

**THE CONFLICT BETWEEN CONSTITUTIONAL PROVISIONS AND CUSTOMARY
RIGHTS OF WOMEN IN JONGLEI STATE-BOR COUNTY OF
SOUTH SUDAN**

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Of Postgraduate Studies and Research, Kampala
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**In Partial Fulfillment of the Requirements for
The Award of Masters
Degree in Law**

By

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July, 2011**



Declaration A

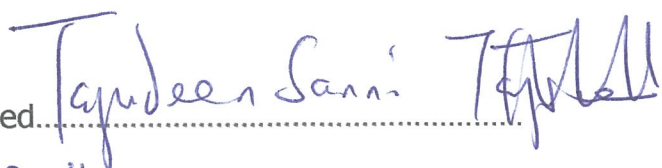
I Chol Deng Anyieth declare that this thesis is my original work and has never been submitted for any other academic award in any University or Institution of learning for any academic purposes.

Name and signature of candidate

Date:

Approval


This research was carried out under my supervision, I, Mr. Tajudeen Sanni, the University lecturer.

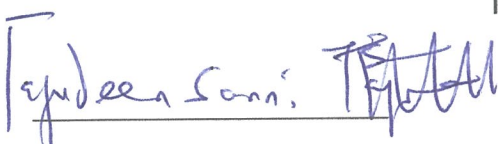
Signed.....


Date...../11/2011

APPROVAL SHEET

This thesis entitled **"The Conflict Between Constitutional Provisions And Customary Rights of Women in Bor County of Jonglei State-South Sudan"** Presented and submitted by **Chol Deng Anyieth** in partial fulfillment of the requirements for the award of degree of Masters in Laws has been examined and approved by the panel on oral examination.


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Dedication

This study is dedicated to my family for their love and care

Acknowledgement

I wish to acknowledge the contributions of the following people who worked closely with me during the course of my work:

My lecturers in the school of Post graduate Studies and my supervisor for their intellectual nourishment.

Not forgetting the financial and social support from my parents, sisters, brothers, relatives and friends which enabled me to complete the study successfully.

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Abstract

This study investigated the conflict between constitutional provisions and customary rights of women in Jonglei state- Bor County, South Sudan. The study emerged as a result of gross violation of women's rights on issues pertaining to marriage and widow inheritance, hence other rights of women such as right to work and participation in public life were excluded from this study. The study consisted of five chapters; chapter one contains problem and its scope, research objectives, research questions, significance of the study and the definition of operational key terms used in this study. Chapter two is about the reviewed literature related to the study, opinion/ ideas of experts and authors, the conflict between law and customs at state level, an overview of South Sudan legal system, the present status of customary law, sources of law, an overview of rights of women under the law and the constitution of South Sudan, customary law in Bor County and finally the conflict between the constitution and customary rights of women. Chapter three of the study concerns mainly with methodology used in the study, while chapter four and five chiefly deal with presentation, interpretation, analysis of data, findings, recommendations and conclusions. The study was limited to South Sudan's legal systems (statutory and customary laws) and as such few studies about customary law in the Africa region were not much included. The study was guided by three specific objectives thus (I) Level of constitutional provisions on the rights of women (II) level of customary provisions on the rights of women (III) the relationship between constitutional provisions and customary provisions on the rights of women. The study employed descriptive correlational survey research design, with a population of 90 respondents, mainly women. The study found out that the level of constitutional provisions on the rights of women is fair in general but provision of Article 15 is not fair; the level of customary provisions on the rights of women is also at fair levels. The study found no significant relationship between the level of constitutional provisions on the rights of women and the level of customary provisions on the same. The study recommended that a review of the constitution, particularly Articles 15 and 123 should be done to further strengthen the rights of women. A section 273 of the South Sudan Penal Code 2008 contradicts the

constitution and therefore the study recommended it to be reviewed. The role of Non Governmental Organizations, though they are not the sole bearers of human rights protection should not be discouraged but such entities should be involved in order to help in the process of promoting and sensitizing respect for human rights and in particular the rights of women and children.

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List of Acronyms

CEDaW	Convention on the Elimination of All Forms of Discrimination against Women
GoSS	Government of Southern Sudan
ICCPR	International Covenant on Civil and Political Rights
MoJ	Ministry of Justice
UN	United Nation

CHAPTER ONE

Problem and its scope

1.0 Introduction

South Sudan is a country inhabited by over fifty African tribes with different customs and beliefs. Each and every tribe has its own customs that differentiate it from another, because their customs and beliefs spell out what practices are acceptable and what are not within that particular community. It is very important at this point to give the definition of the word 'custom' before proceeding further. Custom is a practice that by its common adoption and long, varying habit has come to have force of law¹.

It is undisputable that customs and beliefs provide the social order in the society. For instance, incest in certain communities like Dinka, Luo, Nuer and other Nilotic tribes is a serious abomination that requires ritual purification if it happens, whereas the same incest is a normal practice and belief within the Azande community. This variation of customs and beliefs induces the customary law to conflict with other statutory laws in South Sudan. Further, the Transitional Constitution of the Republic of South Sudan 2011 recognizes the Customs of various communities to be a source of legislation and the constitution, because customary law is believed to be the expressions of beliefs and practices of the people of South Sudan, and it (customary law) has a disciplinary authority over the members of the society belonging to a certain group of people living in a given locality. All members of the tribe have to abide by the customs because it is the only traditional law guiding the tribe. Moreover, there was no effective statutory law governing the behavior of the society since the members of the tribe used to resist the statutory and Sharia'a laws enacted by the then colonial governments and pre-partition Sudan and their attempt to apply those laws in South Sudan. As a result of this resistance, over ninety per cent of both criminal and civil cases were determined using customary law. The customary law overrides the other statutory laws that were enacted

¹ Bryan A Garner, Black's Law Dictionary Ninth Edition 1990, pg 442

conflict covers major parts of the country; however, its severity is very high in Warrap, Lakes, Unity and Jonglei States respectively. The rights of women in the four aforementioned states remained to be a contentious debate of human rights activists especially on issues regarding marriage. It is unquestionable that women are treated like property by majority of the inhabitants. The consent of a woman in marriage is immaterial and as such, forced marriage has become the order of the day. It is the choice of parents to decide the marriage partner of their daughter.

The current Transitional Constitution of the Republic of South Sudan 2011 under article 15 has articulated the right and freedom of the persons who have attained the marriageable age to found their family but that right is somehow subjected to customary law. Although the Bill of Rights in the Interim Constitution of the then GoSS laid down the rights, in which all members of the human family are entitled to enjoy, this attempt has become fruitless due to the fact that customs undermine the role and will of women. In taking cognizance of the constitution as the supreme law of the Republic of South Sudan, all other laws (Customary laws) must conform to the provisions of the constitution but such conformity is questionable in practice.

During the six years interim period, the five states of the Republic of South Sudan witnessed a great protest led by women against the customary laws and practices, especially issues pertaining to marriage. Nowadays a quite number of girls flee their homes in resistance against the forced marriage and the young women who also became widows resist the practices of widow's inheritance(*see the meaning on page 10*), as a result of this resistance, over five young women and girls lost their lives every year. In February 2011, a young girl of sixteen years old was beaten to death in Bor County, Jonglei state by her parents because she insisted to marry a man of her own choice⁴. Unfortunately the suspects were released after serving two months in prison on the fact that the issue was addressed in accordance with the customs and norms of the aggrieved party. The suspects were the cousins to the deceased and therefore their act under customary law was an exercise of customary rights over the

⁴ Jonglei State Human Rights Commission's Report 2011

victim. The same incident occurred in other states, like Lakes State, where only one suspect was brought to Rumbek High Court to face charges in 2010. The suspect, Khamic Mabuon Apach and others are waiting in the prison for killing the young girl who refused early marriage⁵. This gross violation of women's rights have cost the lives of more than five girls and young women across the country, the girls are either beaten to death by their parents or sometimes commit suicide. Although the above mentioned act constitutes a crime under the Penal Code 2008, the culprits are not usually brought to book by the law enforcement agents, and to make it worse, no effective measures are taken to address the issue. The Citizen Newspaper's journalist and the states' human rights activists tried to protest against the said treatment but their reaction produced no progress especially in the villages and towns where such gross injustice are carried out.

There is consensus amongst intellectuals that change in customary law is inevitable but change must come from within South Sudanese society who are practising such harmful cultural practices upon women and children and at a pace, to which society can adjust. There is a need that plans to assist the development of customary law must be designed to avoid unintended consequences, which may endanger the country's position in the international plane, especially in the areas of individual rights. International bodies and interest groups judge some of these customs to be at odds with contemporary and internationally accepted standards of human and individual rights⁶. In this particular juncture, the status of women and children under most customary law systems is the source of much contentious debate that needs immediate response from the government of South Sudan. The possibility of implementing and enforcing the implementation is a characteristic fundamental to any law⁷. If human rights guarantees are to amount to more than lofty declarations of intent, their realization and implementation at the domestic level must not be left to the

⁵ WWW.Sudantribune.com, Forced Marriage in South Sudan accessed on 15th July 2011

⁶ Justice Aleu Akechak, Study of Customary law in the Contemporary Southern Sudan, 2004, pg 7

⁷ Walter Kalin and Jorg Kunzli. The Law of International Protection of Human Rights 2009, pg 183

discretion of states, rather international monitoring is necessary⁸. Hence, South Sudan as a sovereign state has an obligation under international law to protect women and children's rights despite its cultural variations.

It is because of this existing conflict between statutory laws and customary rights of women before and in the post independence period that show there is a need to do research on this issue so that the two legal systems will be harmonized for the benefit of the whole human society. This thesis aims to explore and point out the areas of conflict between the constitutional provisions and the customary rights of women in Jonglei State-Bor County and it will recommend the method to be used in harmonizing the two legal systems.

1.1 Statement of the Problem

The Bill of Rights in Article 9 of the Transitional Constitution of the Republic of South Sudan 2011, and the Customary International Law provides for fair treatment and equality for both sexes, male and female. Both the Constitution and the Customary International Law call for the abolition of those customs (customary laws) that do not conform to the principles of international law. However, the conformity of the customs to the provisions of the aforesaid legal regimes is difficult because majority of the population in South Sudan favour and adhere to their customs rather than the constitution and other laws. Their adherence to the customs makes the application of the constitutional's provisions difficult in the area of women's rights in general and particularly on issues relating to marriage. On the other hand the constitutional's provision is vague in respect to the application and observance of women's rights. Further, article 15 of the Transitional Constitution of the Republic of South Sudan 2011, provides the rights of persons who have attained marriageable age to found a family but subject to their customary laws⁹. Although the said provision articulate the free and full consent as a condition for a man and woman intending to marry, still the customary

⁸ Walter Kalin and Jorg Kunzli. The Law of International Protection of Human Rights 2009, pg 183

⁹ Laws of Southern Sudan. The Transitional Constitution of South Sudan 2011, see Article 15

law overrides the constitutional provisions in the application. The lack of the statutory law pertaining to family affairs has created loopholes for the customs to be the only legal regime governing marriage in the country.

It is because of this apparent injustice imposed on women by the practices of cultural beliefs that raised the interest of the researcher to explore the field and to find out how the customs which are at odd with the law are being harmonized.

This research was carried out in Bor County, Jonglei state in order to highlight the need for the society to respect the will and consent of women in choosing their marriage partners without being forced by parents. Further, it aims to call for the enactment of marriage act, so that there should be a clear definition of rights and duties of each partner. The study emerged as a result of the clear observation on gross violation of women's rights. The customs permit women to be inherited like property and the statutory law calls for the free will of and equal treatment of all human beings. Another alarming issue is forced marriage of persons under the age of sixteen years old. Besides the widow's inheritance, the girls are forced to marry people against their will, despite the call of the supreme law of the nation to abolish those customs that encourage discrimination against women.

1.2 Purpose of the Study

This thesis is aimed at determining how the two legal regimes (customary and statutory laws) can be harmonized for the interest of the society. It is hoped that the impact of customs on the rights of women in terms of marriage in South Sudan and the way forward will be clearly addressed by this paper. This research is also designed to determine the area of conflict between customs and the statutory law on the rights granted to women by the Constitution of the Republic of South Sudan.

1.3 Objectives of the Study

1. To establish the level of constitutional provisions on the rights of women in Bor County.

2. To establish the level of customary rights of women in Bor County, South Sudan.
3. To find the relationship between Constitutional Provisions on the rights of women and the customary rights of women in Bor County, South Sudan.

1.4 Research Questions

1. What is the level of constitutional provisions on the rights of women in Bor County-South Sudan?
2. What is the level of customary rights of women in Bor County-South Sudan?
3. Is there any significant difference between constitutional provisions on the right of women and the customary provisions on the same?

1.5 Null Hypothesis

Ho! There is no relationship between constitutional provision on the rights of women and customary rights of women in Bor County, South Sudan.

Scope

The study was limited to those local customs that conflict with statutory laws in South Sudan. This research was carried out between August, 15th and September, 25th 2011. The research covered Bor County, Jonglei state where random sampling was used. Thirty young girls and married women including the parliamentarians, twenty-five law enforcement agents, twenty-five staff of international non-governmental organizations and eighteen human rights activists from the state were selected randomly.

The targeted population was composed of one hundred women working in five civil societies and parliament, twenty staff working in four international non-governmental organizations, twenty from the members of High court, legal counsels, police and prison personnel and eighteen from the human right activists. The researcher aims to identify the impact of cultural (customary) practices on the rights of women and the degree of the reaction of woman against forced marriage imposed on them by the customs. The opinion of human rights activists was ascertained.

1.6 Significance of the Study

This study will be of benefit to the various segments of South Sudan

South Sudan Human Rights Commission, South Sudan Legislative Assembly and women in particular will find the study useful.

The South Sudan Human Rights Commission will be able to monitor and ensure that the consent of a girl or woman in marriage is respected by the parents. The research will create awareness among women and guide them in the process of taking legal actions against the persons who intend to violate their rights in marriage. The study will also create awareness among the law enforcement agents on the rights of women.

Further, the study will awake the parliamentarians to enact the law that will outlaw marriage of a girl under 18 years old and abolish those customs that conflict with statutory law.

1.7 Operational Definitions of Key Terms

The following are some of the terms used in this research.

Bor County: This is one of the counties of Jonglei State and its administrative Headquarters is Bor Town

Constitutions: are the 2005 Interim Constitution of Southern Sudan and the 2011 Transitional Constitution of the Republic of South Sudan

Customary law: Is the expression of customs, beliefs and practices of the people of South Sudan

Forced marriage: Is marriage where the parents intimidate their daughter to marry a man against her will. Usually it is a marriage between a girl below sixteen years old and a man of sixty years or above

GoSS: Government of Southern Sudan which was an autonomous government charged with the affairs of Southern Sudan as per the provisions of the 2005 Comprehensive

Peace Agreement between Government of Sudan and Sudan's People Liberation Movement

Republic of South Sudan: is the newly independent state that gained its independence from Sudan on the 9th of July 2011. It is bordered by Sudan in the north, Ethiopia to the east, Kenya and Uganda to the south, Democratic Republic of Congo and Central Africa Republic to the west

Jonglei State: Is an administrative area in eastern bank of the River Nile, ruled by a governor and having its own constitution. It lies south of Upper Nile Region and north to the capital Juba.

Lakes State: is an administrative area in the West Bank of River Nile, it is found in the Bahr El Ghazal Region

Sample: Is part or section of population under consideration

Sampling: It is the act of dividing the population into manageable units or samples aimed at enhancing research work.

South Sudan Human Rights Commission: This is the institution charged with the task of monitoring the application of human rights instruments.

South Sudan Legislative Assembly: This is the National Assembly of the Republic of South Sudan.

Widow Inheritance: This is an act where a widow is inherited by the deceased's brother/immediate relative for the purpose of producing children for the deceased. This practice is a strong custom among the Dinka and Nuer tribes.

CHAPTER TWO

REVIEW OF RELATED LITERATURE

2.0 Introduction

This chapter deals with the review of literature related to the study. It shows the conceptual framework and review of related literature as per the study objectives. The study is conceptualized depending on the conflict between statutory laws and customs as the independent variable and legal rights as dependent variable. An overview of the South Sudan's Legal system has also been discussed.

2.1 Ideas and opinion from authors/experts

The protection of women's rights by statutory laws at national and international level

The enforcement of the rights of women has been a major challenge for most legal systems in the Republic of South Sudan because the source of legislation depends on customs. It is a strong custom in South Sudan that the consent of women in decision making is undermined, whether in issues concerning marriage or inheritance, moreover, Article 15 of the Transitional Constitution of the Republic of South Sudan 2011 calls for the equal treatment of both sexes who have reached marriageable age¹⁰. The call by the constitution for equal treatment of male and female is based on the principles of the United Nations' Convention on the Elimination of All Forms of Discrimination against Women. South Sudan being not a signatory to the said convention does not qualify it to favour customs than the provisions laid down by the convention.

On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly¹¹. It entered into force as an international treaty on 3 September 1981 after the twentieth country had

¹⁰ Laws of Southern Sudan. The Transitional Constitution of South Sudan, see Article 15

¹¹ UN Convention on the Elimination of All Forms of Discrimination Against Women, 1979(CEDAW), see Preamble

ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions¹².

The Convention was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights¹³. The Commission's work has been instrumental in bringing to light all the areas in which women are denied equality with men. These efforts for the advancement of women have resulted in several declarations and conventions, of which the Convention on the Elimination of All Forms of Discrimination against Women is the central and most comprehensive document.

Among the international human rights treaties, the Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns. *The spirit of the Convention is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, in the equal rights of men and women*¹⁴. The present document spells out the meaning of equality and how it can be achieved. In so doing, the Convention establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights. The rights spelled out by the convention, cannot under any circumstance, be violated by states in the exercise of the customary practices. It is hoped that those customs that do not conform to the provisions of the constitution and international human rights law are subject to abolition. Article 2(f) of the Convention on the Elimination of All Forms of Discrimination against Women provides that state parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end undertake:

¹² UN Convention on the Elimination of All Forms of Discrimination Against Women, 1979(CEDAW), see Preamble

¹³ Ibid

¹⁴ United Nations Charter, see Article 55(c)

To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women¹⁵.

Such appropriate measures were reaffirmed in South Sudan by the chairperson of South Sudan Human Rights Commission in his statement in Juba. The top official in South Sudan Human Rights Commission, Hon. Laurent Gurbandi during the celebrations for International Women's Day at Nyakuron Cultural Centre in Juba¹⁶, appealed to all levels of government in South Sudan to enact laws that combat what he called "bad habits" which resulted in the murder of young girls by parents over forced marriage disputes. The remarks made by the said official made it very clear that the violations of women's rights were carried out in pursuit of customs. Article I of the Convention for the Elimination of All Forms of Discrimination against Women reads:

"For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field¹⁷".

Having taken note of the above article of the convention, it is apparently clear that undermining the consent of women in marriage is a gross violation of the convention. The General Recommendation No. 5 made by the Committee on the Elimination of Discrimination against women, called upon state parties to make more use of 'temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics, and employment'¹⁸. General Recommendation No. 12 called upon states parties to include in their reports information on measures taken to deal with violence against

¹⁵ UN Convention on the Elimination of All Forms of Discrimination against Women 1979, see Article 2(f)

¹⁶ www.sudantribune.com Forced Marriage in South Sudan, accessed on 15th July 2011

¹⁷ Convention on the Elimination of all Forms of Discrimination Against Women 1979, see Article 1

¹⁸ Malcolm N Shaw, *International Law* Cambridge University Press 2010, tenth edition, pg 324

women¹⁹, while General Recommendation No. 21 concerned equality in marriage and family relations²⁰.

The call for the eradication and abandonment of bad customs by the top official of South Sudan Human Rights Commission was also based on the fact that discrimination against women has no room in the contemporary society of man. In recent years, the importance of women's rights has received greater recognition. The Vienna Declaration and Programme of Action adopted in 1993 emphasized that the human rights of women should be brought into the mainstream of United Nations (UN) system-wide activity and that women's rights should be regularly and systematically addressed throughout the UN bodies and mechanism²¹. In the light of the above, the fifth meeting of Chairpersons of Human Rights Treaty Bodies in 1994 agreed that the enjoyment of the human rights of women by each treaty body within the competence of its mandate should be closely monitored²², and this is an obligation of each and every sovereign state.

Furthermore, the rights of the child are also another issue, especially in developing countries like South Sudan, the rights of the child has also witnessed gross violation. The local customs have no certain age set for the female child; instead the custom is silent about the legal age in which the girl can marry. The South Sudan Child Act 2008 defines a child as 'a person under the age of eighteen years'. It can be argued here that the violation of women's rights has extended to those of children particularly in issues pertaining to marriage under customary practices. Section 23 (1) of the South Sudan Child Act 2008 provides:

"Every child has the right to be protected from early marriage, forced circumcision, scarification, tattooing, piercing, tooth removal, or any other cultural rite, custom or

¹⁹ Malcolm N Shaw. International Law Cambridge University Press 2010, tenth edition, pg 324

²⁰ ibid

²¹ ibid

²² This discussion is quite essential because monitoring and evaluation is an important element by which goals can be achieved. Many UN Resolutions are not adequately implemented due to partly compliance and problem of monitoring.

*traditional practices that is likely to negatively affect the child's life, health, welfare, dignity or physical, emotional, psychological, mental or intellectual development*²³”.

The protection of the child is shouldered on both the government and the parents or any person in charge of a child.

2.2 The Conflict between law and customs at state level

In taking cognizance of the South Sudan 2011 Constitution, it can be argued that there is a conflict between customs and the law because the present customary law situation shows extremely patriarchal society as being anachronistic in the modern world and imposing severe and unacceptable constraints upon the rights of the individual, particularly women and children in respect to marriage.

It is broadly accepted that the term ‘customary law’ as it applies to Africa in general and South Sudan in particular refers to the body of traditions, norms, social conventions and rules that through long usage and widespread acceptance direct and govern traditional African society²⁴. Customary ‘law’ therefore is as much social convention as it is legal protocol. The customs have become a bar for the application and enforcement of the basic principles of human rights. However, it is expedient to proceed and look at what is considered as customary law in the Africans’ perspectives.

There have been many attempts to define custom and with it customary law over the years. Customary law has been defined by many authors and many explanations were provided. It is a law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws²⁵. The existence of legal requirements or obligatory rules of conduct in a society is not a prerequisite for customary law to have force of law, but only effectiveness of such rules. Further explanation regarding the effectiveness of customary law can be found in the Black’s Law Dictionary on page 443:

²³ Laws of Southern Sudan, Child Act 2008, see section 23

²⁴ [WWW.Features](#) of Customary Law, accessed on 15th September, 2011

²⁵ Bryan A Garner ,Black’s Law Dictionary, ninth edition 1990, pg 443

'In contrast with the statute, customary law may be said to exemplify implicit law. A custom is not declared or enacted, but grows and develops through time. The date when it first came into full effect can usually be assigned only within broad limit. Though we may be able to describe in general the class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author, there is no person or defined human agency we can praise or blame for its being good or bad. There is no authoritative verbal declaration of the terms of the custom; it expresses itself not in a succession of words but in a course of conduct'²⁶.

By virtue of the above explanation, one can easily conclude that customary law is a rule of conduct obliging those under it in a particular geographical location for a long time. It can change when the society is on the process of changing. A general definition can also be found in Osborn's Concise Law Dictionary. By John Burke, at page 108²⁷:

'Custom is a rule of conduct obligatory to those within its scope, established by long usage. A valid custom has the force of law. Custom to the society is what law is to the State. A valid custom must be of immemorial antiquity, certain, reasonable, obligatory and not repugnant to statute law, though it may derogate from the common law.'

In the history of Sudanese jurisprudence much of the controversy over the definition of customary law has related more to its scope than meaning. Disagreement existed between the judiciary of the colonial era, which advocated a restrictive definition, and the then Sudanese courts, which favoured a wider definition to include the canon law or personal laws of other communities domiciled in Sudan. The former

²⁶ Ibid In much of Africa, especially pre-colonial Africa, Customary law may not satisfy the criteria of a non authoritative verbal declaration of the terms of the customs'. This is because the king or sovereign represents the fountain of the law, and much of the customs find verbal expression or declaration in form of proverbs and unwritten statements.

²⁷ Justice Aleu. A Study on Customary Law in the Contemporary Southern Sudan 2004, pg 12

was exemplified in a landmark case *Bamboulis v Bamboulis*, 1954. In that case, Chief Justice CJ Lindsay held that²⁸:

'Custom in [the context of customary law] refers to local custom originating by usage in the Sudan, and is not applicable to the imported rule of law of foreign origin'.

In attempting to explain how customary law originates there are few better explanations than that given by RWM Dias²⁹

'When a large section of the populace, are in the habit of doing a thing over a very long period, it may become necessary for the courts to take notice of it. The reaction of the people themselves may manifest itself in mere unthinking adherence to a practice which they follow simply because it is done; or again it may show itself in a conviction that a practice should continue to be observed, because they approve of it as a model of behavior. The more people follow a practice the greater pressure against non-conformity. But it is not the development of a practice as such, but the growth of a conviction that it ought to be followed that makes it a model for behavior'³⁰.

Dias postulates that that certain conditions have to be fulfilled for a custom, usage or practice to be recognized by a court of law as having the force of law. These are³¹:

The custom must be of immemorial antiquity. The onus of its antiquity being on the person who asserts the application of the custom. The proof becomes easier, however if its origin cannot be remembered. The burden of rebutting it lies upon the party against whom the custom is being applied.

It must have been enjoyed as of right.

It must be certain and precise.

²⁸ Justice Aleu. A Study on Customary Law in the Contemporary Southern Sudan 2004, pg 12

²⁹ Justice Aleu, op cited pg 12-13. The conviction that Dias speaks of here usually arises in South Sudan in form of traditional adherence to the religious moral ideology of the traditional people.

³⁰ *ibid*

³¹ *ibid*

It must have been enjoyed continuously.

It must be reasonable.

The conditions set forth by Dias definition about the reasonableness of the customs, can be construed as the conformity between customs and law. In interpreting the word reasonableness of the customs, it means that customs must not contradict the principle of justice, equality and good conscience and this view of conformity is maintained in the transitional constitution of the Republic of South Sudan 2011 in its Article 123. When the custom is contrary to the principle of justice, equality and good conscience³², then that custom has no validity in the society. Moreover, some customs that impose discrimination against women and children, like the practices of forced marriage and widow's inheritance in Jonglei state are found to be at odd with the principle of justice, equality and good conscience. Hence, the issues of forced marriage and widow's inheritance which are practised as customs nowadays in Jonglei state are the gross violation of human rights law and it also proved that the conflict between law and customs exist in practice. The majority of South Sudanese customary law systems show plainly a conflict between international human rights laws and rights granted to women and children in customary law. The pressure to harmonize customary law with international law will continue to grow and must sooner or later be addressed³³. A strategy for resolving this issue should be developed by lawmakers, community leaders and the judiciary.

³² John Wuol Makec. The Customary Law of the Dinka People of Sudan (Afroworld) 1988, pg 26

³³ Justice Aleu, op cited, pg 12

2.3 An overview of South Sudan's legal system

Introduction

This part discusses in brief the historical overview of the legal system in the Republic of South Sudan, the sources of laws and the features of customary law in South Sudan. Further, the validity test about the studies of the legal system will also be discussed.

Historical overview

Before proceeding to discuss the sources of law in the Republic of South Sudan, it is essential to look at the historical overview of the laws that existed in the land during the colonial era. It is undisputable that before the 1820 invasion of Sudan (including the present South Sudan territory) by Anglo-Egyptian forces, the customs and traditions of South Sudanese tribal groups were the primary sources of law to those people³⁴. That invasion was the first in a chain of events, which resulted in bringing their own influence to bear over traditional customary practice and laws. However, the traditional customary laws were not codified and not formalized due to varieties in tribal areas, as such, the successive colonial regimes under the British and Egyptians, resulted in the enactment of a series of statutory instruments designed to codify, formalise and ultimately to control application, effect and scope of customary laws throughout the Sudan³⁵.

The geographical and tribal diversities in the then pre-partioned Sudan led the colonial regime to enact various laws based on tribal beliefs and practices. In the Northern part of Sudan which is now the present Sudan, there were Mohammedan law courts. One of the earliest of such enactment was the Mohammedan Law Courts Ordinance 1902 which sought to empower Sharia'a courts to entertain the following matters³⁶;

³⁴ WWW.Sudanese judgments and judicial precedents, accessed on 29th September 2011

³⁵ Ibid

³⁶ Justice Aleu. A study on Customary Law in the Contemporary Southern Sudan 2004 p.14

"Any question regarding marriage, divorce, guardianship of minors or family relationship, provided that the marriage to which the question related was concluded in accordance with Mohammedan law or the parties are Mohammedan.

Any question regarding wills and wakf, gift, succession, interdiction or lost person, provided that the endower donor or the deceased or the interdicted or lost person is a Mohammedan.

*Any question other than those mentioned in the last two paragraphs provided that all the parties, whether being Mohammedan or not, make a formal demand signed by them asking the court to entertain the question and stating that they agree to be bound by the ruling of Mohammedan law*³⁷. It can be well observed here in the preceding paragraphs that Mohammedan courts have jurisdiction only on Muslims and such jurisdiction can be exercised upon non-Muslims who accepted the court's ruling. Some autonomy was also provided to formal Islamic lawmakers in that the same ordinance authorized the Grand Kadi, pending the approval of the colonial Hakimdar (Governor-General), to make regulations governing the decisions, procedures, constitution and jurisdiction of the Mohammedan law courts³⁸.

Moreover, the regime enacted Chiefs' Courts Ordinance in 1931 to address issues that arise within the non-Muslim communities. In these ways, the first non-Western laws operating in Sudan were formally recognized by colonial powers³⁹. Customary laws were also addressed with the passage of the Civil Justice Ordinance 1929 and the Chiefs Courts Ordinance 1931. The Chiefs Courts Ordinance 1931 was an initial development of the customary law for the fact that it recognized customary chiefs' legal authority to exercise the customary jurisdiction in their traditional tribal areas. More elaborations pertaining to the jurisdiction of customary law courts can be seen in section 7 of the Chiefs' Courts Ordinance 1931. The said section provides:

³⁷ Justice Aleu, op cited, pg 14

³⁸ Ibid

³⁹ Ibid

*"The Chiefs' Court shall administer the native law and customs prevailing in the area over which court exercises its jurisdiction provided that such native law and custom is not contrary to justice, morality or order"*⁴⁰. The Chief's Courts Ordinance 1931 was indeed aimed to promote the political agenda of the colonial regime because the focal point of leadership and social order was the tribal chief.

The recognition of the customary law and its significant role of maintaining society order were reaffirmed by the then Sudanese government. The People's Local Courts Act 1977 repealed the original ordinance, but replaced it with an almost identical mandate⁴¹. It is however, interesting to note that the Sudan Criminal Act 1991 actually exempted South Sudanese persons from the application of huddud (Sharia'a penalties), which were replaced with criminal penalties conforming to the concepts of localized customary laws⁴². The crimes of adultery which is punishable with death penalty under Sharia'a law and the offence of intoxication were in fact not applied in South Sudanese territory. The aim of the legislators was to ensure that the local customary laws were to be applicable since the communities in South Sudan were non-Muslims. Although the power of traditional local chiefs is recognized by the South Sudan legislatures, yet the ability of the customary courts to execute their orders has been limited by statutory laws. Some of the statutory provisions conflict with customary laws, especially in the areas of human and individual rights. However, the South Sudan Penal Code 2008 is like the former Chiefs' Court Ordinance 1931 in the sense that it conferred the power to decide and determine those offences of customary nature to the customary courts.

2.4 The present status of customary law

As discussed in the previous part of this chapter, customary law during the time of long war in Sudan was used to keep social order in the communities. It is undeniable that the local courts determined the criminal and civil cases using customary law. However, after the independence of South Sudan, the same power of traditional authorities was limited by the government. Section 98 of the Local Government Act 2009 provides:

⁴⁰ Lufti G. A. The Future of English Law in the Sudan 1976, pg 2. Sudanese judgments and precedence, Encyclopedia

⁴¹ Justice Aleu ,op cited, pg 15

⁴² Ibid

"The customary law courts shall have judicial competences to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethnics of the communities.

A customary law court shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent statutory court⁴³. "

Based on the above section, the powers of the customary courts to adjudicate cases of criminal nature have been superseded by statutory courts and a threshold was put on customary courts after the formation of the South Sudan government. Further the individuals are reluctant to submit their complaints, even those of customary nature to the customary courts due to the fact that the customary courts, in most cases do not have effective police personnel to execute the orders and this has led to the weakness of customary courts. Moreover, the customary courts claim overlap of powers between statutory and customary law courts and this has brought the conflict of ideas between the two bodies of law.

2.5 Sources of Laws.

It is clearly provided under article 5 of the Transitional Constitution of the Republic of South Sudan 2011 that the sources of legislation in South Sudan shall be:⁴⁴

The constitution

The preamble of the Transitional Constitution of the Republic of South Sudan 2011 indicates that the constitution shall be the supreme law of the nation, which means all other laws operating in South Sudan shall conform to the constitution. It can be expressly stated that mother of all laws shall be the transitional constitution and any law conflicting with it shall be deemed as having no force in the land. The second source of legislation is the **customs and traditions of the people.**

⁴³ Laws of Southern Sudan. The Local Government Act 2009, see section 98

⁴⁴ Laws of Southern Sudan. The Transitional Constitution of the Republic of South Sudan 2011, see Article 5

The importance of customs and traditions as source of legislation can be seen in the statement of the former Chief Justice Ambrose Thiik “Customary law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we have fought for these past twenty years⁴⁵”. Hence customs and traditions of the people provide the social order and the use of such customs or traditions as a source of law reflect the will of the people. The other two sources besides those mentioned above are:

The will of the people. This includes referenda and consensus held by people of South Sudan to address a particular situation.

Any other relevant source. These include the international treaties and other conventional laws.

It is however generally accepted that the term ‘customary law’ in South Sudan refers to the body of customs and traditions that are utilized by, and unites, the majority of citizens in that jurisdiction. It is most important to understand customary law or “customs” in the South Sudanese context also refers to the practice of Islamic law by South Sudanese Muslims.⁴⁶

2.6 Features of customary law in South Sudan. Customary law has two main aspects, flexibility and antiquity.

a. Flexibility.

Customary law in South Sudan is not found in written form, even with the advent of literacy among the South Sudanese communities. There was a potential resistance previously against an attempt to reduce customary laws of the communities into written form. The main reason given for this resistance is a belief that customary law reflects

⁴⁵ Justice Aleu, op cited pg 11. For the Muslims, religious tenet represents their customs. It is however subject to discussion whether it satisfies the criteria of customary law, particularly in the jurisdictions such as Nigeria.

⁴⁶ Justice Aleu, op cited pg 11. However, if we have to see Islamic law as customary law in the context of South Sudan, it will be an exceptional since it is in writing and universal.

the contemporary customs, practices and beliefs of the community⁴⁷; these customs and practices are given to change and customary law must be flexible enough to reflect this dynamism⁴⁸. Any attempt to codify, document or reduce these laws to writing, it is argued, would severely limit their flexibility⁴⁹. Having taken note of the future change of customary laws, as evidenced by the study, it is clearly believed that unwritten law will lead into misinterpretation and therefore its applicability will be bias.

b. Antiquity.

It is broadly accepted that the term “customary Law” as it applies to Africa in general and South Sudan in particular refers to the body of traditional norms, social conventions and rule that through long usage and widespread acceptance direct and govern traditional African society⁵⁰. In this sense, customary law is a social convention among the communities. The definition and scope of the custom was illustrated by chief justice CJ Lindsay in *Bamboulis V Bamboulis* 1954.

Lindsay held that: Customs in (the context of customary law) refer to local custom originating by usage in the Sudan, and is not applicable to the imported rule of law of foreign origin⁵¹. More elaborations on how customary law originates can be found in a few better explanation given by RWM Dias:

“When large sections of the populace are in the habit of doing a thing over a very long period, it may become necessary for the courts to take notice of it. The reaction of the people themselves may manifest itself in mere unthinking adherence to a practice which they follow simply because it is done or again it may show itself in a conviction that a practice should continue to be observed, because they approve of it as a model of behavior. The more people follow the practice the greater pressure against non-

⁴⁷ Justice Aleu, op cited pg 11. However, if we have to see Islamic law as customary law in the context of South Sudan, it will be an exceptional since it is in writing and universal.

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Lutfi G, A, *The Future of English Law in the Sudan* 1976. *The Sudanese Judgments and Precedents Encyclopedia*, Sudan Judiciary Khartoum at 2

⁵¹ Ibid

*conformity. But it is not the development of a practice as such, but the growth of a conviction that ought to be followed that makes it a mode for behavior*⁵².

In the above explanation, Dias clearly mentioned the conditions under which the custom, practice and usage must undergo in order to be recognized by a court of law. Such recognition will render the custom, practice or usage a valid force of law. The said conditions are as follows⁵³:

The custom (valid custom) must be of immemorial antiquity. If the origin of the custom cannot be remembered, then the proof for such custom is easier.

The custom must have been enjoyed as of right.

It must be certain and precise.

It must have been enjoyed continuously.

It must be reasonable. The reasonableness of the custom can be construed as its conformity to the principle of justice, equity and good conscience. Any custom that contradicts the principle of justice, equity and good conscience loses its validity and therefore its legal force is nullified. Further, it is generally recognized that there are four primary sources of custom that exist. These are stated below⁵⁴:

"Practice", defined as custom or tradition that has been repeated over many generations at the community level rather than individual level.

'Binding or persuasive decisions from courts' These binding or persuasive decisions should be from the customary courts but not also limited to the statutory courts which are empowered to preside over customary law cases.

"Religious beliefs" have particular import in the treatment of matters such as incest and adultery.

⁵² Lutfi G, A, The Future of English Law in the Sudan 1976. The Sudanese Judgments and Precedents Encyclopedia, Sudan Judiciary Khartoum at 2

⁵³ [WWW.Features](#) of customary law, accessed on 15th September 2011

⁵⁴ [WWW.Features](#) of customary law, accessed on 15th September 2011

"Morality" and moral principle

2.7 An overview of the rights of women under the law

Introduction

The primary objective of this part is to discuss the rights accorded to women and children under the constitution, customary laws of South Sudan and other conventional laws. Further, it assesses compliance with the laws in Bor County and the possible conflict between the conventional and customary laws thereat.

2.8 Rights of Women under the Constitution of the Republic of South Sudan.

It is essential at this juncture to hold brief discussion about what constitute the rights of women in the human rights' perspective and to what extent does the constitution of South Sudan provide protection to and respect for the said rights. Before discussing the rights of women and children under the constitution of South Sudan, it is very important to glance at the notion of human rights in general. It is undisputable that there is no clear legal definition of human rights. However, the characteristic traits of human rights may be described as follows⁵⁵:

- (a) *Human rights create entitlements.* As such, they are fundamentally different from rights established solely as state obligations that cannot be claimed by the beneficiaries.
- (b) *The beneficiaries of these entitlements are individuals.* As individual rights, women are sole beneficiaries of their rights.
- (c) *The individual/collective's rights can be asserted,* in principles, only vis- a- vis states or quasi-state entities but, in principles not private actors⁵⁶.
- (d) *They are applicable, as a matter of principle,* in peacetime and in time of armed conflict, but they may be in certain circumstances be temporarily suspended during such times by virtue of the application, of derogation clause⁵⁷.

⁵⁵ Walter Kalin and Jorg Kunzli. The Law of International Protection of Human Rights 2009, pg 31

⁵⁶ Walter Kalin and Jorg Kunzli, op cited pg 31

⁵⁷ Ibid

(e) *They are internationally guaranteed*⁵⁸. The fact that these rights are guaranteed internationally means that international law prescribes to what extent rights holders may assert and enforce their entitlements both domestically and at the international level⁵⁹. The domestic legislature draft the constitution in accordance with the basis of international laws, reason being to set out the fundamental human rights into the constitution. However, the application of the constitutional provisions, for the protection of those fundamental human rights is inapt in the field of individual rights, especially in most of the newly independence states. Any debate about the rights of the individual and in particular women and children in traditional South Sudan is the focal point for all human rights activists. The Transitional Constitution of the Republic of South Sudan articulates the rights of women under article 16(1), that they shall be accorded full and equal dignity of the person with men⁶⁰.

In this context, dignity includes private life of a woman. To this end, private life as stated by Walter Kalin and Jorg Kunzli, is where we do not want to share with others, where we determine a way of life or style of living that reflects our attitudes, values, taste and preferences, where we take pleasure in intimate relationships with a lover, shape our family life, or enjoy being together with our friends⁶¹. Having regard to the freedom on individual's private life, the provision of the transitional constitution reflects the rights to private life. Article 164 provides: All levels of government shall⁶²

"Promote Women participation in public life and their representation in the legislature and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs, and traditions".

"Enact laws to combat harmful customs and traditions which undermine the dignity and status of women".

⁵⁸ Walter Kalin and Jorg Kunzli, op cited pg 31

⁵⁹ This has been a debatable subject of discussion in international human rights laws.

⁶⁰ The Laws of Southern Sudan. The Transitional Constitution of the Republic of South Sudan 2011, see Article 16

⁶¹ Walter Kalin and Jorg Kunzli. op cited, pg 183

⁶² Laws of Southern Sudan. The Transitional Constitution of the Republic of South Sudan 2011, see Article 164

Despite the protection accorded to women in the transitional constitution of South Sudan, women's rights in the society of South Sudan remained under constraints due to the influence inflicted upon the constitution by customs and traditions. The constitution provides for the rights of individual to found a family, where as the customary law makes it as an obligation upon an individual to found a family. Moreover, the contradiction between the statutory and customary laws on the issues of founding a family will be discussed at the end of this chapter. The provision of Article 15 of the Transitional Constitution of the Republic of South Sudan provides:

"Every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry"⁶³.

In taking cognizance of the above article, it is clear that the constitution provided protection to the rights of women to some extents though there is an ambiguity of words, or phrases for instance, 'marriageable age', 'their respective family laws' and 'the free and full consent of the intending spouses'.

The aforesaid phrases will be discussed under the conflict of laws at the end of this chapter.

Furthermore, the violations of women's rights, to somewhat include child's rights, and as such, it is important to look at the protection accorded to child's rights under the transitional constitution. The provision of article 17 (1) (g) of the Transitional Constitution of the Republic of South Sudan 2011 provides that:

"Every child has the right not to be subjected to negative and harmful cultural practices which affect his or her health, welfare or dignity"⁶⁴.

⁶³ Laws of Southern Sudan. The Transitional Constitution of South Sudan 2011, see Article 15

⁶⁴ Ibid, see Article 17(1)(g)

Having regard to the expression of the above article, the rights of the child is protected but the major challenge is the application of those rights within the society where cultural practices override the law.

2.9 The rights of women under statutory law.

The rights of women under statutory law are guaranteed, however, the exercises of such rights are subject to compliance with the customs of the local community. For instance, section 273 of the South Sudan Penal Code 2008 provides that:

"Whoever kidnaps or abduct any woman with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse, commit an offence and shall be addressed according to the customs and traditions of the aggrieved party, in lieu of that and upon conviction, shall be sentenced to imprisonment for a term not exceeding ten years or with a fine or with both⁶⁵."

The provision of the above section outlawed the act of kidnapping a woman and compel her to marry against her will, this is in principle, provides protection. However, addressing such act in accordance with the custom of the aggrieved party is another scapegoat of the perpetrator. For instance, the custom of the aggrieved party may regard it as a civil wrong, which need compensation, and in most cases under customary laws of South Sudan, a heifer when the perpetrator refuses to marry. But what about the custom of the aggrieved party that may regard such act as a serious crime, for instance in some countries, kidnapping a woman and forcing her to marry against her will or compel her to have illicit intercourse is a serious crime that amounts to rape. Having taken note of the provision of the said section, it can be concluded that the protection provided under it is inadequate to suppress the perpetrators and this will expose the women to dangerous lives.

⁶⁵ Laws of Southern Sudan. The Penal Code of South Sudan 2008, see section 273

Another alarming issue is found in the same Penal Code 2008, section 266 which provides:

"Whoever has consensual sexual intercourse with a man or woman who is and who he or she has reason to believe to be the spouse of another person, commits an offence of adultery, and shall be addressed in accordance with the customs and tradition of the aggrieved party and in lieu of that and upon conviction, shall be sentenced to imprisonment for a term not exceeding two years or with a fine or both"⁶⁶

This section also confers power to the customary law though the act is a crime under the penal code. Moreover, in the South Sudanese customary laws, women are exempted from the punishment; instead men are always liable for such a crime. But the provision of the section tries to hold both the woman and man who may be involved in an offence of adultery to be responsible, that means either one of them who is a spouse of another person shall be punished. The interpretation of the section will bring more confusion in the modern cities where people of different countries reside. There are some residents belonging to different cultural background where an act of adultery does not constitute criminal act. In this case, the court can either sentence a suspect to two years imprisonment or fines the suspect as stipulated in the penal code. Suppose the customs and tradition of the aggrieved party inflicted capital punishment upon the suspect, for instance, in the Muslims communities the punishment for adultery is stoning to death. The question that poses itself here is, will the court address it in accordance with the Muslim community's customs. The answer to the above question will be negative and in trying to neglect or dodge customs of the other communities will be perceived as a miscarriage of justice, since the said section provided the recognition of the aggrieved party's customs and traditions without subjecting such customs and traditions to the principle of justice, equality and good conscience. The protection of women's rights under the statutory law may be adequate if the words customs and traditions of the aggrieved party are distanced from the application of the provision of section 266 of the Penal Code 2008.

⁶⁶ Laws of Southern Sudan. The Penal Code of South Sudan 2008, see section 266

In addressing the murder cases, section 206 of the Penal Code 2008 of South Sudan provides:

"Whoever causes the death of another person

With the intention of causing death, or knowing that death would be the probable act or of any bodily injury which the act was intended to cause, commits the offence of murder, and upon conviction be sentenced to death or imprisonment for life provided that if the nearest relatives of the deceased opt for customary blood compensation the court may award it in lieu of death sentence with imprisonment for a term not exceeding ten years"⁶⁷.

The award of customary blood compensation creates loopholes in the application of the section. The gaps created by the above section can be seen in the case between the South Sudan Government v Oka Alier and others, 2011.

The salient facts of this case were as follows:

A young girl, by name Akoi Madol Alier fell in love with a man and agreed to marry him. As a result of that agreement, the man (Mading Yar) eloped the girl and that act provoked the girl's parents because their consent was not obtained. Due to such inconveniences, the girl's father ordered the people to bring back the girl. The girl was brought back to her father's house. She stayed there for some few days and then she went back to the same man whom her parents refused her to marry. At that second time, she insisted to marry him, despite her family's refusal to the marriage. Both her paternal uncles by names Alier Makuei and Ngong Oka went to bring her back and put her under the police custody in a small village called Malual-agor bar. Later in the evening, she was released to go to her father. The father beaten her and took her to Jirkuat (a cattle camp a cross the river or sometimes known as "toic"). On arriving in

⁶⁷ Laws of Southern Sudan. The Penal Code of South Sudan 2008, see section 206

the said cattle camp, she was beaten again by her cousins. The two young men by names Oka Alier and Mayoul Abol, beat her and as a result, she died at the spot⁶⁸.

Again her friend who escorted her during the first time was also beaten, but she survived. The suspects were arrested on the 3rd of March 2011 and released from prison on 28th May 2011.

The releasing of the two suspects based on the fact that they have paid customary blood compensation to the deceased's family. It has already been indicated in section 206 of the Penal Code 2008, that if the nearest relative of the deceased opts for customary blood compensation, the court may award it in lieu of death sentence with imprisonment for a term not exceeding ten years. But in the above case, the court tried to apply customary law and as a result, it contrary acted to the provision of section 206 of the Penal Code 2008, in the eye of statutory law. Hence, the law has been diverted from its courses and the protection expected has been insufficient. The decision reached at by the court in the above cited case shows clearly the weakness of the legal system in the area of women's rights. The customary blood compensation for female is twenty-five cows, whereas the same compensation is fifty cows for male, this indicates clear discrimination against women.

2.10 Customary Law in Bor County

Each and every tribe in South Sudan has its own system of law which bases upon its customs. Bor County is not an exceptional county. The customary law of each and every tribe covers many areas of daily activities, for instance:

Marriage, including scope of union, successive marriage, procreation, sexual cohabitation, marriage payment and ceremonies⁶⁹.

Adultery, including penalties.

Divorce, including marriage nullification, criteria, consent issues and bride wealth.

⁶⁸ Jonglei State Human Rights Commission's Report, 2011

⁶⁹ Justice Aleu. op cited, pg 13

Child custody, including choice of law in property distribution.

Property including transfer of title, tracing, testate and intestate success in and inheritance, land law, personal property, resource rights and loss of title⁷⁰.

Social obligation, including contractual undertakings, tort liabilities for homicide and liability for injury caused by animals⁷¹.

Procedural laws, including fundamental principles of customary case management. Hence, the customary law⁷² is a complete legal system which governs each community or tribe.

Further, the customary law system places threshold upon the women in the area of succession and inheritance. Under customary law, some relatives lose their rights of inheritance after they have changed their social and legal status. It can be observed here that married sisters and daughters are excluded from inheritances, although the grounds of inheritance are the existence of blood relationship between the claimant and the deceased⁷³. Moreover, the law (customary law) is very unique in the areas of child custody. A child born as a result of a legitimate marriage is always placed under the custody of his /her father if the marriage is dissolved in accordance with Dinka customary law. The reason for placing the child under the custody of a father is to serve the best interest of the child.

The customary court does not look at the cause of dissolution, instead it looks whether there was a valid marriages between the two spouses and this suffice for the court to award a child to his/her biological father provided, that he has paid the bride wealthy and in lieu of that pay 'aruok' (five cows) to the woman's relatives as consideration for a child.

⁷⁰ Justice Aleu. op cited pg 13

⁷¹ John Wuol Makec. Cases and Principle of Customary Law in the Sudan 2007, pg 23

⁷² Ibid

⁷³ Ibid

Furthermore, a child who is born as a result of adultery is not given to his / her biological father but goes to a legitimate husband of the woman. This is done in order to preclude the culprit from benefiting from his act. Precluding the adulterous man from having custody of a child is also a deterrent to further act of adultery in the society. The general principle in the Dinka customary law states:

"Any Dinka woman who is not a girl is presumed to be a married woman and any man who commits sexual intercourse with such a woman does so at his own risk"⁷⁴. It follows from the above principle that a death of the husband does not even terminate the marriage under Dinka customary law, and as such, a man who has sexual intercourse with a widow belonging to another clan, commits adultery. However, the principle is diminishing in its application as shown in the civil suit between Ayuen Ajith Jok versus Adut Ayom Kur and others. (See the decision issued by Lay magistrate Enoch Deng Anyuat dated 19/August 2011 in Bor County)

The salient facts of the case were as follows;

Madol Ajith impregnated a lady called Adut Ayom Kur and consequently accepted her as his wife. Madol Ajith being a soldier was transferred to a military camp and unfortunately he was killed. His wife gave birth to a baby girl and she remained with her parents (Thon Ayom Kur) during the period of the armed conflict. However, the wife (defendant) started to have sexual relationship with another man called Deng Angeth Deng who consequently produced a child with her. Again the defendant (wife) left Deng Angeth and developed another relationship with another man and produced two children with him.

The plaintiff petitioned the above court stated early and prayed the court to grant him the custody of children including those born by other men⁷⁵.

The honorable court issued a decree, awarding the first child to the paternal uncle (the plaintiff), and the second child to the second husband and the other two children whose

⁷⁴ See section 27 of the Restatement of the Bahr el Ghazal Region Customary Law (amended) Act 1984

⁷⁵ Unreported case, Judgment of 18th August 2011, Bor County Court of Lay Magistrate

their mother failed to disclosed their father to the court, were awarded to the maternal uncle.

In light of the above decree, it can be plainly stated that the court has acted contrary to the principle of the Dinka Customary law. The two marriages cannot exist simultaneously under the Dinka Customary law and awarding children to their biological fathers will create anarchy in the society. The first marriage was not terminated by a competent court instead the husband was killed in war and according to the customary law of the Dinka, the death of the husband does not terminate the marriage. Further, the honorable court also acted contrary to the principle, for instance, awarding the second child to man who is not a legal husband, shows that the man indeed has benefited from adulterous act. The judgment of the court (Bor County) is the cornerstone for the change in customary law and it also indicated the lack of security on the rights of women. The judgment of the honorable court failed to consider the status of the woman who will remain the weak person in the society, due to the fact that nobody will marry her again since she has reached old age. In taking cognizance of the said decision, the rights of women under customary law in Bor County remained unprotected and thus rendered the women to be the most vulnerable person in the human society. In assessing compliance with the law in Bor County, one can conclude that there is in fact a conflict between the statutory laws and customary rights of women and this will be discussed under the conflict of laws in order to show the area of divergence of the laws and customs.

2.11 The conflict of laws

There is a general consensus amongst South Sudanese societies that the tension between customary law and statutory law has historically been an essential and creative process, giving dynamism to both systems and key force for beneficial change.⁷⁶

The conflict between customary laws and other statutory laws continues as society is on the process of coping with globalization. This fundamental difference of opinion stems

⁷⁶ Justice Aleu. A Study on Customary Law in the Contemporary Southern Sudan 2004, pg 30

on the one hand from lack of understanding amongst some in the international community of the underlying ethos of customary laws that set the good of the community above the rights of the individual⁷⁷. This indicates that, the community right is used in certain circumstances to override the constitution and other statutory laws. For instance, kidnapping a woman and forcing or compelling her to marry against her will, is deemed to be a serious crime that can amount to rape under statutory law, but when coming to look at the community's perspective, it is addressed in a way of any civil wrong under customary law. This clash between legal systems is evidenced throughout the Sudanese legal history from at least the time of colonization by use of the terms such as 'reasonableness', 'justice', 'equity' and 'good conscience' as caveats by the judiciary on the utilization of customary law and 'repugnance' as a means of describing some crimes as being beyond the remit of customary law⁷⁸. Although the statutory laws restrict the application of customary law to conform to the minimum standard of human rights yet its application (of customary law) is favoured within the South Sudanese courts. The provision of article 123 of the Transitional Constitution of South Sudan 2011 provides:

*"Judicial power is derived from the people and shall be exercised by the courts in accordance with the customs, values, norms and aspiration of the people and in conformity with this constitution and the law"*⁷⁹.

The exercise of judicial power subject to the customs, values and norms creates legal lacuna in the areas of individual rights particularly women, and children. The protection to be accorded to women and children under the constitution is of much contentious debate. Under the customary law, marriage is a duty and not a right. The principle is that, every person, male or female who has attained the age of maturity, is under social obligation to have a family of his or her own through the system of marriage. The rule obliges the living relatives to conduct marriage for the dead in order for the latter to

⁷⁷ Justice Aleu. A Study on Customary Law in the Contemporary Southern Sudan 2004, pg 30

⁷⁸ Ibid pg 31

⁷⁹ Laws of Southern Sudan. The Transitional Constitution of the Republic of South Sudan 2011, see Article 123. The word 'law' in this context refers to statutory laws

have children and families⁸⁰. This tenet leads to the maintenance of widow's inheritance within the society.

However, marriage under the constitution is a right of an individual either to marry a person of his / her will or to refrain from marriage. And as such, it demand a free and full consent of the persons intending to marry but directs that right to be exercised in accordance with the customs of the parties. The provision of article 15 of the Transitional Constitution does give right of individual but subjected it to customary law. The said provision states that.

"Every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry"⁸¹.

In this respect the phrase "their respective family laws" can be construed to mean customary laws of the people intending to marry themselves. The said provision also outlined the free and full consent of people intending to marry". This is another contradiction because "free and full consent of people intending to marry" under customary law has low weight. The constitutional provision is seemed to be overridden by the customary law and this was evidenced by a case of South Sudan Government versus Oka Alier and others 2011, at Bor High Court, where the suspects were released from prison under the pretext that the customary blood compensation was paid to the victim's father. In fact the customary law conflict with the statutory laws and the constitution and to some extent, the customary law override the other laws in Bor County. The South Sudan Penal Code 2008, section 206 provides:

*"Whoever causes the death of another person
with the intention of causing death, or*

⁸⁰ John Wuol Makec. Cases and Principles of Customary Law in the Sudan 2007, pg 3

⁸¹ Laws of Southern Sudan. The Transitional Constitution of the Republic of South Sudan 2011, see Article 15

knowing that death would be the probable and not only a likely consequences of the act or of any bodily injury which the act was intended to cause, commits the offence of murder, and upon conviction be sentenced to death or imprisonment for life, and may also be liable to a fine provided that, if the nearest relative of the deceased opt for customary blood compensation the court may award it in lieu of death sentence with imprisonment for a term not exceeding ten years⁸².

The provision of the above section does not set the suspect at liberty even if the customary blood compensation has been paid, still the accused must spend a term not exceeding ten years imprisonment. This has not happened in the above mentioned case and the provision of the law was overrode by customary law. The High Court exercised judicial power subject to the customs, norms and values of the society and as such the accused persons were released without spending the terms provided by the law. Furthermore, the compensation was also done in accordance with the customary law, the compensation for female is twenty-five cows and for male is fifty-one cows. The conflict therefore still exist between customary laws whose objective is to hold its basic tenet, reconciliation, which arguably is an impetus for social good and vital tool for peaceful transition in South Sudanese societies that must not be lost in the change and the statutory laws that provide for punishment of the offenders. The stark contrast between the approach to murder in customary and statutory law courts, exemplifies the differing philosophies of South Sudanese and Western-oriented societies⁸³. Whereas the ethos of punishment and deterrence exists in both systems, customary law takes a more pragmatic and arguably human approach. It recognizes the need to find reconciliation between the families and communities of victim and perpetrators and recognizes that imprisonment or death rarely achieves conciliation⁸⁴. Moreover, punishment costs the community in terms of further lives lost from the workforce and /or the cost of lengthy incarceration⁸⁵. The customary law system provides blood customary compensation for female to be less than that of a male. This clearly shows a

⁸² Laws of Southern Sudan. The Penal Code 2008, see section 206

⁸³ Justice Aleu. op cited, pg 30

⁸⁴ Ibid

⁸⁵ Ibid

conflict between the rights enshrined in the constitution and statutory laws and those allowing women and children in customary law. It seems reasonable to assert that with regard to many aspects of individual human rights, women and children in South Sudan have international law on their side. The pressure for customary law to come into harmony with international law will continue to grow if the former is allowed to override the statutory law.

2.12 Comparison

Introduction

This part compares the protection accorded to women under various international and regional human rights treaties.

International Treaties;

The world has been a theatre of war for so many years, the weak persons were attacked without any reason and human rights were violated as witnessed during the world wars. Reacting to the sufferings caused by the Second World War and recognized from experience that the regimes which abuse human rights are frequently also aggressive beyond their borders; the founders of the United Nations agreed that unconditional respect for human rights is a prerequisite for securing and maintaining a just peace that allows nations and peoples to develop and prosper⁸⁶. This was expressly stated by one former UN Secretary General, "We will not enjoy development without security; we will not enjoy security without development, and we will not enjoy either without respect for human rights".⁸⁷ Respect for human rights is the ultimate goal of the international community and as such all states are required to safeguard human rights. Respect for human rights also determines the level of development of the country. Article 1 of the UN Charter of 26th June 1945 therefore mentions 'international cooperation... in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' as one of the

⁸⁶ Water Kalin and Jorg Kunsili. The law of international protection of Human Rights 2009 pg 39

⁸⁷ I bid

main purposes of the United Nations.⁸⁸ For the same purpose of respect for human rights, Article 56 of the UN Charter, read in conjunction with Article 55, require member states to cooperate with the UN in promoting 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religions'.⁸⁹ The said purposes were not met adequately and the monitoring body to ensure the implementation of the said rights did not fulfill its objectives, as a result, the community of nations continued to convene in order to provide protection to a specific category of persons. To that end the community of nations adopted series of international conventions, and designed them to protect particular categories of persons such as refugees, women, children, migrants and persons with disabilities. These treaties however, were designed to regulate the legal status of these particular persons in the contemporary human community and they sometimes deal with policy and regulatory issues going beyond human rights guarantee as such.⁹⁰ The main purposes for the said series of conventions were done in order to protect those persons from discriminatory act. As such, the community of nations agreed and adopted Convention on the Elimination of All Forms of Discrimination Against Women on 18th December 1979 resolution 34 (180) and entered into force on 3rd September 1981⁹¹. This convention establishes international machinery for the implementation of its provisions along the lines of those established for implementation of International Covenant on Civil and Political Rights. I.e. an 18 members committee on the Elimination of Discrimination against Women was empowered to settle disputes between states parties concerning observance of the convention and to receive and examine information from them on measures taken to achieve its goals.⁹² The convention's underlying philosophy is that discrimination against women is incompatible with human dignity and constitutes an obstacle to the full realization of the potentialities of women; therefore, the rights of women to share equally in improved conditions of life must be

⁸⁸ I Water Kalin and Jorg Kunsili. The law of international protection of Human Rights 2009 pg 39

⁸⁹ United Nations Charter, see Articles 55 and 56

⁹¹ Walter Kalin and Jorg Kunzli, op cited pg 39

⁹² Conventions on the Elimination of All Forms of Discrimination against Women 1979

promoted and protected. Hence, the states parties have obligations to avoid and abolish cultural practices that aim in discriminating women within the society and in order to ensure those rights as stipulated in the convention; the states parties enshrined the rights of women in their domestic constitutions. The convention defined the term discrimination against women in article 1 as

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economical, social, cultural, civil or any other field".⁹³

The convention is the basis for the bill of rights in the states' constitutions and there is no reason a state can avoid it. However, the enforcement for the rights granted to women under the domestic constitution or legislation is subject to failure. The convention requires states to refrain from engaging in discrimination as defined in article 1 and in addition, to pursue a policy of eliminating discrimination against women.⁹⁴ To that end, states parties must take a number of concrete measures, including, for instance, embodying the principle of equality in their constitution.⁹⁵ They must also take concrete measures to promote equality (article 3 and 5), which may include temporary measures (including quotas⁹⁶) provided that they are not maintained for longer than necessary.

One of the articles of the convention which is still to be observed by states parties and to implement it is article 16 which provides:

States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women.

⁹³ Convention on the Elimination of All Forms of Discrimination Against Women 1979, see Article 1

⁹⁴ Watter Kalin and Jorg Kunzli The Law of International Protection of Human Rights 2009 pg 44

⁹⁵ I bid

⁹⁶ Ibid

The same right to enter into marriage.

The same right freely to choose a spouse and to enter into marriage only with their free and full consent.

*The same rights and responsibilities during marriage and at its dissolution.*⁹⁷ The above article provides a clear protection to the rights of women, however, the newly independent states, for instance, South Sudan articulates such rights to be exercised in accordance with the customary laws of the persons intending to marry and this always lead to a great conflict of the ideological approaches of human rights with ideological cultural relativism. It is upon the states parties to observe the principle of non-discrimination for the purposes of ensuring the individual rights within their jurisdiction. The principle of non-discrimination requires the establishment of equality in fact as well as formal equality in law.⁹⁸ As the Permanent Court of International Justice noted in *Minority School in Albania case*,⁹⁹ and stated 'equality in law may preclude discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations.'¹⁰⁰ The differentiations of such situations depend upon what is just or reasonable for the attainment of Justice. The application of equality in fact may also require the introduction of affirmative action measures in order to diminish or eliminate conditions perpetuating discrimination.¹⁰¹ Such measures would need to be specifically targeted and neither absolute nor of infinite duration.¹⁰² The convention stipulates the measures to be taken by states parties in order to ensure the protection of women's and such measures include the report procedures. Under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 10th

⁹⁷ CEDAw, op cited, see Article 16

⁹⁸ Malcolm N. Shaw International Law 2010, pg 288

⁹⁹ Ibid pg 289

¹⁰⁰ Malcolm N Shaw, op cited pg 289

¹⁰¹ Ibid

¹⁰² Ibid

December 1999 (OP-CEDAW), individual complaints may not be submitted to the Committee on the Elimination of Discrimination against Women.¹⁰³

The human rights of children and young person below the age of eighteen years are comprehensively recognized in the UN Convention on the Rights of the Child (CRC) of 20th November 1989.¹⁰⁴ It does not only prohibit discrimination but stipulates the civil liberties of the child including preserve of his / her identity, (nationality), name and family relations as recognized by law without unlawful interference. The convention also stipulates the rights of the child in the event of separation from the parents. Article 9 of the convention states:

*'States parties shall ensure that a child shall not be separated from his / her parents against their will, except when competent authorities subject to judicial review determine in accordance with applicable law and procedure that such separation is necessary for the best interest of the child'.*¹⁰⁵ Such determination is necessary required in a particular case, such as in the dissolution of marriage, the court has to put 'the best interest of a child' as a paramount duty before it grants the decree for the custody of a child. The convention provides affordable protection to children from sexual exploitations and sexual abuse. Article 34 prohibits inducement or coercion of a child to engage in any unlawful sexual activity, however, states parties were left to determine the legal age under which the child may engage in certain activities. The convention gives states parties right to determine the child age in their domestic legislation, for instance the state's legislation has state clearly, who is a child. The prohibition of discrimination is an integral component of states' fundamental human rights obligation, as clearly demonstrated by its inclusion in international treaties, e.g. International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2 (2), International Covenant on Civil and Political Rights, article 2 (1)¹⁰⁶. It follows here that non-

¹⁰³ Walter Kalin and Jorg Kuzli. The law of International Protection of Human Rights 2009 pg 45

¹⁰⁴ I bid

¹⁰⁵ The UN Convention on the Right of the Child 1989, see section Article 9

¹⁰⁶ Walter Kalin and Jorg Kunzli. The law of International Protection of Human Rights 2009 pg 113, see Article 2(2) of ICCPR

discrimination principle rules out limitations that would otherwise be permissible if they were formulated in a discriminatory manner.¹⁰⁷

The Universal Declaration of Human Rights

The prohibition of discrimination in the human society is a prerequisite for international security. It was ultimately grounded in article 1 (3) of the UN Charter, which includes among the purposes of the United Nations 'International cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'¹⁰⁸. The principle of equality for both male and female was reaffirmed in article 16 of the Universal Declaration of Human Rights. The said article provides:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.*¹⁰⁹

The declaration put the rights of the persons intending to marry to be a collective responsibility of the state and the society. Therefore both men and women are placed under the protection of the law equally. However, mere declaration has no legal force as a result; positive obligations to fulfill human rights go beyond the obligation to afford protection against violation by private actors or risks emanating from natural forces.¹¹⁰ Broadly speaking, they require the state to create the legal, institutional and procedural

¹⁰⁷ Walter Kalin and Jorg Kunzli. The law of International Protection of Human Rights 2009 pg 113, see Article 2(2) of ICCPR

¹⁰⁸ UN Charter, see Article 1(3)

¹⁰⁹ The Universal declaration of Human Rights 1948, see Article 16

¹¹⁰ Walter Kalin and Kunzli op cited. pg 112

conditions that rights holder need in order to realize and enjoy their rights in full.¹¹¹ But, human rights cannot be exercised without prior enactment of specific laws and the related establishment of competent state bodies.¹¹² For instance, the existence of matrimonial law and the right to contract marriage before state authorities or at least to have the human rights registered.¹¹³ The domestic legislation of each state is the chief machinery for the enforcement of the rights enshrined in the declaration despite the fact that declaration does not create obligation.

Regional treaties for human rights

The regional human rights bodies play a great role in the advancement of human rights. However, the role played by each regional human rights body varies from region to region and the application of those rights is limited to the geographical region. The African Charter on Human and People's Rights (the Banjul Charter) (ACHPR) was adopted on 26th June 1981 by the Organization of African Unity (since 9th July 2002: the African Union).¹¹⁴ The Charter contains a wide range of rights including in addition to the traditional civil and political rights, economic, social and cultural rights and various people's rights.¹¹⁵ The Charter stipulates the extent to which the rights shall be exercised. Article 18 of the African Charter on Human and People's Rights provides:

The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical health and moral.

The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

¹¹¹ Walter Kalin and Jorg Kunzli, op cited pg 44

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Malcolm N. Shaw. International law Cambridge University Press 2010, 391

*The aged and the disabled shall also have the rights to special measures of protection in keeping with their physical or moral needs.*¹¹⁶

In addition to the above rights, the Charter also contains collective rights, such as self-determination, development, peace and satisfactory environment.¹¹⁷ The African Charter is the first human rights convention that details the duties of the individual to the state, society and family.¹¹⁸ The rights of women and children under the African Charter are provided in a clear term. The Charter set up the African Commission on Human and People's Rights and mandated it to have important educational and promotional responsibilities, including undertaking studies, organizing conferences, disseminating information and making recommendations to governments.¹¹⁹ The commission is a special mechanism for the realization of the rights set forth in the Charter. Having regard to the African Charter and other international human rights instruments, the protection of women's rights is clearly stated, but enforcement of the said rights at the domestic level is a challenge to states' legal system.

¹¹⁶ African Charter on Human and People's Rights 1981, see Article 18

¹¹⁷ Walter Kalin and Jorg Kunzli. op cited, pg 45, see Article 22-34 of the African Charter on Human and Peoples' Rights.

¹¹⁸ Malcolm N Shaw. International law 2010, pg 392

¹¹⁹ I bid

CHAPTER THREE

METHODOLOGY

3.0 Introduction

This chapter describes the methods and approaches that were used in the study. It describes the research design, the research instruments used in data collection, the research procedure, and data analysis techniques.

3.1 Research Design

This was a descriptive correlational survey design in nature and used cross sectional survey designs. The use of cross-sectional design is justified because data were collected once across the selected sample. It is a survey because it involved quite a big sample. Correlational design was used on the basis of comparing the two variables of the study.

3.2 Research Population

The target population of this research was all the residents in Bor town, the capital of Jonglei state, human rights activists and the law enforcement agents in the said state. The residents were required to provide clear information about the available conflict between constitutional provisions and the customary rights of women in their respective localities, while the law enforcement agents were required to give information about the measures (if any) they used against those suspects who violate the rights of women in pursuit of cultural practices. The accessible population was intended to be comprised of one hundred and thirty residents of Bor County, Jonglei state.

3.4 Sample Size and Sampling Procedure

The sample size of the study was 98 respondents got through the use of Sloven's formula. In fact, the sample comprised a number of respondent categories that the researcher wished to sample. The research targeted specifically five Women Associations, four International Non-governmental Organizations, four law enforcement agencies and human rights commission.

Therefore, to avoid sampling bias and increase the validity of the research, the more sample size you use the less sampling error this was the basis of sample determination. The study used stratified random sampling.

Table 1

3.5 Distribution of the Study Population

categories	Population	Sample size	Sampling method
Women Associations	80	30	Random sampling
INGOs	40	25	Random sampling
Law Enforcement agencies(Judiciary, MOJ, Police and prisoners)	40	25	Random
Human Rights Commission	25	10	Random
Total	185	90	

Source; Field data

3.6 Research instruments

The questionnaires were preferred for this study because it could enable the researcher reach a larger number of respondents within a short time, thus making it easier to collect relevant information. The questionnaires were developed basing on the objectives of the study and the personal profile of the respondents. It was the researcher who made the questionnaires and delivered to the said groups of persons and collected them. The questionnaires had two sections, section (A) on the profile of the respondents, and B on parental status. A record sheet was used to collect data on students' retention from the school records.

3.7 Validity

Validity is the success of a scale in measuring what it was set out to measure so that differences in individual scores can be taken as representing true differences in characteristics under study.

The researcher consulted statistical specialists and his supervisor who ensured the relevance and suitability of the content in the questionnaire which provided coverage of the objectives of the study. The validity of the questions was checked by the responses acquired and the content validity index.

3.8 Reliability of instrument

Reliability is a measure of the degree to which a research instrument yields consistent results after repeated trials. It is therefore refers to consistency and stability in measurements. To establish the reliability of the questionnaire, the researcher used the methods of expert judgment and pre-test in order to test and improve the reliability of the questionnaire.

3.9 Data gathering procedures

After getting a transmittal letter from the School of Post Graduate studies, allowing the researcher to go and collect data, request was also sought from the administrative offices in the county. The researcher then proceeded to request for permission from local consenting agencies. The respondents then were selected and questionnaire given to them, after which an appointment was made with them for the collection of the filled questionnaires after five days.

3.10 Data Analysis

During data analysis, quantitative and qualitative methods of research were used to analyze the data. Descriptive statistics such as frequency tables and percentages were used to analyze the profile of the respondents. Objective two and three were analyzed using means, objective four was analyzed using parsons' linear correlation coefficient.

3.11 Ethical consideration

To ensure that ethics is practiced in this study as well as utmost confidentiality for the respondents and the data provided by them, the following were done: (1) coding of all questionnaires; (2) the respondents were requested to sign the informed content; (3) Authors mentioned in this study were acknowledged within the text; (4) Findings were presented in a generalized manner.

3.12 Limitation of the study

The anticipated threats to validity in this study were as follows;

Intervening or confounding variable which will be beyond the researchers control such as honesty of the respondents and personal biases. To minimize such conditions, the researcher requested the respondents to be as honest as possible and to be impartial/unbiased when answering the questionnaires.

The research environments are classified as uncontrolled setting where extraneous valuables may influence on the data gathered such as comments from other respondents, anxiety, stress, motivation on the part of respondents while on the

process of answering the questionnaires. Although these are beyond the researchers' control, efforts were made to request the respondents to be as objective as possible in answering the questionnaires.

CHAPTER FOUR

PRESENTATION, INTERPRETATION, ANALYSIS OF DATA, AND FINDING

4.0 Introduction

In this chapter the results of the study are presented, analyzed and interpreted in the context of the purpose and research questions as they were formulated at the beginning of the study. The results are presented in form of tables, frequency counts, percentages and means.

4.1 Profile of the respondents

Table 2: Shows the profile of the respondents.

Category	Frequency	Percentage
Sex		
Male	36	40
Female	64	60
Total	90	100
Age		
18-28 yrs	25	28
29-38 yrs	35	39
31 and above	30	33
Total	90	100
Academic level		
Primary level	60	67

Secondary Level	13	14
Degree	7	8
Others	10	11
Total	90	100

Source: field data

One hundred questionnaires were distributed to the respondents and ninety were filled and returned .This therefore represents ninety per cent (90%) of the total number of questionnaires that were distributed.

As pertains to sex, most of the respondents were majorly women, could be because the study concerned them. Women were the leading at sixty per cent whereas the male respondents were forty per cent. As regards to age, most of the respondents were aged 31 years and above at thirty-nine per cent, followed by those between 29-38 years at thirty-three per cent(33 %), those who are in the age bracket of 18-28 came last at twenty-eight per cent(28%). With respect to level of academics, most of the respondents were primary school drop outs at sixty-seven per cent(67%), followed by secondary school leavers at fourteen per cent(14 %) whereas bachelors' degree holders formed only eight(8 %), the number that had other qualifications was eleven per cent (11%).

4.2 Independent Variable

The independent variable in this study was constitutional provisions on the rights of women. This variable was measured using seven items in the questionnaire. The respondents, particularly those who deal with law enforcement, were asked to respond to these set of questions using a scale of, 4=strongly Disagree, 3= Disagree, 2=Agree and 1= Strongly Agree. These responses were later summed up and their means computed using SPSS.

Mean Range	Respondents	Interpretation
1.00-1.95	Strongly disagree	Poor
1.96-2.95	Disagree	Fair
2.96-3.95	Agree	Satisfactory
3.96-5.00	Strongly agree	Very Satisfactory

Table 3

Level of Constitutional Provisions on the Rights of women

Indicators of constitutional provision on the right of women	Mean	Interpretation
Women are accorded full and equal dignity of the person with men	3.21	Satisfactory
Women have equal pay for equal work and other related benefits with men.	2.13	Fair
Women participate equally with men in public life	2.43	Fair
The government promotes women participation in public life and their representation in the legislative and executive organs by at least 25%	3.12	Satisfactory
The government has enacted laws that combat harmful customs and traditions which undermine the dignity and status of women	2.64	Fair
The government provides maternity and child care and medical care for pregnant and lactating mothers.	2.93	Fair
Women own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased	3.26	Satisfactory
Average Mean	2.81	Fair

Source; Field Data

From the data in table 3, it is evidenced that the overall mean average of the level of constitutional provision on the rights of women is at fair levels with a mean of 2.81. within the elements of the constitutional provision, the item that ranked highest was the fact that women own property and share in the estates of their deceased husbands' together with any surviving legal heir of the deceased, with a mean of 3.26. This was followed by the fact that women are accorded full and equal dignity of the person with men; this had a mean of 3.21. The item that followed was on the issue of the government promoting women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent (25%), with a mean of 3.12. The item that ranked fourth was the concept of the government providing maternity and child care and medical care for pregnant and lactating mothers, with a mean of 2.93. Ranked fifth was the concept of the government enacting laws that combat harmful customs and traditions which undermine the dignity and status of women, with a mean of 2.64. That women participate equally with men in public life was ranked sixth, with a mean of 2.43. The item that was ranked lowest was the fact that women have equal pay for equal work and other related benefits with men, with a mean of 2.13.

4.3 Dependent Variable

The dependent variable in this study was customary rights of women which were conceptualized as the unwritten laws that govern the society. Indicators of these unwritten laws were written down and the women asked to respond to them using a range of strongly agree-strongly disagree 4 point likert scale. The responses were analyzed using SPSS and presented as follows.

Mean Range	Respondents	Interpretation
1.00-1.95	Strongly disagree	Poor
1.96-2.95	Disagree	Fair
2.96-3.95	Agree	Satisfactory
3.96-5.00	Strongly agree	Very Satisfactory

Table 4

Level of Customary Rights of Women

Customary Rights of Women	Mean	Interpretation
If there is a dissolution of marriage, children go with their mother	1.45	Poor
One who murders a woman pays less compensation than one who kills a man.	2.31	Fair
Girls' consent is considered in marital issues	1.59	Poor
Girls' are allowed to inherit their fathers' properties	2.04	Fair
Women are allowed to hold position of authority in the society	1.32	Poor
Women are allowed by your custom to give their views in the governance of the society	1.98	Fair
In the event that a husband dies, the deceased's wife is permitted by your custom to have control over her husbands' estate.	2.09	Fair
Women are involved in crucial family decision making	1.67	Poor
Your custom permits women to get involved in income generating activities	1.34	Poor

Your custom usually tolerates women battering	3.75	Satisfactory
Average Mean	2.0	Fair

Source; Field Data.

From table 4 above, it is categorically evident that the overall level of customary rights of women is fair, with an average mean of 2.0. A scrutiny of the elements however reveals that the item with the highest rating was the fact that the custom tolerates battering of women, with a mean of 3.75. This was followed by the fact that one who murders a woman pays less compensation than that one who kills a man, with a mean of 2.31. which stands at fair. This was followed by the fact that in the event that a husband dies, the deceased's wife is permitted by your custom to have control over her husbands' estate, with a mean of 2.09 which is rated fair. The fact that girls are allowed to inherit their father's property, then followed with a mean of 2.04, which is also rated fair. This was followed, by the fact that Women are allowed by your custom to give their views in the governance of the society with a mean of 1.98 which ranks fair. This was followed by the fact that Women are involved in crucial family decision making with a mean of 1.67. The fact that girls' consent is considered in marital issues, then followed with a mean of 1.59 which was rated poor. This was followed by the fact that If there is dissolution of marriage, children go with their mother, with a mean of 1.45. This was followed by the fact that the custom permits women to get involved in income generating activities with a mean of 1.34. Women are allowed to hold position of authority in the society, and then followed with a mean of 1.32, which too is ranked poor.

Table 6**Relationship between the Level of Constitutional Provisions on the Rights of Women and Level of Customary rights of Women**

Category	Mean	Computed r-value	Critical value	Interpretation	Decision on Ho
Level of Constitutional provisions. Vs	2.81	-2.229	0.027	No Significant Relationship	Accepted
Level of Customary rights of women	2.0				

Source; Field data

Using Pearson's Linear Correlation Coefficient (PLCC) at 0.05 level of significance, the null hypothesis, of no significant relationship between the level of constitutional provisions on the rights of women and level of customary rights of women was accepted. Though the mean score (2.81) of level of constitutional provisions was higher than that of level of customary provisions (2.0), it still suggests no significant differences. Implying that the higher the level of Constitutional provisions on the rights of women, the lower the levels of customary provisions on the rights of women and vice versa. Considering the fact that the sign. Value, in table 5, indicate a significant negative correlation between the two variables, (Sig. Values> 0.05) it is thus sufficient to base on these facts and declare thus the null hypothesis is accepted and its alternate rejected leading to a conclusion that constitutional provisions on the rights of women

was ranked sixth, with a mean of 2.43. The item that was ranked lowest was the fact that women have equal pay for equal work and other related benefits with men, with a mean of 2.13.

With regards to objective two, the study found out that the overall level of customary rights of women is fair, with an average mean of 2.0. A scrutiny of the elements however reveals that the item with the highest rating was the fact that the custom tolerates battering of women, with a mean of 3.75. This was followed by the fact that one who murders a woman pays less compensation than that one who kills a man, with a mean of 2.31. which stands at fair. This was followed by the fact that in the event that a husband dies, the deceased's wife is permitted by your custom to have control over her husbands' estate, with a mean of 2.09 which is rated fair. The fact that girls are allowed to inherit their father's property, then followed with a mean of 2.04, which is also rated fair. This was followed, by the fact that Women are allowed by your custom to give their views in the governance of the society with a mean of 1.98 which ranks fair. This was followed by the fact that Women are involved in crucial family decision making with a mean of 1.67. The fact that girls' consent is considered in marital issues, then followed with a mean of 1.59 which was rated poor. This was followed by the fact that If there is dissolution of marriage, children go with their mother, with a mean of 1.45. This was followed by the fact that the custom permits women to get involved in income generating activities with a mean of 1.34. Women are allowed to hold position of authority in the society, and then followed with a mean of 1.32, which too, ranked poor.

As pertains to the third objective, the study found out that at 0.05 level of significance, the null hypothesis of no significant relationship between the level of constitutional provisions on the rights of women and level of customary rights of women was accepted. Though the mean score (2.81) of level of constitutional provisions was higher than that of level of customary provisions (2.0), it still suggests no significant differences. Implying that the higher the level of Constitutional provisions on the rights of women, the lower the levels of customary provisions on the rights of women and vise

versa. Considering the fact that the sign. Value, in table 5, indicate a significant negative correlation between the two variables, (Sig. Values> 0.05) it is thus sufficient to base on these facts and declare thus the null hypothesis is accepted and its alternate rejected leading to a conclusion that constitutional provisions on the rights of women does not significantly affect the level of customary provisions on the rights of women in Bor County Southern Sudan.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

5.1 Recommendations

Based on the study findings, the following recommendations are hereby made;

- a. A review of the constitutional provisions, especially articles 15 and 123 should be made in order to further strengthen the rights of women.
- b. The effort of Non Governmental Organizations and other human rights activists to promote and sensitize on the respect for human rights and in particular the rights of women and children should not be discouraged.
- c. And in order to address further violation of human rights caused by the customary law, the state should do the following:
 - i. A review of the Penal Code 2008, especially section 273 should be done.
 - ii. Practices like early marriage, widow's inheritance etc should be abolish. It is a sole responsibility of the state to enact laws that will prohibit the marriage of a girl under the age of eighteen years and this will even discourage high rate of illiteracy among women. Widow's inheritance should be practised in accordance with the consent of the widow.
 - iii. Awareness raising among women and law enforcement agents. The women should be given access to judicial system so that they can litigate the violators of their rights. This can be done through training of women and law enforcement agents about the importance of observing human rights and fundamental freedoms of all persons.
 - iv. Enact laws that provide clear protection to women and children. The parliament should enact laws such as Marriage Act in order to provide protection for women's rights during marriage and at its dissolution. The present legal system leaves women to be the victim during marriage and at its dissolution due to the

fact that customary law courts which have jurisdiction to determine and issue decision regarding divorce are presided over by men. Further, the decision of the customary courts concerning divorce favours men, for instance children are awarded to father, and the mother is left without a child or property. This is really a miscarriage of justice in South Sudanese Society that needs urgent response from the government. The parliament should enact law that put women at old age not to be divorced because a woman divorced at the age of thirty-five years old is likely not to find a man who can marry her again.

- v. Restrict the customary rights subject to the constitution. The state has to create a system where the customary rights should be exercised in accordance with the constitution so that to avoid the abuse of human rights in the pursuit of customs. This will change the concepts among the residents and they will know that 'women's rights' is not only Western world ideology but is a part of their constitution.
- vi. Reduce customary law into writing and disseminate it to avoid conflict with other laws. The current customary law is not in conformity with the conventional laws. It is believed that unwritten law is too flexible in its application and therefore exposes it to criticism and misuse. A written law is not always biased.

5.2 Conclusion

The rights of women and children have been a focal point of the international and regional human rights instruments as discussed in the previous chapters. This focus shows plainly that women and children in contemporary human society are facing discrimination in all aspects of life. The discrimination against women in the society, in more cases based on beliefs, for instance, the Hindu¹²⁰Scriptures say that for a man to attain salvation, a son must perform the last rites. Men fear that if they have no son, their soul will find no peace. Naturally, people want to ensure that they have at least one surviving son. Discrimination thus starts even before birth. It is therefore a practice

¹²⁰ Vijaya Ghose. Women in Society 1994, pg 36

in every human society, that there was no legal framework for the protection of women's rights.

When one talk about the rights of women or attempting to put women to be equal to men in most of the African societies like South Sudanese society, is perceived as a Western ideology which aims in distorting the African cultures and traditions. It can be observed in the previous quoted sections of South Sudanese laws that customary laws of South Sudan are incorporated in the jurisprudence of legal system and the application of the constitutional's provision is override by customary laws in practice. Such overriding is perceived by human rights activists and foreign nationals as a gross violation of human rights.

However, the African states which have attained their independence early, at least have less violation of those rights due to the fact that awareness among women has been raised. Nigeria is one of the African countries which have a huge diversity of customs like South Sudan; however the rights accorded to women by the Nigerian government surpass the one of South Sudan. For instance, Nigerian women are guaranteed the right to dignity; the right to life, integrity and security of persons; freedom from harmful practices which negatively affect the human rights of women; equal rights in marriage; equal rights in cases of separation, divorce and annulment; the right to equal protection and benefit of the law; the right to participate in political and decision making process; the right to a peaceful existence and participation in the promotion and maintenance of peace; the right to education and training; equal opportunity in work and career advancement; the right to health, including sexual and reproductive rights; the right to food security; the right to adequate housing; the right to a positive cultural context; the right to a healthy and sustainable environment; the right to sustainable development; widow's rights; the right to equitable share in inheritance; the right of elderly women to special protection and freedom from violence; the right of women with disabilities to special protection and freedom from violence; the right of women in distress to special protection; and a right of remedy to any woman whose right or freedom has been

violated¹²¹. Some of the rights granted to women by the Nigerian government are also granted by the South Sudanese government but the major challenge is the mode of application. Moreover, the equal rights of man and woman in case of separation does not exist in South Sudan legal systems. The woman is not entitled to any rights under customary law when she is divorced and the statutory law is silent about the rights of woman after the dissolution of marriage.

There is a consensus among those interviewed in Bor County, that respect for Women's rights is much connected to development, for instance, a woman in Bor town is aware about legal system than the one in the village. Moreover, the construction of roads and the advent of technology e.g. Mobile phones helped women to connect themselves and to search for work in towns. Further the violation of women and children's rights in Bor County, in fact resulted from poor standard of the law enforcement agents in human rights and lack of enacted marriage and family laws. The rights granted to women under the constitution are disputable due to the fact that the constitution in some extent subjected the rights to customs. For instance, article 15 of the Transitional Constitution of South Sudan 2011 provides:

"Every person of marriage age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry".

The provision of the constitution is vague in term of women's rights during marriage because founding a family in accordance to the respective family laws is considered by the society to have conferred power to the customary law and there is no provision in the customary laws of South Sudan that recognizes the free and full consent of woman in marriage. As a result, women are forced to marry against their will and the perpetrators go unpunished because the conventional laws are overridden by customary laws. It is clear that the statutory laws and customary law are in conflict in areas of

¹²¹ Omoyemen Odigie-Emmanuel. Assessing Women's Rights in Nigeria, 1st December 2010. Originally Published in Pambazuka

For the Women in the community

	Customary Rights of Women				
1	If there is a dissolution of marriage, children go with their mother				
2	One who murders a woman pays less compensation than one who kills a man.				
3	Girls' consent is considered in marital issues				
4	Girls' are allowed to inherit their fathers' property (s)				
5	Women are allowed to hold position of authority in the society				
6	Women are allowed by your custom to give their views in the governance of the society				
7.	In the event that a husband dies, the deceased wife is permitted by your custom to have control over her husbands' estate.				
8.	Women are involved in crucial family decision making				
9	Your custom permits women to get involved in income generating activities				
10	Your custom usually tolerates women battering				

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VARIES