



**Customary law, norms, practices
and related factors that enable
and constrain women's access to
housing, land and property
in South Sudan**

A desk review

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Peter CATON

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Customary law, norms, practices and related factors that enable and constrain women's access to housing, land and property in **South Sudan**

A desk review

Prepared for IOM

by

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ACRONYMS

| | |
|--------------------|---|
| HLP | housing, land and property |
| IDMC | Internal Displacement Monitoring Centre |
| IDP(s) | internally displaced person(s) |
| JICA | Japan International Cooperation Agency |
| MAFC&RD | Ministry of Agriculture, Forestry, Cooperatives and Rural Development |
| MGCSW | Ministry of Gender, Child and Social Welfare |
| MLHUD | Ministry of Land, Housing and Urban Development |
| PLC | <i>payam</i> land council |
| PoC | Protection of Civilian (programme) |
| UNDP | United Nations Development Programme |
| UNHCR | United Nations High Commission for Refugees |

EXECUTIVE SUMMARY

This report presents a review of the existing literature on customary law and practices, attitudes and beliefs (social norms) and other factors that create barriers to women's access to and control over land and property in South Sudan. It also presents efforts to improve women's property rights. The findings emphasize not only access, but also security of that access and its limitations, the ability to use land as desired, and the ability to control income derived from land. In this desk review, "access to land" is short for "access to, use of and control over land" and includes "improving or strengthening tenure security", as well as access to housing, as linked to the protection of housing, land and property rights (Tempira et al., 2018).

To make findings more meaningful, the review briefly lays out the sociopolitical context to highlight current challenges to women's access to housing, land and property (HLP) rights, before turning to the country's customary and statutory land governance frameworks. The review then presents a conceptual framework for women's land rights that illustrates the potential benefits that securing them can have at the individual and household levels. After presenting the case for women's land rights and discussing the current institutional environment, the review discusses barriers to and opportunities for securing women's access to housing, land and property. The barriers are categorized as either sociocultural or institutional, and many have cultural roots that provide rationales invoked by family members, government officials and traditional authorities to subordinate women, in general, and deny them access to land, in particular. Furthermore, cultural norms also shape women's own attitudes about their right and ability to own land. These, together with coexistent yet often contradictory customary and statutory legal systems, compounded by a lack of knowledge of the law and how to follow land administration procedures, often leave women unable or unwilling to exercise their rights. Finally, current initiatives and opportunities are presented to show potential synergies that actors pursuing women's HLP rights might catalyse.



Margret Joseph, 50, inside her new home in Wau, South Sudan. © IOM 2020/Peter CATON

“

When I move back to my house there was a large hole in the roof, fortunately IOM fixed the roof and now I am very comfortable.

”

1. CONTEXT: DISPLACEMENT, DISPOSSESSION AND CHALLENGES TO RETURN

Overlapping land claims and the struggle for territorial control were central to South Sudan's independence struggle and the waves of post-independence intercommunal conflict. The Internal Displacement Monitoring Centre (IDMC) estimated that 1.4 million people were internally displaced within South Sudan (IDMC, 2020) at the end of 2020. At the end September 2020, over 2.1 million people were living as refugees in nearby countries (UNHCR, 2020). Secondary occupation by internally displaced persons (IDPs) or soldiers (Buchanan, 2019), loss or absence of documentation and contentious land acquisitions (often called "land grabs") threatened return.

Van der Haar and van Leeuwen (2019:6) found that the incidence of land grabs or expropriation, by both domestic and international actors, often increases in the aftermath of a conflict due to a general disarray in land governance while the government is in the process of organizing its administration of the new State and passing and implementing new laws. In such a context, individuals, especially widows, divorced women and orphans, who have yet to return physically to stake land claims, tend to fall victim to "irregular appropriation of land". Military police, soldiers and wildlife rangers are examples of domestic actors reported to be involved in evictions and expropriation of land in urban areas (Deng, 2014). Agriculture, including biofuel production, the establishment of wildlife reserves and forest conservation are other considerable large-scale, land-based investments that infringe on the land and resource rights of residents in rural areas (Deng, 2011).

According to Sydney (2019a), the inability to access one's land and property due to ongoing violence and lack of infrastructure deter return as well. In a survey report, Sydney (2019b) noted that "more than 80% of the IDPs surveyed had property before their displacement", with 70 per cent of interviewees stating that their property had been destroyed. The destruction of homes and essential infrastructure was significant, particularly in densely populated urban areas (Jahn, 2017). With majority of land held under customary tenure, many IDPs and refugees do not have documents to prove land ownership, increasing the occurrence of land disputes, which tend to be between individuals, such as relatives contesting the division of inheritance and women and orphans staking claims to land (Institute of Management Research, 2016), or involve issues of secondary occupation (Bennett et al., 2010).



Margret Joseph, 50, plasters her new home in Wau, South Sudan. © IOM 2020/Peter CATON

“

I am doing the plastering because I love the house, and it is very important that when IOM helps me, I must do something myself to try and keep the house for a long time.

”

2. STATUTORY AND CUSTOMARY LAND GOVERNANCE FRAMEWORKS

The Government of South Sudan is creating a national governance and administrative framework that focuses on an integration and nation-building process that will address ethnic tensions and build a strong economy (World Bank, 2017). As a newly formed State with a colonial legacy, South Sudan has a dual land tenure system based on: (a) statutory legal rights, promoted by the Constitution and protected by the formal justice system; and (b) customary rights, favoured by traditional authorities and secured through membership in a particular ethnic community, but also recognized by new legal frameworks such as The Transitional Constitution (2011), The Land Act (2009), The Local Government Act (2009), and the draft National Land Policy (fourth version, 2019) (USAID, 2013).¹

There are three types of land in South Sudan: public, community and private (Autonomous Government of Southern Sudan, 2009a; MLHUD, 2019), with community land being dominant in rural areas and administered by traditional authorities (MLHUD, 2019). In urban areas, private and public land governed under statutory tenure and legal frameworks tend to prevail (*ibid.*).

The Transitional Constitution of South Sudan stipulates that “women shall be accorded full and equal dignity of the person with men” and that “women shall have the right to own property and share in the estates of their deceased husbands, together with any surviving legal heirs of the deceased” (Government of South Sudan, 2011a).² Customary land rights have equal force and effect in law, and customary law and traditional judicial institutions operate alongside State institutions. However, decisions made in customary courts can be appealed in statutory courts (Autonomous Government of Southern Sudan, 2009a:section 8(6)). The tensions that tend to arise from having two land tenure systems operating simultaneously are well documented (USAID, 2013; Freudenberger, 2013; MGCSW, 2019).

Customary law “is a set of rules and norms that govern community allocation, use, access and transfer of land and other natural resources” (Freudenberger, 2013) and is based on religious, ethnic and tribal practices. These rules and norms are unwritten and, therefore, not codified and only passed down orally. Land holdings are often “undocumented” – that is, they are without written proof of ownership. The customary tenure system rely on community-based dispute resolution mechanisms and traditional authority figures, such as village or community chiefs, to settle disputes and allocate land. Trust and respect are needed for traditional dispute resolution mechanisms to work.³ Finally, the customary land tenure system tends to be gender-inequitable, as women’s access to land and property

¹ See: Government of South Sudan, 2011a (The Transitional Constitution); Autonomous Government of Southern Sudan, 2009a (The Land Act); Autonomous Government of Southern Sudan, 2009b (The Local Government Act); MLHUD, 2019 (draft National Land Policy).

² See, in particular, Articles 16 (Rights of Women) and 28 (Right to Own Property).

³ Many chiefs with long-standing relationships with and knowledge of local communities and their practices have been killed or disappeared. The traditional succession pattern has been disrupted, and many chiefs now are salaried government appointees. In some instances, military officers have replaced traditional chiefs (Jahn, 2017). The ability of traditional leaders to mediate land disputes appears to be diminishing. In addition, respect for traditional leaders among younger men is on the decline (Bennett et al., 2010).

is predicated on their relationships with men (e.g. husbands, fathers, older sons, uncles and brothers-in-law), traditional authorities (chiefs), marital status and child-bearing ability (Stone, 2014). There are over 60 community and ethnic groups in South Sudan, each with its own norms and rules that govern land relations (Leonardi et al., 2011; USAID, 2013; Mennen, 2016). As such, some women in the country might have more support and ability to access and control land than others (even with the Constitution's stipulation of equality, discussed below).

There are two processes that men and women can use to register land under their own names: (a) a more formal, Government-led process and (b) another that is less formal and community-led (Deng, 2014). How each of these land registration processes is carried out differs across regions and with respect to the actors involved. In general, the Ministry of Physical Infrastructure oversees the Government-led process, which results in the land user obtaining a Government-issued written lease (with terms of 25 years or more) and a sketch of the surveyed plot. These documents serve as evidence of ownership, and the lease is formally registered with the High Court (ibid.; Jahn, 2017).

In the community-led process, after a chief allocates land or after a land user submits a land claim application to a chief, a committee of local leaders may conduct an informal boundary demarcation procedure before issuing the land user with a token authorizing temporary use of the land (Deng, 2014). A chief or headman also needs to approve the acquisition of a plot of land by someone from outside of the community (Mennen, 2016). The token is not free. Token fees are not written down, vary by community and, therefore, provide an opportunity for corruption (ibid.). Fees accrue to chiefs and community leaders, who may share them with *payam*-level authorities. A land user can register his or her token with local land authorities, usually at the *payam*-level, but not with the High Court (ibid.:36). For an additional fee, a user can upgrade the token to a "title deed". Because chiefs and local community leaders facilitate this process, ethnic and/or community politics and political patronage often interfere with its transparency, with "complaints of discrimination based on gender or ethnicity" commonplace (ibid.:37). Unless tokens are registered formally, the community-led process *may be less secure* (Jahn, 2017; Deng, 2014). The draft National Land Policy includes a mandate for a comprehensive review of the country's land registration system to create a streamlined, transparent and uniform process that should address these shortcomings (MLHUD, 2019).

3. WHY WOMEN'S ACCESS TO LAND AND PROPERTY MATTERS: A CONCEPTUAL FRAMEWORK

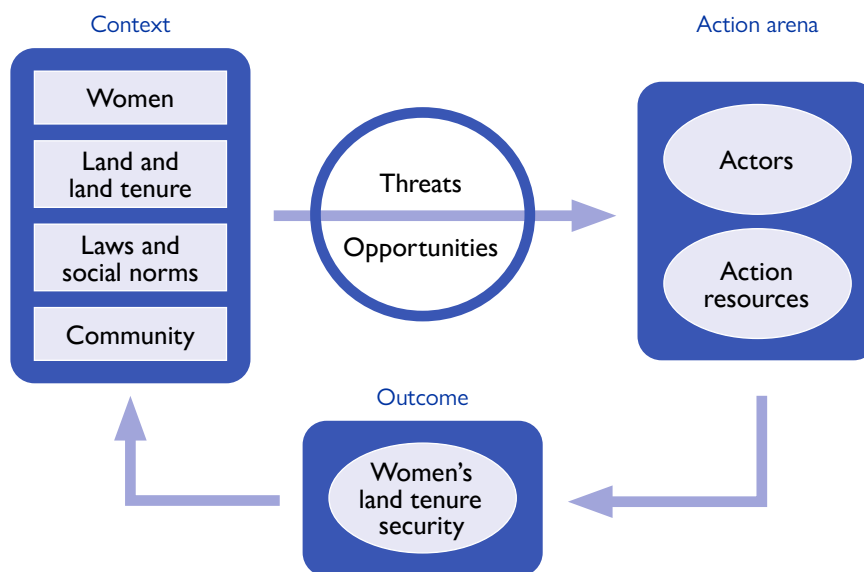
Econometric analyses demonstrate the economic gains that would result from advances in gender equality and women's property and asset ownership (Moodley et al., 2019). Academic scholarship and applied research on international development interventions confirm the benefits of women's land rights and of securing those rights, not only for women themselves but also their families (USAID, 2016; Scalise and Giovarelli, 2020). Studies show that when women own land and have decision-making power over how to use income derived from it, they tend to invest that income in their children's education and their family's nutrition. In addition, when women have decision-making power over land, they are more likely than men to adopt agricultural innovations, such as new crops, crop varieties and planting methods being promoted as part of climate change adaptation and food security strategies (Shibata et al., 2020:7). Quisumbing and Kumar (2014) found that Ethiopian women with the power to manage plots of land were more likely to plant trees and adopt climate-smart agricultural practices. Given that women make up 60.2 per cent of agricultural workers and constitute 80 per cent of the agricultural workforce (Sylvester, 2020), giving women more control over land and associated decision-making powers could improve the country's land management and food security.

While highly sensitive to context, studies from around the world show that, overall, land and property ownership reduces marital and domestic violence against women (Panda and Agarwal, 2005; Chowdhry, 2012; Hillard et al., 2016). When a woman owns land and has tenure security – and, therefore, a place to live and a means to earn an income – she has a “fallback” position, which presents her with a means to escape a violent home environment and/or increase her bargaining power in her marital home (Scalise and Giovarelli, 2020). With a means to earn an income, a landowning woman might be able to leave a violent marriage or threaten to do so (Caron, 2018a). In the traditional South Sudanese context, given the customary practice of paying a bride price (discussed in detail in Chapter 6), a married woman is seen as the property of her husband's family and clan. Marriage is thus a communal affair, and marital problems, including domestic violence and divorce, are seen as community concerns rather than private matters between a husband and his wife. Therefore, relatives might stop a woman from leaving her marital home to maintain community cohesion (Stern, 2012), in addition to avoiding or reducing conflict between families. In fact, over 80 per cent of South Sudanese men and women interviewed in a 2016 survey responded that “women should tolerate violence in order to keep the family together” (Oxfam International, 2017:42).

There are two conditions of the HLP issue necessary for the improvement of women’s lives, gender equality and women’s empowerment: (a) the ability of women to engage their rights to access housing, land and property; and (b) *the security* of that access. Since women and their families are embedded in larger social and institutional structures (Agrawal, 1997), there needs to be a normative culture of respect for a woman’s legal right to own land, housing and property and an operational legal framework that backs up this right, so that her access is secure enough and cannot be arbitrarily taken away.

Figure 1 shows elements of the sociopolitical context (i.e. social norms and practices, as well as institutional mechanisms and legal frameworks) that create threats or barriers to, as well as opportunities for actors (e.g. individual men and women, government officials, religious leaders, traditional authorities, and other respected community leaders) to create an enabling environment for women’s land tenure security (Doss and Meinzen-Dick, 2020).

Figure 1. Factors affecting women’s land tenure security



Source: Doss and Meinzen-Dick, 2020.

4. THE INSTITUTIONAL ENVIRONMENT: FRAMEWORKS FOR GENDER EQUALITY AND LAND GOVERNANCE

South Sudan's Gender Development Index (GDI) score puts it in the "low equality" category, as women fare considerably worse than men in three basic dimensions of human development: health, education and command over economic resources (UNDP, 2018). For example, the literacy rate of women ages 15 or older is still only 28.8 per cent (World Bank, 2017), putting many women at a disadvantage, as the ability to read and write is crucial for women to independently engage in land registration processes and the formal justice system,

The Gender Inequality Index (GII) uses three indicators to assess national-level gender inequality, two of which (empowerment and economic activity) are relevant to a review of the state of women's HLP rights. South Sudan's GII score falls in the bottom third of all countries with respect to its performance in reducing violence against women and increasing socioeconomic empowerment, both of which secure land rights could help to improve (UNDP, 2018).

The Government of South Sudan has a relatively new land governance framework that includes a number of laws and policies with gender implications (Table 1). The Transitional Constitution, The Land Act (2009) and the draft National Land Policy all stipulate that women can own land (Odeny, 2013). To be specific, section 13(4) of The Land Act (2009) states that "women shall have the right to own and inherit land together with any surviving legal heir or heirs of the deceased, as stipulated in Article 20(5).

Table 1. Laws, policies and strategies relevant to HLP rights in South Sudan

| Date | Title |
|---------------------------------|--|
| 2009 | The Land Act |
| 2009 | The Local Government Act |
| 2011 | Transitional Constitution of the Government of South Sudan |
| 2011 | South Sudan Development Plan (2011–2013) |
| 2018 | South Sudan National Development Strategy |
| (Under review/ consultation) | Draft National Land Policy |

The Transitional Constitution specifies that all levels of the South Sudanese Government should "enact laws to combat harmful customs and traditions which undermine the dignity and status of women". It recognizes the institution, status and role of "traditional authority" (section 167.1) and stipulates that courts "shall apply customary law" (section 167.3). It also states that, with respect to land tenure, "all levels of government shall institute a process

to progressively develop and amend relevant laws to incorporate customary rights and practices and local heritage” (section 171.8).

Aspects of customary law are inconsistent with both women’s rights and the Transitional Constitution (Jolaade and Abiola, 2016), with significant implications for women seeking justice through the customary justice system. The Constitution, for example, recognizes the equal rights of men and women to own land; however, customary law only allows women and girls access to property through their fathers or husbands. The Local Government Act (2009) “establishes Customary Courts ... to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities” (Stone, 2014:28). The three types of customary courts recognized by the Local Government Act (2009) are *boma* courts, *payam* courts and paramount chief courts. Customary law allows marital and inheritance disputes to be settled at the family or clan level, which means that such cases might not even be presented before one of these three courts and, as such, these disputes and their outcomes go unrecorded (Mennen, 2016).

The more recent National Development Strategy (Government of South Sudan, 2018:8) espouses the principles of democracy and good governance, including through the “enactment and enforcement of property rights and contracts”. The South Sudan Development Plan recognizes gender as a cross-cutting issue and calls for establishing gender-sensitive policy frameworks in all sectors, including public services (Government of South Sudan, 2011b:60), potentially increasing employment opportunities for women in land-related government offices and ministries. However, achieving this objective might be a challenge, as women’s inclusion in the wider national political, State-building and peacebuilding processes has been limited (Westendorf, 2018).

The Government of South Sudan has either signed or ratified international conventions relevant to human rights and gender equality (Table 2). Together, they create a foundation for addressing discriminatory practices (Smart Edge Research, 2016).

Table 2. Legal instruments signed or ratified by the Government of South Sudan

| International (global) instruments | Year signed or ratified |
|---|---|
| Convention on the Elimination of all forms of Discrimination against Women (CEDAW) ^a | Ratified in 2014 |
| International Covenant on Civil and Political Rights (ICCPR) ^b | Ratified in 2019 |
| The International Covenant on Economic, Social and Cultural Rights (ICESCR) ^b | Ratified in 2019 |
| Regional instruments | Year signed or ratified |
| The African Charter on Human and Peoples’ Rights ^c | Ratified in 2013 |
| The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa | Signed, but not ratified, as of July 2020 |

Sources: ^a United Nations Mission in South Sudan, 2014;
^b United Nations Commissioner for Human Rights, Office of the, 2019;
^c African Commission on Human and People’s Rights, 2021.

Despite decrees and processes that provide for women to obtain and register land under their own names, access to and ownership of land and assets in South Sudan remains highly inequitable (MAFC&RD, 2012).

5. BARRIERS TO WOMEN'S ACCESS TO HOUSING, LAND AND PROPERTY

Culture is learned and its norms are internalized. Boys and girls learn or are socialized into what their community considers appropriate and expected behaviours as they grow up. Therefore, norms shape a woman's experience of the world, including how she is treated and whether or not she can or has the confidence to exercise her legal and socioeconomic rights. Bennett et al. (2010:6) stated that “the collective belief in Southern Sudan ... confirmed by non-existence of data stating otherwise, is that cultural beliefs and attitudes in Sudan are very strong barriers to women's visibility and constrains their participation and opportunities for reaping benefits from mainstream development processes.” In the case of South Sudan, limited access to housing, land and property, specifically, constrains women from participating in economic development initiatives.

Women are not a homogeneous group, and so they are not all affected by such constraints in the same way. Age and marital status, for example, influence a woman's ability to access housing land and property. A married woman has better access to land and property than does a widow, as there is a man present in the household to access land on her behalf. An older woman also tends to have stronger HLP rights (USAID, 2013). The intersection of age and marital status could have implications for return, with the number of widows, abandoned and divorced women – and, consequently, female-headed households – on the rise due to conflict-related deaths and disappearances of husbands⁴ (Stone, 2014; Jahn, 2017). The findings in this chapter highlight the differences within the larger group of “women”.⁵

Women face a range of barriers to exercising their constitutional right to own land. Barriers identified in this review are categorized as either sociocultural or institutional. Sociocultural barriers refer to harmful customary practices rooted in culture that discriminate against women and influence their ability to access and control land and property, reflective of broader patriarchal attitudes and beliefs that attempt to keep women in a subordinate position to men (Jolaade and Abiola, 2016; Leonardi et al., 2011; Luedke and Logan, 2018). The denial of women's HLP rights is a denial of resources, opportunities and services and is a form of gender-based violence (Reproductive Health Response in Conflict (RHRC) Consortium et al., 2011). Institutional barriers, on the other hand, women's low levels of awareness of and non-gender-equitable implementation of laws and land administration policies and practices, as well as gender-biased institutional practices, including in the justice system.

⁴ One estimate is that 45–50 per cent of returnee households have become female-headed as a result of the conflict (Odeny, 2013).

⁵ Mennen (2016) provides a nuanced description and analysis of how ethnic group or tribal membership shapes HLP outcomes for women. The report is a comparative self-ascertainment study of 14 tribes/ethnic groups in five South Sudan states and provides insights into customary law and practices regarding inheritance and family succession, family law (including the practice of widow inheritance), and land law. Given the page count restrictions of this review, a 14-group comparison could not be included. The report's colour-coded annexes illustrate areas for reform and harmonization between statutory and customary law.

There is an overlap between these two categories. In sociological terminology, culture is a social institution that permeates and works across all levels of society, from the individual psyche to the household, and within State policies, systems and procedures. Rigid gender norms and stereotypes (Denman and Lipscomb, 2020b) rooted in culture influence the ways that women are viewed and treated across all levels of society, including when these manifest as domestic violence. Wife-beating is considered a normal, customary practice to “discipline women”, such that women are not usually able to use it as grounds for divorce (Ibreck and Pendle, 2016:39). Improving women’s access to housing, land and property requires both a cultural change in norms, values, attitudes and beliefs held about women at the individual, family and community levels, as well as structural change at the institutional level, via the amendment of laws, policies and programmes, or the introduction of new ones to strengthen enforcement of existing policies and laws, with a view to supporting and re-enforcing cultural change. Change must come from within and with donor assistance (Deng, 2013).

5.1. SOCIOCULTURAL BARRIERS TO LAND ACCESS AND CONTROL

Sections 6.1 and 6.2 enumerate barriers to women’s land rights and threats to land tenure security. As women experience the world differently depending on their age, education level, marital status, community or ethnic group, and geographic location (which region, and whether rural or urban), these differences are presented whenever possible. The barriers are grouped according to the sociocultural–institutional typology already mentioned and are presented in no particular order within each type.

5.1.1. Patriarchal power and male decision-making in the home

South Sudan is a highly gender-unequal society (LeRoux-Rutledge, 2020) influenced by strong patriarchal norms and values. Patriarchy is a system of rule and authority based on norms, beliefs and practices that promote and keep men in positions of power. In a patriarchal system, men control access to goods, resources, knowledge, services and the political structures of decision-making power in both the private (home) and public spheres (government/community). As a result, women and their opinions, knowledge and work are devalued; girls may be deprived of education; and women and girls have little power over their bodies and limited access to land, property and wealth. Women themselves recognize that many customary practices, including marital practices, make them feel as though they are not “equal citizens within their own communities” (Beswick, 2001:36).

Male decision-making in the home operates in a number of ways. A 2016 assessment found that men, women, boys and girls all perceived men to be the primary decision makers in both the home and the community (Oxfam International, 2017). Boys, therefore, learned that they were future decision makers, whereas girls and women argued that they wanted or needed training so that they could become leaders and decision makers, too. One young boy claimed that “women have weak minds” (Oxfam International, 2017:46) – a cultural belief that undermines women’s decision-making capabilities. In addition, most women “strongly agreed” with the statement that “men, as head of the family, must control their family” (Deng, 2013:49). Also, women often needed to ask their husbands for permission to leave the home and participate in public life. Research finds that South Sudan’s patriarchal culture is partially responsible, for example, for the lack of implementation of the legal mandate that women shall have the right to participate equally with men in public life and, more generally, women’s ability to exercise their rights and entitlements (Jolaade and Abiola, 2016).

The exercise of patriarchal power has implications for a woman's ability to access land and property and, therefore, their ability to exercise control over land and income earned from the sale of agricultural surplus (Bennett et al., 2010). First, there is evidence that women who receive development interventions may not be in control of all income streams generated from these interventions. For example, in Yei in Central Equatoria and in Mundri in Western Equatoria, men tend to control the proceeds of the sale of large animals, such as cows and goats, while women tend to control only the proceeds of the sale of small animals (ibid.). Men might claim a woman's land as his own when her crops are ready for harvest, sell them and keep the proceeds of the sale (MGCSW, 2019).⁶ Second, some women have cited that they needed permission from men to buy or sell land. Women in Yambio indicated that if they purchase land without their husbands' knowledge, they risked divorce or having such land and its documentation taken away. Some women reported purchasing land in secret as a result, and, in turn, men have been reported to sell their wives' land without their knowledge or permission (ibid.). Finally, when women lack their own incomes, they are unable to re-claim land that they own upon their return or to pay land survey, documentation or registration fees (Buchanan, 2019).

5.1.2. Character or reputational assault

One mechanism that men use to "keep women in their place" consists of shaming and other forms of verbal assault on their personal virtue or character. Jolaade and Abiola (2016:60) stated that in South Sudanese society, women who attempt to exercise their rights or engage in politics often suffer from being called slurs such as "prostitute" and "irresponsible wife/mother". Such assault on a woman's character often deter her from engaging her rights. Women in Yambio have noted that women who cultivate and develop land are accused of setting a "bad precedent", as land ownership fosters a sense of independence and, thus, might deter girls from getting married (MGCSW, 2019:13). LeRoux-Rutledge (2020:10) found that even some women support this "bad precedent" view, stating, for example, "Girls don't need to buy a house. You are getting married soon and you will move to somebody's house". Unmarried women are often not taken seriously. They may be accused of using sex to "get ahead" and are often conditioned to believe that their own views and voices do not have legitimacy (Stern, 2012:1–23). Women's lack of belief in themselves and their own value undermines their ability to advocate for their rights.

5.1.3. Secondary rights to land

South Sudanese women, by custom, have secondary rights to land (USAID, 2013). This means that a woman can access land through a male family member or relative, as derived through marital, motherhood or childbearing status (Stone, 2014; Caron, 2018b). Men are the primary land rights holders, inheriting land through familial lineage (i.e. from father to son) or via allocations from community chiefs and other authorities (USAID, 2013). If a husband denies his wife access to land, she can approach the chief for an allocation.

Secondary rights do not provide women with security of tenure, as access is conditional (Stone, 2014). In addition, a man can easily take away a plot of land he has given his wife (Caron, 2018b). Stone (2014:39), in a field study, found that 92 per cent of women who were using land were worried about being evicted. Finally, many single women and widows trying to return to their country or resettle in their respective communities after being internally displaced found that their secondary rights and, thus, their ability to access land, were compromised, as the male relatives through whom they would normally access land

⁶ Women in Zambia have reported experiencing the same (Caron, 2018b).

were already deceased (Jahn, 2017; MGCSW, 2019). A 2019 survey by UN-Habitat et al. (2020) found that in one Protection of Civilian (PoC) site in Wau State, 71 per cent of the households were female-headed as a result of family patriarchs being deceased or displaced.

5.1.4. Bride price (or bride wealth)

In accordance with the customary marriage practice of paying a bride price, gifts pass from the groom's to the bride's family in a transaction prior to marriage akin to purchasing a woman like any other commodity (Luedke and Logan, 2018). If more than one man is interested in a woman, there might be a bidding war, with the highest bidder "acquiring" her (Beswick, 2001). A bride price, which may be made as a series of payments over time, "accords a male complete authority over [his wife] ... hence, a woman becomes subservient to her husband in all respects" (Hove and Ndawana, 2017:5). A girl's father is considered her "owner" until the bride price is paid (Ibreck and Pendle, 2016). While the bride price custom is practiced differently across South Sudan's various ethnic communities, it results in a common belief that a wife is her husband's and his community's and clan's property (MGCSW, 2019). In addition, a woman loses her rights to access or use her own family's (natal) land or property upon marriage, making her dependent on her husband and his family for access to land. This dependency, which is underpinned by the practice of patrilocal residence in marriage (the bride moves to her husband's village and lives with him and his parents), makes women vulnerable to abuse and domestic violence, as her social and familial networks are weakened (Caron, 2018a).

Women may internalize these customary beliefs and believe that they do not have an inherent right to land (MGCSW, 2019). The belief that women are property can easily be used as justification to undermine and deny women's HLP rights, since "property cannot own property". That women are "property" also justifies men's ill treatment of their wives, in the form of physical and emotional violence, and the rape and abduction of women (Luedke and Logan, 2018).

5.1.5. Inheritance practices

In most ethnic communities in South Sudan, including the Dinka, land inheritance is patrilineal. If a deceased person has no sons, his brothers or close male relatives inherit his property (Mennen, 2016). Unlike men, women are secondary rights holders and do not generally inherit land from their parents. They do not inherit land directly or automatically from their fathers (MGCSW, 2019), and there are but only a few examples of fathers who have included their daughters as heirs to their landholdings in a written will. Such land-willing behaviour is not viewed positively by some family members (ibid.), and if a woman is successful in inheriting land, she might be coerced or pressured by family or community members to give the property and her rights to it to her male children (Stone, 2014).

There is no legislation that operationalizes the Transitional Constitution's inheritance provision (USAID, 2013; Leiber, 2017). In a customary tenure system, it is often the case that, with the death of her husband, a widow loses access to land and property and is expelled from their marital home (USAID, 2013; Caron, 2018b). Widows are seen as not having a right to claim the "ancestral land of their late husbands, as ... people feel women have no right to land" (Bennett et al., 2010:14). The male relatives of a recently deceased man might also keep his daughters from inheriting any of their father's estate.

5.1.6. Wife inheritance (levirate marriage)

Wife inheritance or levirate marriage is the practice of a male relative of a deceased husband marrying (or “inheriting”) his widow and his land and property, in order to keep all of it within the family, and to make sure that the widow does not waste her reproductive potential to beget daughters for wealth accumulation through the bride price custom (Beswick, 2001; Leonardi et al., 2011; Stern, 2012; Buchanan, 2019). If a widow’s bride price has not been paid in full at the time of her husband’s death, the male relative who inherits her (and therefore becomes her new husband) pays off the balance to her parents (Beswick, 2001), further re-enforcing the idea that women are a commodity that can be “bought on credit” that is paid off over time. If a widow refuses to marry one of her deceased husband’s male relatives, she may be ostracized and lose access to land (MGCSW, 2019). In many cases, widows who have produced a son and young children are more likely to be given land than older widows (Stone, 2014). Equatorial women have reported that a single mother’s access to land is contingent on remaining with her deceased husband’s family; in some cases, she is expected – often forced – to procreate with a male relative, such as an uncle or brother-in-law, a practice that many women find offensive (Beswick, 2001; Stone, 2014). “Inherited” women often have sex against their will, even as such constitutes marital rape and, thus, a form of gender-based violence.⁷ Nonetheless, women submit themselves to their new husbands, as they want to make sure that any other children (e.g. those from a previous marriage) are taken care of (Beswick, 2001).

Levirate marriage might be considered by some communities as a social safety net that benefits widows, as they are not free to re-marry and need a male to look after them (Beswick, 2001; Stern, 2012; Mennen, 2016). However, wife inheritance leads to disputes between widows and their in-laws (i.e. the family members of their deceased husbands) (Buchanan, 2019). If a man who “inherits” a widow already has a wife, disputes might also erupt between the first wife and the “inherited” wife depending on her age and reproductive capability, as a younger, more fertile wife is perceived to be a threat (Beswick, 2001). Women in Wau and Western Bahr el Ghazal have reported that, in more recent times, many women have refused to be inherited and, therefore, lost the right to inherit their deceased husband’s land and property (MGCSW, 2019). Widows have the right to take their in-laws to court to recover the inheritance, but it is often difficult for them to do so without economic resources or the support of their family or the wider community (Leonardi et al., 2011; Jolaade and Abiola, 2016). There have been reports that widows in the Nuer community may own property registered under their own name if both the chief and her in-laws agree (Leiber, 2017).

5.1.7. Customary divorce practices

Shame and guilt are associated with divorce (Stone, 2014). In the Nuer community, divorce is considered a sensitive issue (Ibreck and Pendle, 2016:41). While divorce is not encouraged, there is some evidence that younger, married women are advocating for their right to leave a bad relationship with their property intact (World Bank 2014:23). Also, it must be remembered that divorce not only relates to the rights of the individuals in a marriage – for example, a woman who wishes to leave a violent domestic environment – but that it also has implications for their respective families (Deng, 2013). At one PoC site, a woman petitioned the court for a divorce based on repeated domestic assault. The court granted the divorce, as her parents were present in court and consented to it (Ibreck and Pendle,

⁷ Marital rape is not considered a crime under the Penal Code (Stern, 2012; Stone, 2014). Many tribes consider rape to be a serious crime and civil matter that “demands social reparation” (Deng 2013:56) and which can be corrected through compensation to the victim’s family, with some communities also punishing the perpetrator (Mennen, 2016).

2016). The husband acknowledged beating his wife and was fined, imprisoned and ordered to pay her compensation. While she was able to obtain a divorce and compensated, the fact that a woman needs her parents' consent to divorce her husband is tantamount to treating her as a child who does not have the full rights of an adult, which can force her to remain in a violent home environment if her parents do not support her.

It is common for a divorced woman to be dispossessed of her land rights (USAID, 2013). In the case of divorce, a woman may return to her natal home and her father's family compound, unless she herself instigated the divorce. If her family does not return the bride price payment, she must stay in her marital home (Stone, 2014). In this post-conflict environment, divorced women and other women who are returning unaccompanied to South Sudan encounter new challenges. In her research, Stone (2014) found, for example, that for some women who "have been away too long ... there [was] no one in their father's community who can [still] remember them and therefore support their claim to" land (2014:45). Being "unknown" or disremembered may be more prevalent in urban areas, where people are more mobile and not all residents know each other well.

5.1.8. Constraints on mobility (Approaching land administration and court authorities)

Given male dominance in society, a woman, depending on marital status and the region she is in, may need to be accompanied by a man to seek an audience with the community chief to consult about land or other matters. However, depending on the community and the particular chief, a single woman may make a direct approach, without a male companion, as is the case in the Madi community (MGCSW, 2019). Some women have reported being unable to access land authorities without a male relative or husband to represent them (ibid.:16). Others have reported that they were expected to be accompanied by a man at the State Ministry of Physical Infrastructure when acquiring legal documentation on land-related matters (Antonio et al., 2020). Women in Koythiey have reported having no access to land administration institutions at all (MGCSW, 2019).

5.2. INSTITUTIONAL BARRIERS TO LAND ACCESS AND CONTROL

This section enumerates barriers to women's land rights identified in this review that can be categorized as institutional in nature (Denman and Lipscomb, 2020b). As discussed in the previous section, social norms and customs influence the implementation of policy and help build societal respect for the State and its legal mandates. Patriarchal norms, which both men and women learn, and practices that subordinate women in the household and in the community are embedded in institutional policies and practices. Again, as women experience the world differently (i.e. based on age, income level, ethnicity and marital status), such differences are presented whenever possible. Barriers are presented in no particular order.

5.2.1. Lack of legal knowledge, information and awareness

Men and women, and even traditional leaders, are often not aware of the statutory rights of women to own land, which authorities are responsible for land governance, and that women can have land registered under their own names. Even when they are aware of these, both men and women may claim that traditional norms should override any legal, including Constitutional, mandates (USAID, 2013). Recent field work has found that women's knowledge of land law and how to access land through government programmes vary widely across the country (MGCSW, 2019). In general, awareness of land rights and land law is lower in rural areas compared to urban areas, with customary land tenure

practices more prevalent in the former (MGCSW, 2019; Frahm, 2019). Women in Rajaf have reported that they knew about neither the draft National Land Policy nor the county–*payam* land authorities. Some Nuer women have reported the lack of awareness programmes to empower women and of platforms for women to be involved in key decision-making bodies, including in local community leadership (Leiber, 2017).

5.2.2. Discriminatory views and lack of implementation of statutory law and practices

Government officials discriminating against women in land tenure administration is common around the world, with government officials often refusing to see women as legitimate landowners (Caron, 2018b). As a result, agricultural extension officers overlook or ignore women when they visit farms to offer new information or technical assistance (Farnworth et al., 2018; Sylvester, 2020). Jahn (2017) noted that women have difficulty navigating the land registration process and that government officials often refuse to register land under a woman's name. Women face land registration challenges, including not only harassment by officials during the process, but also via the Government's own land registration forms, which do not have multiple lines to accommodate joint titling under the names of both husband and wife, which may lead to default sole registration under the husband's name (Deng, 2014). The draft National Land Policy stipulates that "registration documents provide for joint ownership between husband and wife" (MLHUD, 2019).

There is a general lack of implementation of land-related laws in South Sudan. Women throughout the country have reported that even if land is registered under their own name, family members often grab that land or sell it in an underhanded manner (MGCSW, 2019). Women in Juba have reported that decision-making bodies and dispute resolution mechanisms often fail to uphold women's statutory land rights, noting that advocacy for education on statutory law and awareness of prevailing practices, and how such law and practices relate to tradition, is required to ensure adequate implementation of women's land rights.

5.2.3. Privileging of customary law in both customary and statutory courts

Custom is applied regardless of which court (customary or statutory) parties present themselves before (World Bank, 2014). Women seeking divorce have a difficult time enforcing their rights regardless of which court they present themselves before because, as already noted, custom favours men (IOM and Webber Wentzel, 2020). If a woman receives a favourable court decision regarding a dispute relating, for example, to inheritance or the distribution of property upon divorce, her husband and his male relatives might re-file the case in another court (Deng, 2014; World Bank, 2014). Many of the types of disputes that women find themselves involved in never even make it to court (Mennen, 2016).

5.2.4. Lack of transparency and collusion in land allocation

Women can request land through the Judiciary and Ministry of Housing and Planning (alternatively known as the Ministry of Housing, Land and Urban Development). Women have noted a lack of transparency in government land allocation schemes (MGCSW, 2019:9). Widows in Torit have reported that local government authorities only allocate them second- or third-class rather than first-class plots of land because they believe that widows do not have enough money to build good houses. They also noted that authorities do not provide women under 45 years of age with first-class residential plots (*ibid.*:11) and reported that land may be taken away either by surveyors or through collusion between the community chief, political elites and local government officials (*ibid.*:22).

Some women have noted that land allocated by chiefs to them may be of inferior quality compared to that allocated to men (MGCSW, 2019), and that chiefs may allocate land to women for shorter periods of time than they would to men. Women in Juba, in particular, stated that if they wanted to grow long-term rotation crops, chiefs may deny them access to land (ibid.:5). As the duration of access to a plot of land has implications for the types of crops a woman can grow on it, this affects her income and wealth-generating potential.

Transparency refers to government record-keeping that includes, in particular, the availability of sex-disaggregated data that monitors how many women, compared to men, have land registered under their names. At present, the Government does not have a comprehensive monitoring system capable of such (Wegerif, 2020). The State itself recognizes the need for a gender-responsive land registry (Sylvester, 2020).

5.2.5. Lack of due process (justice system)

Overall, “customary law is weak in terms of human rights protections” and due process is not well defined (Smart Edge Research, 2016:12). Chief courts can be seen as “purveyors of norms that reproduce gender and generational inequalities and license certain abuses”, as they serve to regulate social behaviour and act as a moral authority (Ibreck and Pendle, 2016:i). Men dominate decision-making in customary courts (Jolaade and Abiola, 2016). Women have stated that they were not taken seriously in resolution processes pertaining to land-related disputes and were not even allowed to speak for themselves during the proceedings. Community elders or chiefs might summon a woman’s husband or male representative to speak on her behalf (MGCSW, 2019:23). In Munuki, women have noted that men resolving land-related disputes did not allow women to be part of the decision-making process; elderly women were sometimes allowed to sit in and listen but were not allowed to give their inputs (ibid.). Women note that they could not present their cases to local government actors or formal courts. They are often asked to stand outside the courtroom while men decide on their cases (ibid.:24).

Up to 90 per cent of cases in South Sudan are heard by customary courts, with 90 per cent of South Sudanese women having customary courts as their only opportunity to seek justice (Hove and Ndawana, 2017). Both men and women have indicated that decisions through the customary dispute resolution process can be arbitrary and/or contradict statutory law (Stone, 2014), as well as universal human rights standards. In their observation of operating customary courts and review of court records, Ibreck and Pendle (2016:10) found that judgements are variable and assert the “power of families and communities over women”. Some women who use local courts express dissatisfaction with the experience, noting that traditional courts are prejudiced against women. Women in Wau reported preferring to settle disputes in the formal courts, even if this process is more expensive and time-consuming. An additional drawback of the statutory or formal court system of the Ministry of Justice is its limited reach (World Bank, 2014; Idris, 2017).

5.2.6. Lack or loss of documentation

Before the war that led to South Sudanese independence and the civil war that erupted thereafter, very little community land in what is now South Sudan was surveyed, demarcated and registered formally with State authorities. This remains the case today. Given the dynamic flows of displacement and return, returnees might find secondary occupants living on land that they previously occupied (van der Haar and van Leeuwen, 2019; Deng, 2014). When returnees and current occupants stake claims to the same piece of land, in the absence of proof and given the secondary nature of women's land rights, in the case of a competing claim, a woman is less likely to win a claim of secondary occupancy. Court hearings to try to recover land can drag on for years without documentation (Deng, 2014).

Formal documentation that demonstrates previous land ownership or possession helps to establish HLP claims. A national identification card is often helpful, but not required. In some cases, the only official form of documentation a woman has is a refugee card, which is issued in her husband's name. If a woman is separated or divorced, a refugee card may not work as proof of identity, as she is no longer formally part of her former husband's household (Stone, 2014). Women in Wau and Western Bahr el Ghazal have reported that without a national identification card, they cannot apply for a token for land in urban areas, and that obtaining one involves complicated paperwork and long-distance travel to Juba (MGCSW, 2019). In addition, the process of replacing lost documents can be lengthy, costly and bureaucratic and often requires the presence of a male relative (Antonio et al., 2020). Land-related documents are often lost during times of conflict (Deng, 2014), with women reporting that, with the necessary documents, they have been able to re-claim their land when they returned (MGCSW, 2019).

5.2.7. Lack of family and inheritance laws

There is no statutory family or equitable inheritance law in South Sudan that supports women's and girls' ability to inherit land from their parents and inherit a same-sized share as a brother (Deng, 2014; Jolaade and Abiola, 2016; Wegerif, 2020). Since land remains in the hands of men, intergenerational inequality increases. In the absence of "a family law that would provide a statutory alternative to inheritance rules under customary law" (Deng, 2014:34), a written will can promote women's and girl's access to family land. However, most husbands do not write wills that secure their widows' and daughters' ability to inherit land. Women have had to advocate for the use of written wills to protect their rights to inherit "land and prevent their land being confiscated by the deceased's brothers" (MGCSW, 2019:15).



Martha Aguak, 60, at her IOM built home in Wau, South Sudan. © IOM 2020/Peter CATON

“

IOM provided me with shelter, so now I am protected from the rain and sun. I then was provided with cash from IOM, so I could send my grandchildren to school and I am very grateful for what IOM has done for me.

”

6. INITIATIVES AND OPPORTUNITIES TO IMPROVE WOMEN'S LAND RIGHTS

In addition to statutory laws, acts and policies mentioned in previous chapters, this review has found evidence of initiatives to improve women's access to housing, land and property, as well as efforts to promote women's HLP rights. Such evidence illustrates that champions of women's HLP rights exist at the grassroots level and indicate leverage points for a larger, societal effort to address women's rights.

6.1. CROSS-SECTORAL AND MINISTERIAL INITIATIVES FOR WOMEN'S LAND RIGHTS

In addition to the Ministry of Gender, Child and Social Welfare, many government ministries, including the Ministry of Housing, Land and Urban Development, have gender focal points. Ministries are also mainstreaming gender across their portfolios (JICA, 2017). The Ministry of Agriculture, Forestry, Cooperatives and Rural Development (MAFC&RD), for example, incorporated gender equality and women's empowerment in its 2012–2017 Agricultural Sector Policy Framework (MAFC&RD, 2012; Government of South Sudan, Ministry of Environment and Forests, 2018). The framework notes that women's lack of access to land has negative implications for agricultural productivity. Given the relationship between land and agriculture, the Ministry of Agriculture might be a partner in the quest to securely place land into the hands of women. As international actors in the water, sanitation and hygiene (WASH) sector work to mainstream gender into the sector's programming, discussion of social norms and power relations that subordinate women are highlighted and discussed (Denman and Lipscomb, 2020a).

6.2. UNITED NATIONS AND CIVIL SOCIETY INITIATIVES TO SUPPORT WOMEN'S LAND RIGHTS

Women's groups in South Sudan have been creating awareness of women's rights at the grassroots level, and men are invited to their meetings (Jolaade and Abiola, 2016). In Torit, community mediation groups work with CSOs to help address land-related disputes (MGCSW, 2019). Foreign donors have funded legal aid and awareness raising for HLP through Access to Justice initiatives (Smart Edge Research, 2016). There are 10 State-level land alliances pooled under a national umbrella – South Sudan Land Alliances (World Bank, 2014). Community radio programming focuses on gender equity and women's empowerment, in general, and, more specifically, women's rights to own land and inheritance rights, providing information on women's Constitutional rights to own land. To encourage women to engage their rights, these programmes emphasize the benefits of land ownership for women, provide examples of how lack of land and property rights makes women and widows vulnerable to and dependent on others, and ask women to stop “allowing themselves to be oppressed or manipulated” (LeRoux-Rutledge, 2020:9). Finally, “Enhancing Women's Access to Land to Consolidate Peace in South Sudan”, a joint project of UN-Habitat and the Food and

Agriculture Organization (FAO) of the United Nations, aims to improve land management and create a gender-responsive administrative system and land dispute resolution process (United Nations, 2018; Akolith et al., 2020).

6.3. WOMEN'S PRESENCE IN LAND GOVERNANCE COMMITTEES AND LAND DISPUTE RESOLUTION

To support customary authority, The Land Act (2009) mandates a tiered land governance system that includes county land authorities (CLAs) and *payam* land councils (PLCs). A CLA must include a woman representative recommended by the county women's association. Likewise, one woman, recommended by the *payam* women's association, should sit on the PLC (USAID, 2013). (PLCs are responsible for the management and administration of land at the district level, with responsibilities such as allocating public land, supporting land registration and transfers, protecting customary rights (including those pertaining to communal grazing land, forests and water resources) and assisting traditional authorities with land management and land dispute resolution (USAID, 2013)). However, it should be noted that: (a) a single woman in a committee made up mostly of men – and operating within a patriarchal culture – might have a hard time speaking her mind, especially if her beliefs and opinions differ from the rest of the council; and (b) the inclusion of one woman on either one of these committees achieves less than the Government's 35 per cent quota of women filling government positions. In a study by Wegerif (2020:10), a woman in Aroyo County believed that “women can be in the committee and [yet] have no powers or any voice in decision making”. During their research in Aweil East, Wau and Kajokeji, Leonardi et al. (2011:123) found that some chiefs would allow women “who demonstrate skills of logic and speak” to sit on their court. Finally, Ibreck and Pendle (2016:25) found women sitting on court panels in the Juba and Bentiu PoC sites, which they argue is a radical departure for Nuer women that challenges “gender assumptions”.

6.4. COMMUNITY LEADERS AND ELDERS SUPPORTING WOMEN'S CLAIMS TO LAND

Women have reported instances of community leaders, including chiefs, helping women to find land and resolving land-related disputes involving widows. Dinka women reported that traditional community leadership structures like chiefs and elders often acted as “watchdogs” for widows' rights (MGCSW, 2019). However, it can be difficult for chiefs and elders to rule in favour of women if majority of men and women in the community believe that neither women nor widows have rights to land. In Eastern Equatoria, leaders may provide a widow with access to land to ensure that she is not left landless. In Aweil, seven elder women have started a “Women Executive Chief” organization to support women by addressing challenges to owning, accessing and inheriting land, and assisting in the resolution of land disputes (ibid).

6.5. WOMEN SECURING AND REGISTERING LAND UNDER THEIR OWN NAMES

Women in Torit have reported acquiring tokens for land through the Ministry for Housing and Physical Infrastructure and registering the plots under their or children's names. There is evidence that married and professional women who have sufficient education and financial resources have land registered under their own names (World Bank, 2014). A World Bank study (2014:23) estimated that 10–20 per cent of land in large cities, such as Juba, Wau and Malakal, is registered under women's names.

7. CONCLUSION

The case for women's greater access to housing, land and property and greater understanding of women's access to HLP rights is well documented and evident. The findings of this desk review indicate that not all men, women, government officials, and traditional authorities are aware of all of the Government's new legal provisions pertaining to HLP rights, including the forthcoming National Land Policy. Traditional authorities and government officers often do not understand the content and application of new statutory laws and policies that support gender-equitable access to housing, land and property. As such, customary law still overrides statutory law in many areas. Changes in policy, as well as in community, societal, social and cultural norms, values, attitudes and beliefs, are needed to dismantle patriarchal systems and structures that operate both in the home and within government institutions and systems to limit women's access to land, housing and property.

While enacting laws to end customs and traditions that degrade women is necessary to improve women's lives and advance gender equality, enacted laws would only work if adequately and properly implemented and if both men and women buy into the messages and social change promoted within the new governance frameworks. In general, social and cultural norms limit women's ability to access land and natural resources and to create wealth, in addition to constraining their participation in decision-making at both household and community levels. The desk review finds that regardless of the Government's and the development and humanitarian communities' attention to this issue, the problems women face accessing housing, land and property persist.

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Customary law, norms, practices and related factors that enable and constrain women's access to housing, land and property in **South Sudan**

A desk review



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