, *Exploring Primary Justice in South Sudan. Challenges, Concerns, and Elements that Work* (Van Vollenhoven Institute 2016) 30.

<sup>8</sup> The inclusion of customary law and courts as part of the national justice system was done in part with political and ideological objectives of affirming the South Sudanese identity, but also with the practical objective of overcoming the limitations of the statutory courts (C Leonardi, D Isser, L Moro and M Santschi, ‘The Politics of Customary Law Ascertainment in South Sudan’ (2011) 43(63) *Journal of Legal Pluralism and Unofficial law* 111, 112).

<sup>9</sup> Braak (n 7) 37; Deng (n 5) 23. The customary courts are regulated by the Local Government Act from 2009 and are divided into: Town Bench Courts in each Quarter Council at the municipal level, and A Courts at the Boma level in rural areas, headed by a single chief; B Courts at Payam level, headed by a panel of chiefs; and finally C Courts, at County level, headed by a paramount chief; Braak & Jacobs (n 5) 9; C Leonardi, *Making Order Out of Disorder: Customary Authority in South Sudan* (Rift Valley Institute 2019) 13.

<sup>10</sup> M Levi and A Sacks, ‘Legitimizing Beliefs: Sources and Indicators’ (2009) 3(4) *Regulation & Governance* 311; T Risse and E Stollenwerk, ‘Legitimacy in Areas of Limited Statehood’ (2018) 21 *Annual Review of Political Science* 403, 406.

empirical legitimacy, as this is an important resource for mediation groups as well as formal legal systems after large-scale conflict, where both institutions are characterized by limited capacity to coerce actors and monitor and sanction deviant behavior.<sup>11</sup>

The *first research question* of this article focuses on the understudied aspect of empirical legitimacy of lay community mediators in a state with weak state institutions and a limited shadow of the law,<sup>12</sup> and asks why people are willing to accept the authority of the CMGs. Our *second research question* probes whether CMGs will most likely challenge or support the building of a stronger legal system and the empirical legitimacy of the state. The analysis of the two research questions allows for a deeper understanding of the value and impact that low-budget community mediation programs can have on building legitimate dispute settlement institutions and a legitimate state in post-conflict countries with weak, inaccessible, understaffed and underfinanced courts.

This article continues with a discussion of the literature on legitimacy of dispute settlement institutions, followed by the literature on community mediators in the global south to gain an understanding of their functioning and the challenges to their operation. Turning to South Sudan, the article then discusses the data regarding popular perception of the CMGs in Wau and Torit, to assess the empirical legitimacy of these institutions. The following two sections consider the functioning of the CMGs and their possible impact on the legal system and the empirical legitimacy of formal institutions in South Sudan, and what lessons this provides for rule of law building efforts in states emerging from large-scale conflict. For this study data have been collected by the authors and a team of South Sudanese research assistants<sup>13</sup> in the towns Torit (Eastern Equatoria) and Wau (Western Bahr-el-Ghazal) between November 2021 and July 2022.<sup>14</sup> Qualitative semi-structured interviews and focus group discussions were held with community mediators, their clients, other community members, traditional, religious and community leaders, representatives of civil society organizations and the Human Rights Commission, lawyers and officials from the ministry responsible for land administration.<sup>15</sup> The first question will largely be answered on the basis of the collected data, the second one from a combination of empirical data and literature study.

## 2. LEGITIMACY OF LEGAL INSTITUTIONS

An important line of scholarship on the empirical legitimacy of legal institutions consists of the studies by Tom Tyler and by scholars building on his research. These authors show that, when people have experienced procedural justice, they are more likely to perceive the system as legitimate.<sup>16</sup> From psychological literature, they have identified four elements of experience that guide how people perceive procedural justice: the opportunity to present their own story (often termed voice); the perceived neutrality and unbiased character of decisions and processes; the perception of being treated with respect; and a belief that the motives

<sup>11</sup> cf Risse and Stollenwerk (n 10) 406.

<sup>12</sup> The shadow of the law refers to the argument by Mnookin and Kornhauser, made regarding divorce law, that the primary function of law is not to impose order from above, but rather to provide a framework within which people can themselves determine their rights and responsibilities (RH Mnookin, and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1978) 88 Yale law Journal 88, 950).

<sup>13</sup> The authors wish to extend their gratitude to Gale Emmanuel, Charles Okullo, Ihisa Innocent, Stephen Robo and Achol Akwi for their assistance with this research.

<sup>14</sup> This research is part of a broader project into land justice in South Sudan, conducted in the context of the Just Future Programme, a 5-year consortium of various partners from the Global North and South, funded by the Dutch Ministry of Foreign Affairs, which aims at promoting more inclusive, constructive and legitimate power relations for justice seekers in Afghanistan, Burundi, DRC, South Sudan, Mali, and Niger.

<sup>15</sup> In total, discussions were held with 154 people, including 15 community mediators and 20 mediation clients. Clients were approached via the CMGs. To triangulate their opinions and minimize bias, in the other interviews with community members (focusing on land and gender) the functioning and legitimacy of CMGs were also discussed. These interviews, which were not organized by South Sudan Law Society (SSLS) or community mediators, led to less-detailed responses, but confirmed the overall positive view CMG clients gave of CMGs. Nevertheless, a certain amount of bias cannot fully be ruled out, as the fragile security situation in South Sudan allowed the researchers limited freedom to go into the field and approach possible interviewees on our own. There is no literature supporting (or negating) our analysis, as there is no other research undertaken or data available on the functioning and perception of the CMGs in South Sudan.

<sup>16</sup> T Tyler, *Why People Obey the Law* (Princeton: Princeton University Press 1990) 115–123.

of the justice actors are trustworthy and benevolent.<sup>17</sup> Tyler states that there is ‘substantial agreement in terms of both the impact of procedural justice on legitimacy and the criteria that define a fair procedure’ across race, gender and income level, and sees similar effects across legal, political and managerial arenas.<sup>18</sup> The focus of procedural justice scholarship in the field of legal studies, however, lies to a large extent on formal courts, the criminal justice system and policing and largely overlooks mediation.<sup>19</sup> It also predominantly consists of deductive, quantitative scholarship.

Another line of scholarship has specifically focused on people’s perceptions of mediation. These studies have highlighted the relationship between participants’ satisfaction with mediation processes and mediators on the one hand, and issues such as process fairness, mediator neutrality or bias, mediator style, competence and gender, and the outcome of the mediation on the other hand.<sup>20</sup> Most of these studies, however, focus on court-based mediation or mediation by professional mediators. Fewer studies have focused on users’ perceptions of community mediation programs, performed by local volunteers with varying levels of education and training.<sup>21</sup> Moreover, studies regarding people’s perceptions of community mediators’ work and outcomes are predominantly based in the global north,<sup>22</sup> whereas research on community mediators in the global south generally focuses more on the functioning and factors that may help or hinder community mediator programs than on people’s satisfaction with and trust in the mediation. The empirical legitimacy of lay community mediators in states with weak state institutions remains understudied.

With the establishment of new dispute-settlement institutions questions also arise ‘with regard to how these new institutions fit into pre-existing governmental and legal schemes, and how they affect the legitimacy of existing institutions’.<sup>23</sup> A common concern articulated about mediation is that it may ‘detract from courts’ important role in public articulation of rights’.<sup>24</sup> According to Hensler, ‘[t]he public spectacle of civil litigation gives life to the “rule of law”’.<sup>25</sup> It is the ‘visible presence of institutionalized and legitimized conflict’ taking place in public courts that teaches citizens that peaceful contest may benefit them more than compromising or accepting the status quo.<sup>26</sup> Others critique mediation for its failure to serve an educational function<sup>27</sup> and for eliminating the public accountability for dispute settlement,<sup>28</sup> which ought to be undertaken by public officials, not private individuals, whose job it is to ‘explicate and give force to the values embodied in’ legal texts<sup>29</sup> and produce rules and binding precedents.<sup>30</sup>

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<sup>17</sup> TR Tyler, ‘Procedural Justice and Policing: A Rush to Judgment?’ (2017) 13 *Annual Review of Law and Social Sciences* 29, 32–33; R Hollander-Blumoff and TR Tyler, ‘Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution’ (2011) *J. Disp. Resol.*, 1, 5–6.

<sup>18</sup> Tyler (n 17) 33.

<sup>19</sup> In their 2011 study on procedural justice and ADR, Hollander-Blumoff and Tyler (n 17) 4 only report two such studies.

<sup>20</sup> JK Alberts, BL Heisterkamp and RM McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) *International Journal of Conflict Management* 218, 219.

<sup>21</sup> Ibid; S Jeghelian, M Palihapitiya and K Eisenkraft, *Legislative Study: A Framework to Strengthen Massachusetts Community Mediation as a Cost-effective Public Service* (Massachusetts Office of Public Collaboration 2011) 45.

<sup>22</sup> See T Hedeén, ‘The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress’ (2004) 22 *Conflict Resol. Q.* 101, 121–122 and Jeghelian et al. (n 21) 48–49 for a number of such studies.

<sup>23</sup> Noyon et al (this issue) 8.

<sup>24</sup> V Maru, ‘Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide’ (2006) 31 *Yale J. Int’l L.* 427, 449.

<sup>25</sup> DR Hensler, ‘Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping our Legal System’ (2003) 108 *Penn St. L. Rev.* 165, 196.

<sup>26</sup> Ibid, 197.

<sup>27</sup> JR Sternlight, ‘Creeping Mandatory Arbitration: Is it Just?’ (2005) 57 *Stanford Law Review* 1631, 1661–1665.

<sup>28</sup> JR Sternlight, ‘Is Alternative Dispute Resolution Consistent with the Rule of Law-Lessons from Abroad?’ (2007) 56 *DePaul L. Rev.* 569, 570.

<sup>29</sup> OM Fiss, ‘Against Settlement’ (1983) 93 *Yale Law Journal* 1073, 1085.

<sup>30</sup> D Luban, ‘Settlements and the Erosion of the Public Realm’ (1995) 83 *Georgetown Law Journal* 2619, 2622–2623.

However, expecting formal courts in countries emerging from large-scale conflict to effectively undertake all these functions amounts to severe ‘litigation romanticism’,<sup>31</sup> based on empirically unverified assumptions about the countrywide existence, accessibility and operation of courts. In many such countries, formal courts are only marginally, if at all, able to fulfil their assigned roles, and the rule of law needs to be built almost from the ground-up. A pertinent question with regard to local initiatives to increase access to justice for citizens thus asks how such initiatives relate to the rule of law building project in the country. Is the empirical legitimacy of formal and informal institutions as a zero-sum relationship, where increasing popularity and use of informal dispute settlement institutions detract from the popularity and empirical legitimacy of formal institutions, inhibiting the maturation of the formal legal system and a rule of law? Or could informal dispute settlement institutions – with proper linkages to the state – strengthen formal institutions, both judicial and administrative? These are of course highly relevant questions for post-conflict states where building a well-functioning legal system is seen as a precondition for sustainable peace and development.

### 3. ACCESSING JUSTICE VIA COMMUNITY MEDIATORS/ PARALEGALS

In many countries of the global south, and perhaps even more so in post-conflict countries, formal legal institutions share their legal power with informal institutions that often enjoy greater legitimacy and are the primary locus of dispute resolution. From the turn of the century this has also increasingly been realized by the international community.<sup>32</sup> In post-conflict countries, a common context of ‘barren institutional landscapes’<sup>33</sup> and limited access to justice and legal aid has induced a turn to community mediators or paralegals – terms we use interchangeably in this article – the last two decades prominently as part of legal empowerment agendas.<sup>34</sup> Donors and civil society organizations have trained volunteers from local communities to act as community mediators or paralegals, to create awareness among communities of their rights and legal remedies, to mediate disputes, and to act as bridge between the local community and legal and other state – and in many cases also traditional justice – institutions. Paralegals are now seen to ‘occupy central territory in terms of community development and legal empowerment of the poor’<sup>35</sup> and to contribute substantially to attempts to consolidate countries’ democracies.<sup>36</sup>

While Maru wrote in 2006<sup>37</sup> that paralegals and community mediators operating in the global south have received scant attention from scholars and human rights organizations, since then a number of notable studies have come out – partly under Maru’s editorship. These studies discuss a range of important hindering and facilitating factors that impact on the operation and success of the work of paralegals. While this scholarship does not emphasize issues of legitimacy and user satisfaction, a discussion of its main findings is highly relevant for understanding the functioning of mediators in South Sudan, their legitimacy, and their relation to the wider legal system.

The first factor this scholarship on mediation in the global south emphasizes is the quality of the relationship between paralegals and institutional actors and local leaders, including

<sup>31</sup> C Menkel-Meadow, ‘Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases)’ (1994) 83 *Georgetown Law Journal* 2663, 2669.

<sup>32</sup> L Grenfell, *Promoting the Rule of Law in Post-conflict States* (Cambridge University Press 2013); B Van Rooij, ‘Bringing Justice to the Poor, Bottom-up legal Development Cooperation’ (2012) 4(2) *Hague Journal on the Rule of Law* 286; World Bank, *World Development Report 2011: Conflict, Security, and Development* (The World Bank) 84-92.

<sup>33</sup> Maru (n 24) 447.

<sup>34</sup> H Dancer, ‘Power and Rights in the Community: Paralegals as Leaders in Women’s Legal Empowerment in Tanzania’ (2018) 26(1) *Feminist Legal Studies* 47, 48.

<sup>35</sup> J Dugard and K Drage, ‘“To Whom Do the People Take Their Issues?” The Contribution of Community-Based Paralegals to Access to Justice in South Africa’ in V Maru and V Gaudi (eds), *Community Paralegals and the Pursuit of Justice* (Cambridge University Press 2018) 63.

<sup>36</sup> *Ibid* 93.

<sup>37</sup> Maru (n 24) 429.

courts, police and state institutions, but also traditional and religious leaders.<sup>38</sup> Paralegals need to find a delicate balance between demanding accountability from institutions on the one hand and sustaining a workable relationship on the other. A non-adversarial approach and regular consultations and information sharing may help to establish such balance.<sup>39</sup> Ideally institutions see the paralegals as ‘supportive, rather than threatening (...), colleagues rather than competitors’,<sup>40</sup> helping them to enhance their operations.<sup>41</sup> This relationship is double-edged though. On the one hand, open and approachable government officials and local leaders are a key enabling factor to paralegalism; on the other hand, corrupt officials and leaders who themselves violate law, can seriously hinder the work of paralegals and be their ‘worst of enemies’.<sup>42</sup> In such cases, it is crucial whether the paralegals can access and rely on higher authorities.<sup>43</sup>

The second factor is the availability of sufficient public interest lawyers to take over cases that ultimately have to be resolved in court.<sup>44</sup> It is the link paralegals have to lawyers that makes credible the threat that paralegals represent: that any misbehaviour – whether of officials or citizens – might have repercussions. It is this threat that casts the shadow of the law, which can serve to discipline officials, balance out power inequalities of mediating parties, and impart some confidence in clients.<sup>45</sup> However, the involvement of lawyers also has drawbacks. Dugard and Drage<sup>46</sup> describe how paralegals often lose sight of what is happening in the case and contact with the client when lawyers become involved. Limited communication between paralegals and public interest lawyers furthermore means that lawyers’ involvement does not lead to any ‘up-skilling’ of the paralegal. Franco et al. also mention that the work of paralegals can be hampered by scepticism of the abilities of paralegals, due to a ‘lawyer-centered consciousness’ among citizens, government officials, and the paralegals themselves.<sup>47</sup>

A third key factor for the success of paralegal programs is long-term, stable donor support.<sup>48</sup> Sufficient availability of public interest lawyers is hampered by international donors’ short cycles of financing, limiting the capacity of NGOs to sustain the position of lawyers.<sup>49</sup> Limited funding for the programs also hampers operational aspects such as transport and communication costs. In addition, un-paid voluntary positions lead to lower quality and high turnover of staff.

A fourth factor mentioned in the literature as impacting on the effectiveness of paralegal programs relates to the fact that paralegals mediate solutions between disputing parties rather than forcing authoritative decisions. This is seen as a basis for more durable solutions, in which disputing parties do not become adversaries with a winner and a loser but can shake hands and remain on good terms.<sup>50</sup> The mediators’ embeddedness within the local community facilitates this, as it ensures mediators are sensitive to local issues and practices, and have a better understanding of the dynamics of the community and the value of social harmony. Hailing from that same community themselves often also means the mediators are willing to go the extra mile for the community.<sup>51</sup>

38 Dugard and Drage (n 35); J Franco, H Soliman and MR Cisnero, ‘Community-based Paralegalism in the Philippines: From Social Movements to Democratization’ in Maru and Gaudi (n 35) 113; HA Moy, ‘Kenya’s Community-based Paralegals. A Tradition of Grassroots Legal Activism’ in Maru and Gaudi (n 35) 184.

39 Dugard and Drage (n 35); Moy (n 38) 190.

40 Moy (n 38) 190.

41 Dugard and Drage (n 35) 82.

42 Franco et al (n 38) 113, 115, 128.

43 Moy (n 38) 188.

44 Dugard and Drage (n 35); Maru (n 24); G Swenson, ‘The Promise and Peril of Paralegal Aid’ (2018) 106 *World Development* 51, 57.

45 W Berenschot and T Rinaldi, ‘Paralegalism in Indonesia: Balancing Relationships in the Shadow of the Law’ in Maru and Gaudi (n 35) 154.

46 Dugard and Drage (n 35) 80, 89.

47 Franco et al (n 38) 117.

48 Dugard and Drage (n 35); Franco et al (n 38) 111, 115; Moy (n 38) 199; Swenson (n 44) 61.

49 Communication with Gasper Amule, South Sudan Law Society, sense-making workshop Land Justice, 8 December 2021, Juba.

50 Dugard and Drage (n 35) 81, 90; Moy (n 38) 205.

51 Dugard and Drage (n 35) 90.



One might infer a fifth factor from mediation studies, which generally claim that relatively equal power relations among the disputants are necessary to achieve mediation results that deal effectively with wrongs suffered by the poor and underprivileged.<sup>52</sup> Literature on paralegals in the global south, however, rather implies that power imbalances can be mitigated by the involvement of paralegals. Maru, for instance, finds that poor people in fact approach the paralegal offices in Sierra Leone to avoid bias and barriers in other dispute settlement institutions.<sup>53</sup> And Berenschot and Rinaldi describe that in Indonesia the involvement of paralegals counters the impact of power imbalances on local dispute settlement, due to the stronger shadow of the law caused by the involvement of paralegals with knowledge of state law and legal institutions and procedures.<sup>54</sup> Paralegals can furthermore help the less powerful party to take other action in case mediating parties do not reach a settlement or an agreement is not complied with.<sup>55</sup>

Several of the factors mentioned above, particularly the relationship with principal institutional actors and the availability of sufficient public interest lawyers, connected to financial means via long-term stable donor support, are also highly relevant for South Sudan, as will be discussed in section 5.

#### 4. COMMUNITY MEDIATION GROUPS IN SOUTH SUDAN

After the discussion above of the literature on paralegal programming in the global south, we now turn our focus to South Sudan. In our field study areas, a considerable part of urban and peri-urban land disputes is connected with land demarcation and registration, a complex and expensive two-stage administrative process that is often marked by arbitrariness, corruption and mismanagement by officials involved in these processes.<sup>56</sup> Throughout our fieldwork we heard several reports of people being confronted with the fact that, through this administrative process, their land was sold to and registered in favour of third parties by state officials. In these particular disputes statutory law is applicable, and customary courts have no jurisdiction. As access to statutory courts is limited for all but the more wealthy people, this leaves a considerable justice gap, allowing the corruption to largely continue undeterred. Considering the strong connection between land disputes, ethnicity and violence, it is a gap that poses considerable risk to the fragile peace in various areas of South Sudan.

In an attempt to provide legitimate mechanisms to settle these and other land and property related disputes, civil society organization South Sudan Law Society (SSLS) established several Community Mediation Groups (CMGs). We studied two areas where such groups operated: Torit and Wau. In these towns, inhabitants of various locations<sup>57</sup> were selected as mediators to mediate local disputes in their geographical area, undertake awareness raising campaigns tailored to the needs of their local communities, liaise with relevant government departments, and refer cases to the lawyers connected to SSLS. Mediators received basic training on land law and customs and skills in community engagement.<sup>58</sup>

In our interviews with mediators and clients<sup>59</sup> we wanted to find out why people are willing to accept the authority of the CMGs. Why do people turn to the CMGs, how do they perceive

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<sup>52</sup> HT Edwards, 'Alternative Dispute Resolution: Panacea or Anathema' (1985) 99 *Harvard Law Review* 668, 679; Hensler (n 25) 173; Maru (n 24) 450.

<sup>53</sup> Maru (n 24) 450.

<sup>54</sup> Berenschot and Rinaldi (n 45).

<sup>55</sup> Maru (n 24) 451.

<sup>56</sup> Braak (n 1) 97.

<sup>57</sup> In Wau the CMG also included a member from local government, from the Ministry of Physical Infrastructure, a chief, a youth representative and a woman representative.

<sup>58</sup> At the time of our field research the work of the CMGs was suspended while waiting for new funding.

<sup>59</sup> The term client should be understood somewhat differently from a lawyer's client, in the sense that the CMG client's interest is not always leading. Interviewed mediators expressed their goal as reaching a fair solution to disputes and experienced that this would sometimes differ from the solution sought by the person who first approached them for their help. cf Maru ((n 24) 456), who describes the ultimate duty of paralegals in Sierra Leone as 'being toward the entire community and toward basic principles of justice and democratic equality'.

their experience, and to what extent and why do they trust them?<sup>60</sup> Interviewed clients expressed that they were generally satisfied with the services offered by and trusted the CMGs, and explained their reasons. Clients highlighted foremost the fact that the CMGs were free, not charging either formal or informal fees, and operated quickly, without the delays people associate with state courts. One respondent told the story of how, when summoned to come and talk with the CMG about the land conflict he had with his neighbour, he prepared the 'usual' bribe money, only to be surprised that no money was asked.<sup>61</sup> At the same time clients stated that they felt no rush in the mediation process, each party could present their story in their good time and was listened to. They reported that the CMGs were avoiding the adversarial part of the courts. They would go through a rather quick but unhurried process of fact-gathering, through hearing the story of both sides of the dispute, speaking with witnesses, and (in cases of land disputes) undertaking site visits. Clients reported that they felt their stories and experiences were validated and understood by the community mediators. One of them described it as follows: 'The CMG people saw the marks left on me, they felt concern.'<sup>62</sup>

Another aspect highlighted by both mediators and clients is the impartiality and fairness of the mediations. This was linked to both character traits of the mediators and lawyers – with clients describing them as impartial, honest, good, committed and hardworking, and having humanity – and to processual aspects. To avoid bias, decisions about the mediation process are made by the majority and mediators who are familiar with either of the parties do not take part in the mediation. One client reports that he felt that the mediators acted 'without fear or favour' of any of the parties.<sup>63</sup> A mediator considers their success to be based on the fact that they always tell the clients the truth: '[We tell them] this is how we see it'.<sup>64</sup> The mediator adds that they seek to find a solution that is fair, which can include telling the party who first approached them when they are wrong.

As land disputes in South Sudan frequently have an ethnic component,<sup>65</sup> a community mediator explains the importance of treating everyone impartially: 'We are from all different tribes. We have one principle: non-discrimination. We accept complaints from any person. We focus on the problem, not on who comes from where'.<sup>66</sup> This is borne out by the variety of clients in the mediations conducted by the CMGs, which include men and women, young and old people, of various tribal backgrounds. The selection of mediators did not include any explicit criteria for ethnic diversity. It was rather through the approach to select volunteers from different locations in town that the groups ended up including people from all kinds of ethnic groups. The CMGs were also gender-inclusive. Two reasons were mentioned to explain why women mediators were regarded as a necessity. First, to make the CMG feel open to female clients. In the words of a female community mediator: 'If all the people you face in a dispute are men, you feel they are biased. This is what we see in the customary courts'.<sup>67</sup> The second type of reasons highlights the approach and style women supposedly bring to the CMG. According to a male mediator: 'Women have the sense of peace. They can make someone feel guilty and come to us. They always tell the truth and without fear'<sup>68</sup> and a male client: 'Women are important. Women talk peace with sympathy, with facts. We have to empower them. In this world women speak peace with sincerity. Women are paramount.'<sup>69</sup>

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<sup>60</sup> Semi-structured interviews were conducted, which started from rather open questions regarding people's perceptions of CMGs to more specific questions based on relevant factors found in the literature on procedural justice, legitimacy and people's satisfaction with mediators as well as on literature on land disputes and their causes in South Sudan.

<sup>61</sup> Interview male CMG client, Torit, 25 November 2021.

<sup>62</sup> Interview female CMG client, Wau, 3 December 2021.

<sup>63</sup> Interview male client CMG, Torit, 25 November 2021.

<sup>64</sup> Interview CMG mediators, Wau, 2 December 2021.

<sup>65</sup> It is important to note that conflicts with strong political and ethnic overtones are currently too hot to handle for CMGs as well as courts. They require political solutions and peace processes.

<sup>66</sup> Interview CMG mediators, Wau, 2 December 2021.

<sup>67</sup> Interview female CMG mediators, Torit, 24 November 2021.

<sup>68</sup> Interview male CMG mediators, Torit, 24 November 2021.

<sup>69</sup> Interview male client CMG, Torit, 25 November 2021.



Burrell et al. in an American study show that an emphasis on mediation training may lead to minimal differences in gender behaviour between male and female mediators.<sup>70</sup> But the authors, and several others,<sup>71</sup> also point out that despite limited actual differences, persistent, stereotypical gender-based expectations likely influence disputants' perceptions. In our case, the community mediators receive limited training and gender stereotypes are strong, which makes it likely that there are both actual and perceived differences between how men and women mediators act. The inclusion of women in a highly patriarchal society such as South Sudan was sometimes challenging. Both male and female mediators reported that some participants in mediations treated the women in their group as 'just women',<sup>72</sup> or that a disputing party preferred to speak with a male mediator.<sup>73</sup> However, in general participants reported they did not care for the gender of the mediators as long as they were helped with their dispute, and mediators felt such discriminatory behaviour did not really hamper the mediation. A female mediator explains: 'We don't mind what they say. It is not really impacting the work, or communications with the courts, but you can feel discouraged, feel like they don't want you.'<sup>74</sup> A male mediator from the same CMG feels that 'the women in our group are very strong. They go ahead even if people abuse them verbally. They have no fear'.<sup>75</sup> Besides gender-inclusivity, the mediators were also selected from different locations, which was to facilitate outreach but also to create a feeling of being understood: 'we are part of you, not from the outside, we will help to solve the issue or refer you to the right entities'.<sup>76</sup>

This section has demonstrated the empirical legitimacy of the new CMGs in Wau and Torit. To a large extent, the reasons given above for trust in the CMGs align with the four elements of experience that guide how people perceive procedural justice: voice; unbiased, neutral processes and decisions; respectful treatment; and trustworthy mediators. Procedural justice literature of course does not deny the relevance of fairness and favour of outcomes,<sup>77</sup> and these aspects also came to the fore in the interviews, with several clients reporting that they appreciated the CMGs for bringing their (land) disputes to a positive outcome. More context-specific perhaps was the fact that many clients, even those whose disputes had not (yet) been favourably resolved, reported that they highly valued the CMGs for providing an avenue for addressing their disputes, where before none had existed for them. According to a client: 'They stand with your rights, with the truth'.<sup>78</sup> Most clients reported that they would not have been able to take the case to court themselves or did take the case to court but ran out of funds before the end of the process. In the words of a mediator, 'It was as if the community was longing for this [the creation of the CMG]. A lot of land related issues existed but the community did not know how to address them. It was as if the group has come to relieve them of the existing land issues'.<sup>79</sup>

Hollander-Blumoff and Tyler make the argument that 'assessments of procedural justice by disputants are a critical element in ensuring that ADR exists in harmony with rule of law values (even as ADR, by its very terms, does not produce resolutions that arise directly from the rule of law per se)'.<sup>80</sup> From the data discussed above, we can conclude that the CMGs in Wau and Torit fulfil the requirements of procedural justice and – if we follow the line of Hollander-Blumoff and Tyler – are as such compatible with the rule of law. This conclusion does not yet, however, answer our second question regarding the extent to which the creation of community mediation

<sup>70</sup> NA Burrell, WA Donohue and M Allen, 'Gender-based Perceptual Biases in Mediation' (1988) 15(4) *Communication Research* 447.

<sup>71</sup> See Alberts et al. (n 20) 226.

<sup>72</sup> Interviews with two groups of CMG mediators, one consisting of men the other of women, Torit, 24 November 2021.

<sup>73</sup> Interview male CMG mediator, Wau, 3 December 2021.

<sup>74</sup> Interview female CMG mediators, Torit, 24 November 2021.

<sup>75</sup> Interview male CMG mediators, Torit, 24 November 2021.

<sup>76</sup> Interview CMG mediators, Wau, 2 December 2021.

<sup>77</sup> TR Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 292.

<sup>78</sup> Interview female CMG client, Wau, 3 December 2021.

<sup>79</sup> Interview male CMG mediators, Torit, 24 November 2021.

<sup>80</sup> Hollander-Blumoff and Tyler (n 17) 2.

groups are a help or a hindrance for building a broader, well-functioning, empirically legitimate legal system in a state emerging from large-scale violence. The following section addresses this question, but first discusses the functioning of the CMGs and important conditions for their success.

## 5. CMGS AND BUILDING THE RULE OF LAW

### 5.1. THE FUNCTIONING OF CMGS

It is generally accepted that, in developing contexts, the work of community mediators goes beyond dispute resolution and encompasses three dimensions: (1) building awareness; (2) settling private disputes; and (3) increasing state and corporate accountability.<sup>81</sup> Community outreach and legal awareness campaigns educate people about their rights as well as how to claim them. This not only helps people to name and claim former ‘unperceived injurious experiences’,<sup>82</sup> but also informs people of how they should behave. Although it is difficult to fully assess, it is safe to say that the outreach and mediations by CMGs contributed to build awareness about land rights and legal paths to address land disputes. As highlighted by Stromseth et al., this is a quick and cost-effective way of spreading legal information beyond elites.<sup>83</sup>

For the CMGs we studied in South Sudan, with their focus on land and property issues and the large role played by governmental offices such as the Directorate of Land and Housing regarding demarcated land, the second and third dimensions of community mediators’ work – settling private disputes and increasing state accountability – very often overlap. As mentioned above, the process of land demarcation and registration is often marked by arbitrariness, corruption and mismanagement, and a source of many disputes in urban and peri-urban areas. This makes the relationship between the paralegals and officials, identified in the literature as an important factor impacting on paralegal activities, both important and fraught in South Sudan. When solving private disputes involves the unmasking of corrupt practices, this will threaten the involved officials, while at the same time, a cooperative land agency is paramount to solving the underlying disputes. This highlights the importance of finding supporters within the same organization, where possible, and of the necessity to put pressure on corrupt elements via exposure and court cases. Access to higher levels of courts and government authority, and representation by qualified lawyers, are often crucial in such cases.

The option of ultimate resort to adjudication, supported by lawyers, is essential to address those conflicts that cannot be settled out of court, and to make the shadow of the law deep enough to actually impose some discipline on officials at the land departments and elsewhere. Community education and mediation alone would leave all those unwilling to abide by the law – prominently among them those with more power and corrupt officials – scot free. It is the ultimate resort to adjudication that provides a credible threat that actors who violate rights of poorer citizens will be sought out, made visible, and called to account. However, the role of lawyers should go beyond representing clients in court. In Wau and Torit, they also support and train the community mediators and serve as a source of information for them, and write official letters to state institutions in case these are obstructing certain processes. For instance, one mediator told us how the support of a lawyer helped them to successfully file a case in court against the Directorate of Land and Housing for refusing to provide access to public documents. He also reported how, from that point onwards, state officials feared to be exposed in court, and became much more cooperative.<sup>84</sup>

The involvement of lawyers serves to make the legal system legible for both the community mediators and the clients. One interviewee noted that ‘[c]ourt processes can be long, and hard to understand. It helps that the lawyers explain and give encouragement’.<sup>85</sup> Several clients also

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<sup>81</sup> Franco et al. (n 38) 121; Maru (n 24).

<sup>82</sup> W Felstiner, R Abel and A Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming... (1980)’ (2006) 15 Law and Society Review 631, 633.

<sup>83</sup> J Stromseth, D Wippman and R Brooks, *Can Might Make Rights: Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press 2006), 240.

<sup>84</sup> Interview male CMG mediators, Torit, 24 November 2021.

<sup>85</sup> Interview CMG client, Wau, 5 December 2021.

connected the involvement of lawyers to the trust they had in the CMGs: 'I trust the CMG for one reason: the presence of the lawyers. They are trained and licensed by the government'.<sup>86</sup> 'I trust them because they are legal people, they give legal advice'.<sup>87</sup> As mentioned above, Franco et al. state that the work of paralegals can be hampered by scepticism of the abilities of paralegals, due to a 'lawyer-centered consciousness' among citizens, government officials, and the paralegals themselves.<sup>88</sup> This may be mitigated by a close cooperation between lawyers and community mediators, where lawyers do not just handle those cases that need legal representation in court, but are intertwined in the program, training and mentoring the mediators and providing case-specific assistance. Such intensive cooperation, including feedback on those cases that need to be represented in court, can help to increase the community mediators' knowledge and skills, and as such both dispel the doubt mediators have about their own ability to practice law, and in time diminish the scepticism of other actors towards their problem-solving capacity.

## 5.2. CMGS AND RULE OF LAW BUILDING IN SOUTH SUDAN

After assessing both the empirical legitimacy and the functioning of the CMGs, we can turn to the question whether these new institutions will most likely challenge or support the building of a stronger legal system in South Sudan, whose authority the population is willing to accept. Common critiques on mediation, discussed in section 1, spring from a comparison with the functions that courts are expected to perform. These include the public articulation of rights, explicating and giving force to the values embodied in legal texts, producing rules and binding precedents, and as such serving an important educational function.<sup>89</sup> In many countries in the global south the formal courts are largely unable to fulfil these functions. As detailed above, in many areas of South Sudan there are few or no formal courts, and where courts do exist, they are understaffed and underfinanced, and poorer citizens mostly lack the resources and knowledge to use them to protect their rights. The courts furthermore provide limited reasoning with their decisions, and case law is not reported in accessible outlets. A focus on the presumed advantages of court procedures over mediation is thus rather moot, and detracts visibility of large parts of the population that cannot access courts. Rather than comparing mediators to an ideal-type of courts that do not exist in South Sudan, it is the actual context in which we need to assess whether legitimate community mediation institutions will most likely challenge or support the building of a stronger legal system and the rule of law.

In South Sudan the CMGs seem to play an important role in educating the public about their rights, both through legal awareness campaigns and mediations, of which results often get disseminated by word of mouth.<sup>90</sup> Through their emphasis on laws and legal procedures, CMGs produce and give empirical legitimacy to state law and 'perform stateness'.<sup>91</sup> Resolving disputes at the local level and holding state agencies accountable – two functions respondents consistently reported they were unable to effectuate without the CMGs – can furthermore impart popular confidence in the law. Providing poorer citizens with access to courts will also lead to people seeing and hearing about powerful people and state institutions being challenged and held accountable in court. This will enhance the prestige of the court, 'give life to the rule of law'<sup>92</sup> and create a positive synergy between the CMGs and the courts.<sup>93</sup>

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<sup>86</sup> Client 2 (male), Interview CMG clients, Wau, 5 December 2021.

<sup>87</sup> Client 1 (female), Interview CMG clients, Wau, 5 December 2021.

<sup>88</sup> Franco et al. (n. 37) 117.

<sup>89</sup> Hensler (n 25) 196; Fiss (n 29) 1085; Luban (n 30) 2622-2623; Sternlight (n 27) 1661-1665; Sternlight (n 28) 570.

<sup>90</sup> cf Maru (n 24) 450.

<sup>91</sup> Anthropological literature has increasingly shown that institutions and persons who are not officially associated with the state may be involved *de facto* in the execution of public authority (C. Lund, 'Twilight Institutions: An introduction' (2006) 37 (4) *Development and Change* 673, 676). Law is one of the 'symbolic languages of authority' through which stateness is performed (TB Hansen and F Stepputat, 'Introduction: States of Imagination.' In TB Hansen and F Stepputat (eds.), *States of Imagination: Ethnographic Explorations of the Postcolonial State* (Duke University Press 2001) 1-38).

<sup>92</sup> cf Hensler (n 25) 196.

<sup>93</sup> cf Stromseth et al. (n 83) 239.

In line with observations by Maru and Berenschot and Rinaldi,<sup>94</sup> the practice of CMGs in South Sudan defies the common critique that mediation disadvantages less powerful people.<sup>95</sup> CMGs are servicing a part of the population that otherwise would have simply no avenue to claim its rights. Improving access to justice of poorer citizens is a precondition for real equality before the law,<sup>96</sup> and increasing the shadow of the law helps to level the playing field in and outside of mediations.

There are some important conditions for paralegal programming to benefit the poor and underprivileged. One such condition is that mediation is voluntary, and disputing parties are not forced to accept a proposed solution.<sup>97</sup> This requires the existence of alternative methods of dispute resolution, including an available ultimate resort to an impartial, well-functioning, formal court. Without a credible threat of litigation there would also not be a substantial shadow of the law. This means that whereas paralegal programming can be a driver to increasing access to justice in countries with a fledgling legal system, this will always also require court reform and development.<sup>98</sup> While this paper discusses paralegal programming, it needs to be clear that our assessment of the ability of South Sudan's CMGs to contribute to the development of a better functioning legal system heavily depends on this to be a program consisting of trained lay community mediators *with* sufficient public interest lawyers. In post-conflict countries with low numbers of formally trained lawyers and difficulties of sustaining stable long-term donor funding, this may be a hard-to-take hurdle.

Another condition sees to the skills and knowledge of the mediators. Community mediators can play an important educational function, but this requires them to have good understanding and representation of the law, for which proper knowledge and skills training is necessary. Limited funding is connected to a rapid turnover of volunteer staff,<sup>99</sup> which will hamper the development of a body of well-trained and skilled community mediators. When community mediators are dealing with other types of conflicts than regarding demarcated land, formal laws may clash with cultural norms of a religious or customary nature. In such cases, raising awareness, and acceptance, of formal laws and rights in communities will be more challenging, and will require more persuasive power of the community mediators. The quality of the relationship with traditional and religious leaders will likely become more important. Mediation in such cases also may mean finding a middle ground between the position of state law and the one of customary or religious customary systems. While international donors – with their strong focus on human rights – may find this problematic, one needs to keep in mind that the alternative is usually not that the marginalized party has their dispute decided in court on the basis of formal law but rather that conflicts are either not addressed or dealt with in customary or religious fora on the basis of the prevailing cultural norms.

## 6. CONCLUSION

In this article, based on literature study and empirical research, we have analysed the new CMGs set up in Wau and Torit. Interviews with clients and community members demonstrate that the mediation groups enjoy a high level of empirical legitimacy. Many of the factors mentioned by clients as to why they trust the CMGs are similar to the four aspects of procedural fairness described by Tyler and others. Another main legitimating reason given is the fact that the CMGs provide an otherwise for many people non-existent avenue to address their legal concerns. We conclude – conform Hollander-Blumoff and Tyler – that the legitimacy and procedural justice of the CMGs are critical elements in ensuring compatibility of the CMGs with rule of law values.

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<sup>94</sup> Maru (n 24) 450–451; Berenschot and Rinaldi (n 45).

<sup>95</sup> Edwards (n 52) 679; Hensler (n 25) 173; Maru (n 24) 450.

<sup>96</sup> cf R Kleinfeld, 'Competing Definitions of the Rule of Law' in T Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press 2006) 31, 39.

<sup>97</sup> cf CB Harrington and SE Merry, 'Ideological Production: The Making of Community Mediation' (1988) 22 (4) *Law and Society Review*, special issue: Law and Ideology 709, 717; Hedeem (n 22) 115.

<sup>98</sup> Court decisions are furthermore needed for the production of rules and precedents, although their educational function is limited if they are not published and made available to a wider audience.

<sup>99</sup> cf Dugard and Drage (n 35) 87.

Limited access to formal legal institutions is a common feature of many countries, and empirically legitimate community mediators are a cost-effective way to increase access to justice for citizens. However, it is the potential of community mediators to bring changes to the structure and functioning of the wider legal system that makes them even more interesting actors in post-conflict countries struggling to set up a functioning rule of law. In South Sudan much official behaviour remains unscrutinised by the users and the general public, and there is limited public accounting of the executive towards representative political organs. Changing the free-for-all executive field into one where officials face a real risk of being held accountable, their malfeasances made visible, could mark an important change. As such, the solving of local disputes through mediation combined with the pressure community-mediators-backed-by-lawyers are able to put on more powerful actors in court can ‘show through concrete examples – not words or dreams – that justice is possible’.<sup>100</sup> It can induce the first important steps on the long and arduous road to more access to justice for common citizens, a government that is itself also held accountable, and formal courts that publicly articulate rights and the values embodied in the law. In addition, the state and its law are not only produced in formal judicial institutions, but also in forums like the CMGs each time these emphasize laws and legal procedures.<sup>101</sup> These processes can contribute to citizens’ legal awareness, their trust in the rule of law and the empirical legitimacy of the legal system, highly important processes for states in the process of state and nation building. In line with Hedeem, we thus argue that more ‘[r]esearch is sorely needed to measure the spillover effects’ of community mediation.<sup>102</sup> While Hedeem argues this for the United States, the societal effect of community mediation is even more vital in countries struggling to establish their legal system.

## COMPETING INTERESTS

The authors have no competing interests to declare.

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<sup>100</sup> Maru (n 24) 457.

<sup>101</sup> See footnote 91.

<sup>102</sup> Hedeem (n 22) 127.

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