Family Dispute Resolution from a Cultural Perspective

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South Sudanese Australian Legal Consciousness

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PREFACE

This book was inspired and informed by my work experience for over seventeen years in the community sector as a senior Family Dispute Resolution Practitioner FDRP (Family Mediator) and Support Service Coordinator, focusing on the Culturally and Linguistically Diverse communities (CALD) as well as the wider Australian community. My work experience and involvement in supporting these cultural groups aroused my interest to study and understand more about how family law disputes are resolved or not resolved by these communities, as well as their experiences and concerns as they traversed the challenges of navigating a formal family law system different to their informal customary law.

Through these experiences and my increasing interest in the areas of family law over the last seventeen years, I became alert to the increasing concerns of the South Sudanese community, families, and community leaders who stated that the challenges they faced in resolving family disputes were not being addressed. In addition, many families did not want to see their members departing from their traditional ways of resolving family disputes and taking newfound freedoms which might lead to separation or divorce. However, at the same time, they were not certain how to resolve those disputes without tampering with the legal system in case one of the parties resorted to involving the authorities such as the police or a family court.

Being from the same community, and of a refugee background myself, I had some understanding of the experiences of South Sudanese former refugees. My experience of forced migration began when I left home at the age of fifteen and went to live in the Pinyudo refugee camp in Ethiopia. I later became one of over twenty-six thousand unaccompanied minors known as the lost boys of the Sudan, many of whom found their way to the United States (US) and Australia.[1] I walked thousands of miles to Ethiopia in late 1987 and remained there until 1991. Due to the internal war in Ethiopia, we were left with no other option but to return to Southern Sudan. In late 1993,

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[1] Buol Garang Anyieth Juuk, *From Tyranny to Triumph : Once a Sudanese Refugee, Now a Proud Citizen of Australia and South Sudan / Buol Garang Anyieth Juuk ; Edited by Don Sinnott*, ed. D. H. Sinnott (West Lakes, S.Aust: Seaview Press, 2011).

I crossed the border to Uganda and stayed there until 1995. Due to the Lord Resistance Army (LRA) activities in northern Uganda which created insecurity for refugees in the camps, I decided to move to northern Kenya where the largest population of South Sudanese refugees were residing. In 2004, I finally resettled in Australia. These journeys were full of challenges but were later marked by gaining good employment, raising a happy family, and academic success. They were both personal and a testament to how a refugee's life can be very tough and inspiring. I have witnessed and experienced most of that which my participants have experienced, particularly during the flight into forced migration.

My position as a South Sudanese refugee has influenced my choice of research methods. The South Sudanese community is sensitive to discussing issues related to families and the community with outsiders as, in most cases, they believe the information collected may be used against them at any stage by government agencies or other communities.

The only way they can participate with full confidence is when the information is delivered through community and church leaders. With this in mind, this research has adapted a community driven approach, which involves giving the Jieng community the opportunity to become informed and to understand the benefits of the research. This was realised by approaching and meeting with and briefing community leaders, church leaders, key people such as elders and professionals. As part of the requirement by the Ethics and Behavioural Committee to provide letters of permission from the church and community leaders agreeing to promote the research project on behalf of the researcher, the church representative in Australia wrote a letter of permission as did a representative of the African Communities Council of South Australia. This was significant and likely played a role in the large turnout during the focus groups.

South Sudanese communities do not have a homogenous family and customary law practice; therefore, this study specifically examines the experiences of South Sudanese "Jieng" (known to many as Dinka) families. Many people in Australia and around the world are familiar with the word *Dinka*, however, the term was invented by outsiders, and no one knows the precise origin of the word. The people now known as the "Dinka" call themselves "Muonyjang" or "Jieng", their actual name is Jieng; therefore, I will use Jieng instead of Dinka throughout the book. Given the nature and complexities of South Sudanese experiences, this book takes an interdisciplinary approach that integrates perspectives from law, the social-legal area, and the fields of refugee and migration studies.

CHAPTER ONE

INTRODUCTION

1.1. Introduction

Australia is a multicultural society comprising a rich diversity of cultures, languages, religions and ethnicities with one in four persons born overseas.[1] Although many immigrants come from countries and continents with similar laws to Australia, this may not be the case for those former refugees who emigrated from African communities, in particular South Sudan, where customary laws are followed. South Sudan is the newest country on Earth, gaining independence on 9 July 2011, through a referendum held on 9 January 2011 in the Republic of Sudan.[2] The referendum was agreed upon as a result of the Comprehensive Peace Agreement (CPA) signed in 2005 between the Sudan People Liberation Movement (SPLM) representing the region of Southern Sudan, and the National Congress Party (NCP) which represented the government of Sudan. After independence, South Sudan adopted a decentral system of government with ten states. There are sixty-four ethnic groups in South Sudan, each of which has an individual and distinct body of functioning customary law.[3]

Australia has over approximately thirty thousand[4] former refugees from South Sudan, and this number continues to grow. Family law disputes in South Sudan are traditionally resolved within families or the community

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[1] Australia Bureau of Statistics (ABS), "Culturally Diversity in Australia," 2011 Census (2011).
[2] Christopher Zambakari, "In Search of Durable Peace: The Comprehensive Peace Agreement and Power Sharing in Sudan," *The Journal of North African Studies* (2012).
[3] Akechak Jok, R Leitch, and Carrie Vandewint, "A Study of Customary Law in Contemporary Southern Sudan," *Juba: World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs* (2004).
[4] Julie Robinson, "Sudanese Heritage and Living in Australia: Implications of Demography for Individual and Community Resilience," *Australasian Review of African Studies, The* 32, no. 2 (2011).

and have relied on customary legal practices, rather than government statutory authorities.[5] Despite previous research on South Sudanese settlement challenges in Australia, little is known about the experiences and challenges South Sudanese families encounter in a legal environment that is significantly different from that of their home country. Thus, this book intends to fill this gap in the literature in two ways: by analysing the experiences of South Sudanese Jieng families in relation to marriage, divorce, and the care arrangements for children in South Sudan and Australia from their own perspective; and by exploring ways of making family dispute resolution among the Jieng families living in Australia more appropriate and relevant to Jieng cultures. Jieng (Dinka) people constitute the largest ethnic group in South Sudan, numbering over three million in a country of around twelve million people;[6] it is estimated in Australia that forty-three per cent of the South Sudanese population are of Jieng background.[7]

Family dispute resolution is the central theme of this book and the reason for which the empirical data was collected. This book is significant because it will contribute to the growing body of research on non-Australian perspectives of South Sudanese settlement in Australia. While other researchers have highlighted several of the settlement problems faced by South Sudanese former refugees, none has focused on the important issue of how family law problems are resolved. This book will also make a vital contribution to our understanding of how the Australian legal system works (or does not work) within the context of legal pluralism. While formally, Australia has the one legal system based on statutory law, in practice it appears that different communities within Australia resolve legal issues using their own sense of legal norms and values. On the one hand, it may be the case that family law issues are being adequately resolved within South Sudanese Australian communities; however, on the other hand, it may be that gendered violence and child welfare issues are not being addressed. Therefore, this book will contribute to our understanding of social integration and family well-being of South Sudanese families and other groups in Australia.

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[5] John Wuol Makec, *The Customary Law of the Dinka (Jieng): A Comparative Analysis of an African Legal System* (Khartoum: J. W. Makec, 1986).
[6] Sudan Government, "5th Sudan Population and Housing Census 2008," (Khartoum Sudan: Central Bureau of Statistics, 2009).
[7] (ABS), "Culturally Diversity in Australia."; ibid.

The book identifies strategies that may assist in prevention and early intervention in Jieng families and other cultural groups before statutory Australian family law becomes necessary. Further, the book may also shed light on approaches to mediating conflicts between customary laws and Australian laws in other cultural groups, including the Australian Indigenous peoples. Thus, the book will provide knowledge to service providers, practitioners, and communities concerning how to best support South Sudanese families and other groups with similar practices in Australia. In this way, it will have direct relevance for family law practitioners across Australia, as well as mediators, the judiciary, and other court personnel who work with family law litigants from a range of cultural backgrounds. Finally, the general perspective suggested that a community-based dispute resolutions model may be a solution for the South Sudanese and other similar groups in Australia, which would empower Jieng communities to resolve disputes through culturally appropriate means such as the restorative family dispute resolution model (RFDR).

This book comprises eight chapters including the conclusion and explores South Sudanese Jieng families' experiences of how disputes related to marriage, divorce, and living arrangements for children after separation are resolved. Through engaging interactions with South Sudanese Jieng participants (focus groups and individuals), this book is intended to provide a wider understanding of the South Sudanese experience of dispute resolution in Australia. The study creates opportunities for Jieng families to share their experiences of solving family law disputes in Australia within a legal system that is very different to South Sudanese customary law. The voices of South Sudanese refugees are often overlooked, which may be due to their refugee status, and also reflects language and cultural barriers. Their narratives will document how South Sudanese and immigrant families experience family law issues, and why many South Sudanese families are reluctant to use the formal legal system. Understanding these barriers and the South Sudanese experience in accessing the formal family law system is important for policy makers. This book has also identified ways in which family law issues can be mediated that take into consideration South Sudanese culture. This understanding is significant for service providers who are working with or supporting South Sudanese families. Finally, this book has significance for South Sudanese refugee families, since they will have the opportunity to understand each other's experiences of going to family dispute challenges in Australia.

Chapter Two presents a brief history of South Sudan, including the unrest since 1955, and the South Sudanese people's experiences of war and forced

migration. It also discusses the movement of refugees and migrants from South Sudan to Australia. It is important to examine this historical context in order to fully understand how South Sudanese people experience family dispute resolution in Australia. This chapter further explores the legal system of South Sudan. It firstly demonstrates that the legal system has been unstable, during times of war, or indeed non-existent. As a result of the long-standing internal wars and military regimes, the rule of law in Sudan collapsed. Since Sudan's independence, there has been a complete absence of rule of law, including the separation of powers and the protection of human rights. Consequently, the people of Sudan have been living in a somewhat lawless society led by soldiers and rebel groups, where they had no access to human rights, legal protection, or justice.

Chapter Three provides an overview of the customary law in South Sudan, in particular, investigating how Jieng communities resolve family customary law disputes. South Sudan has a plural legal system which incorporates both statutory and customary law, and which is very different to that of Australia. It is necessary to understand how family law disputes would normally be resolved within Jieng communities in South Sudan in order to understand the legal consciousness of Jieng former refugees once they arrive in Australia. Most family disputes in South Sudan would be resolved through customary law. Therefore, the first task of this chapter is to discuss what exactly customary law is and how it differs from statutory law, focusing specifically on the resolution of marriage, divorce, and child custody disputes in Jieng communities. There has been previous work on Jieng customary law,[8] but none has focused on the resolution of disputes related to marriage, divorce, and child custody. There has also been a strong critique about the negative impact of customary law, especially on women and children, and customary law has also been seen to clash with international human rights instruments. This chapter examines these critiques and explores the role of international human rights instruments under customary law in South Sudan.

Chapter Four provides a brief account of Australian family law and its progression from its English heritage to its application in contemporary multicultural Australia. The chapter gives a historical narrative of the major changes to family law in Australia and offers a brief overview of the progress toward the rights of the child and recognition of non-traditional families. In particular, it focuses on the ways in which family disputes are

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[8] Makec, *The Customary Law of the Dinka (Jieng): A Comparative Analysis of an African Legal System*.

resolved. It then examines the published research on the experiences, challenges, and opportunities encountered by South Sudanese former refugees in relation to the resolution of family disputes within the family law system in Australia. In order to do this, this chapter examines how Australian law operates, or does not operate, within the context of legal pluralism.

While this chapter provides the essential background for the following chapters which present an original empirical analysis of the experiences of Jieng former refugees living in Australia, it also makes a significant contribution in its own right. There have been many amendments to the *Family Law Act 1975*, including recent changes which recognised same sex marriage. However, little attention has been paid to the existence of legal pluralism within Australia, including the way in which refugee, migrant, and Indigenous social groups need to interact with both formal and customary legal systems.

Chapter Five presents the findings of the empirical data and analysis. The chapter discusses and analyses how family disputes are currently resolved or not resolved here in Australia through formal family law systems such as courts and family dispute resolution (Family Mediation). The study found that the most common type of problems experienced were disputes over the care of children, in particular regarding who is traditionally—or according to the *Family Law Act 1975*—supposed to take care of the children after separation. Other common issues included intervention orders and police involvement in family matters which were described by participants as a hindrance to the participation of family members and elders in the dispute resolution process. Male participants further stated they were concerned about the misuse of freedom by women and a lack of understanding of the law and its consequences. Furthermore, participants revealed that they did not trust government agencies to resolve their family matters, and the majority believed that the Department of Child Protection and domestic violence services were created to separate families and remove children to create employment for job-seekers in the sector. Most participants stated they had attempted several times to have their disputes resolved by elders, close relatives, and their community, but they had been unsuccessful.

Chapter Six presents participants' efforts to reach resolution using traditional dispute resolution processes through families and communities. Efforts at resolution were largely contrary to the methods expected within the formal Australian legal system. In order to examine how Jieng communities resolved disputes outside of the formal legal system, this

chapter investigates, in turn, each type of family dispute that arose from the interviews such as bride wealth and co-parenting issues. Finally, the chapter critically assesses the use of traditional methods of resolution by highlighting their problems. Participants were asked about the status of their family and marriage life before they came to Australia and what they believed had changed since. During the interviews and focus group meetings, participants discussed specific issues related to separation, divorce, and disputes over the care of children. Participants were asked additional questions, including what actions were taken to resolve those problems and their satisfaction with the outcome. These issues were then discussed in-depth, exploring the reasons behind their decisions and whether any services were helpful or not throughout the process.

The chapter analyses several of the disputes encountered by families in trying to achieve resolutions. It also questioned whether legal pluralism or restorative (community-based) dispute resolution, normally led by elders, may be an appropriate solution in resolving family disputes among South Sudanese families and other non-European groups, particularly Indigenous Australians.

Chapter Seven offers a solution to the resolution of family dispute problems under Australian family law faced by South Sudanese Jieng families and other similar groups in Australia. It provides a possible policy solution that may be used by the family law sector and service providers across the community. It offers several strategies concerning important perspectives on engaging South Sudanese Jieng communities and other similar groups through the restorative family dispute resolution approach (Community-Based Mediation). This chapter also examines all alternative formal family dispute resolution systems and legal pluralism, which studies revealed were options previously suggested but not acted upon.

Jieng participants, most of whom were community leaders, stressed that family cohesion was their main priority, and that the involvement of external services was seen as likely to lead to divorce rather than reconciliation. Venturing outside of the community to engage family law services was regarded as a "last resort." Therefore, the general perspective suggested that a community-based dispute resolution model may be a solution for South Sudanese communities and other non-European groups, particularly Indigenous Australians. The chapter further provides a brief background of restorative dispute resolution (Community-Based Mediation) and family dispute resolution in Australia and several challenges

with CALD families in utilising the services as briefly discussed in Chapter Four.

The concluding chapter, Chapter Eight, brings together the whole book by exploring how disputes related to marriage, divorce, and co-parenting are resolved or not resolved among the South Sudanese Jieng communities in Australia. It offers concluding remarks and strategies on the significant perspectives in engaging the South Sudanese Jieng communities and other similar groups through the restorative dispute resolution approach.

CHAPTER TWO

SOUTH SUDANESE SETTLEMENT IN AUSTRALIA: HISTORICAL BACKGROUND

The Sudan has been at war with itself for over five decades. The civil war erupted in the 1950s during which time Sudan was still under Anglo-Egyptian and British colonial rule. This initial period of conflict was resolved in 1972.[1] Eleven years later, a second protracted war started and ended in 2005.[2] The Comprehensive Peace Agreement (CPA) signed in 2005 eventually led to the independence of South Sudan in July 2011.[3] Again, peace did not last long. South Sudan experienced only a short period of relative stability before further civil unrest erupted in December 2013.[4] This latest internal war was due to political differences within the ruling party, the Sudan People's Liberation Movement (SPLM). This protracted period of civil war displaced and dispersed the South Sudanese across the borders of what was then Sudan into neighbouring countries and as far as Australia, the USA, and to some parts of Europe. This chapter presents an overview of the contemporary history of South Sudan. It examines the South Sudanese people's experiences of wars and forced migration since 1955 and provides contextual information to understand the circumstances that led to the resettlement of many South Sudanese refugees in Australia.

The chapter also provides the historical circumstances of the challenges encountered by early refugees and migrants before their arrival in Australia. The chapter further explores the legal system of South Sudan. It firstly

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[1] Robert O Collins, *A History of Modern Sudan* (Cambridge University Press, 2008).
[2] Hilde F Johnson, *South Sudan: The Untold Story from Independence to the Civil War* (IB Tauris, 2016).
[3] Sayyid Muhammad Abu Rannat, "The Relationship between Islamic and Customary Law in the Sudan 1," *Journal of African Law* 4, no. 1 (1960).
[4] Jan Arno Hessbruegge, "Customary Law and Authority in a State under Construction: The Case of South Sudan," *African Journal of Legal Studies* 5, no. 3 (2012).

shows that the legal system has been either unstable during times of war or non-existent since due to long-standing civil war and military regimes, the rule of law in Sudan collapsed. Since Sudan's independence, there has been a complete absence of rule of law, including the separation of powers and the protection of human rights. Consequently, the people of Sudan have been living in a somewhat lawless society led by soldiers and rebel groups, where they have no access to human rights, legal protection, or justice.[5] Consequently, the people of South Sudan have no understanding of, or no faith in, the legal system, nor are they likely to access it to resolve their family problems.

Prior to the independence of South Sudan on 9 July 2011, Sudan was geographically the largest country in Africa, containing over 40 million people.[6] Its population is also highly diverse. Sudan consisted of more than 500 ethnic groups, speaking approximately 145 different languages and dialects.[7] This diversity reflects the division of the country into North and South Sudan. Present day South Sudan is inhabited by diverse ethnic groups who identify as ethnic-Africans. In North Sudan, most people identify as Arabs, although many are of African descent. The South Sudanese speak many languages; those most commonly spoken are the *lingua franca*, the "Juba Arabic," ethnic languages or dialects, and English. The main religion in the South is Christianity. The main language in North Sudan is Sudanese Arabic, which is a type of Arabic, and the main religion is Islam.[8] There are also other languages, dialects, religious beliefs, and traditions practiced throughout both North and South Sudan.[9]

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[5] Johnson, *South Sudan: The Untold Story from Independence to the Civil War*.
[6] Peter Malcolm Holt and Martin W Daly, *A History of the Sudan: From the Coming of Islam to the Present Day* (Routledge, 2014); ibid.; ibid.
[7] England : Ashgate Aldershot, *The Multi-Cultural Family*, ed. Ann Laquer Estin (Aldershot, England: Aldershot, England : Ashgate, 2008).
[8] Holt and Daly, *A History of the Sudan: From the Coming of Islam to the Present Day*.19
[9] Francis Deng, *Customary Law in the Modern World: The Crossfire of Sudan's War of Identities* (Routledge, 2009).
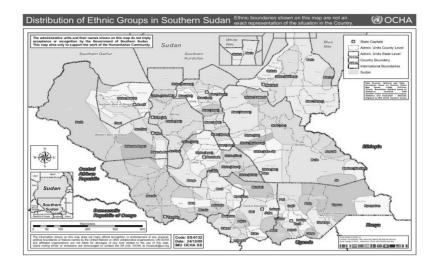
Figure 2.1: Demographic Map of South Sudan

Figure 2.1 shows the distribution of ethnic groups across South Sudan. In South Sudan, there are sixty-four ethnic groups, mostly consisting of Indigenous peoples broadly categorised into the *Nilotic, Nilo-Hamitic, and Sudanic* groups.[10] The Nilotic people are the largest ethnic group in South Sudan, and their original home can be traced to the Nile Valley from where they disperse across South Sudan and neighbouring regions.[11] They mostly speak the Nilotic language which is part of a large ethnic sub-group of the Nilo-Saharan language. It is mainly spoken in Eastern African countries including South Sudan, Kenya, Northern Tanzania, Uganda, and South-Western Ethiopia.[12] The major Nilotic groups in Australia is the Jieng

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[10] Santino Atem Deng, "Fitting the Jigsaw: South Sudanese Family Dynamics and Parenting Practices in Australia" (Victoria University, 2016).
[11] Francis M Deng, "Customary Law in the Cross-Fire of Sudan's War of Identities," *Washington DC: Institute of Peace* (2006).
[12] James Wani-Kana Lino Lejukole, "" We Will Do It Our Own Ways": A Perspective of Southern Sudanese Refugees Resettlement Experiences in Australian Society" (2009).

(known to many as Dinka).[13] The next largest is the Nuer (Naath), followed by the Shullok (Collo), Acholi, and many other small ethnic groups.[14]

The second group in South Sudan consists of the Nilo-Hamites, who are mainly located the central and eastern parts of the Equatorial and Upper Nile regions of South Sudan. This group speak Bari, Otuho (Lotuko), and several other dialects. Whereas the Nilotic people rear farm animals, the Nilo-Hamites depend mostly on subsistence farming.[15] The third group of people in South Sudan are the Sudanic. This group lives mainly in the East-Western Equatorial and Western Bahr El Ghazal regions and comprised of Azande, Balanda, Madi, Muru, and a few others.[16] Similar to Nilo-Hamites, the Sudanic group are also subsistence farmers.

While these are the three main ethnic groups within South Sudan, there are also many others. Table 2.1 lists all the sixty-four ethnic groups, and each has its own distinctive customary law system. The Nilotic, Nilo-Hamites and Sudanic peoples are known as the Indigenous peoples of South Sudan. Many other groups also immigrated to South Sudan before and after its independence in 2011. This diversity means that South Sudan is still strongly divided. There have been barriers in identifying all of the ethnic and cultural groups in South Sudan, as well as problems incorporating all groups within a unified nation.[17] The first national census was scheduled for 2015 but was cancelled due to ongoing civil unrest.[18]

In South Sudan, many of the ethnic groups live in semi-independent homesteads that are clustered into villages. The homesteads are inhabited by immediate and extended family members. The way in which groups are structured and regulated varies according to ethnic identity. Some groups (the Shilluk, Azande, and Anyuak) have been traditionally administered by a King, whereas others are overseen by Chiefs. Most groups followed traditional beliefs before the arrival of Christianity, especially within groups located in rural areas, and many have continued with their traditional

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[13] Ibid.
[14] Mohamed Fadlalla, "Customary Laws in Southern Sudan: Customary Law of Dinka and Nuer," *New York: iUniverse* (2009).
[15] Jok Madut Jok, *Diversity, Unity, and Nation Building in South Sudan* (US Institute of Peace, 2011).
[16] Jay Marlowe, *Belonging and Transnational Refugee Settlement: Unsettling the Everyday and the Extraordinary* (Routledge, 2017).
[17] Kok, op.cit. 29
[18] Douglas Hamilton Johnson, *The Root Causes of Sudan's Civil Wars: Peace or Truce* (Boydell & Brewer Ltd, 2011).

practices.[19] Some communities continue to believe in the power of spirits; for instance, the Jieng believe in a supreme God (Nhialic) in the sky, and fortune-tellers, diviners, rainmakers, and spear-masters are highly regarded members of the community.[20]

Within South Sudanese culture, the division of labour has been traditionally structured around gender, age, and individual status within the family, clan, and the larger community.[21] Traditionally, men have largely been the head of the family, protectors of their own families as well as of the clan and wider community, while women are homemakers and carers for the general well-being of the family. This family structure, however, has changed in response to the civil wars, as with the deaths of so many male heads of families, women have had to step into the vacuum.[22] Every ethnic group in South Sudan has its own way of introducing young men and women to adulthood,[23] for instance, the Jieng and Nuer communities use marking an individual's someone's forehead and the wearing of special beads to denote being initiated into adulthood and being able to marry and have a family.[24] For most people in South Sudan, marriage is seen as an important milestone which involves not just a couple but also the entire immediate and extended family members on both the paternal and maternal side of the family,[25] and as will be examined in the following Chapter, traditional norms around marriage also extends to the practice of early and forced marriage, polygyny and levirate marriage.[26]

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[19] Tracy E. Higgins, *Future of African Customary Law*, ed. Paolo Galizzi and Jeanmarie Fenrich (Cambridge University Press, 2011).

[20] Deng, *Customary Law in the Modern World: The Crossfire of Sudan's War of Identities*.24

[21] Francis Mading Deng, *The Dinka of the Sudan* (New York: New York, Holt, Rinehart and Winston, 1972).

[22] Julia A Duany and Wal Duany, "War and Women in the Sudan: Role Change and Adjustment to New Responsibilities," *Northeast African Studies* 8, no. 2 (2001).

[23] Deng, *The Dinka of the Sudan*.

[24] Ibid.

[25] Ibid.

[26] Stephanie Beswick, "" We Are Bought Like Clothes": The War over Polygyny and Levirate Marriage in South Sudan," *Northeast African Studies* 8, no. 2 (2001).

Table 2.1: List of 64 Ethnic Groups with Distinctive Customary Law in South Sudan

1. *Acholi*	2. *Adio (Makaraka*	3. *Aja*
4. *Anyuak (Anyuaa*	5. *Atuot (Reel)*	6. *Atuot (Reel)*
7. *Azande*	8. *Bai*	9. *Baka*
10. *Balanda-Boor*	11. *Balanda-Bviri*	12. *Banda*
13. *Bari*	14. *Binga*	15. *Bongo*
16. *Didinga*	17. *Dinka (Jieng)*	18. *Dongotona*
19. *Feroghe*	20. *Gollo*	21. *Ifoto*
22. *Imatong*	23. *Indri*	24. *Jiye*
25. *Jur (Beli & Modo)*	26. *Jurchol (Luo)*	27. *Kakwa*
28. *Kara*	29. *Keliku*	30. *Kuku*
31. *Lango*	32. *Larim (Boya)*	33. *Logir*
34. *Lokoya*	35. *Lopit*	36. *Lotuka (Otuho)*
37. *Lugbwara*	38. *Lulubo*	39. *Maban*
40. *Madi*	41. *Mananger*	42. *Mangayat*
43. *Moro*	44. *Moro Kodo*	45. *Mundari*
46. *Mundu*	47. *Murle*	48. *Ndogo*
49. *Ngulngule*	50. *Nuer (Naath)*	51. *Nyangatom*
52. *Nyangwara*	53. *Pari*	54. *Pojullo*
55. *Sere*	56. *Shatt*	57. *Shilluk (Chollo)*
58. *Suri (Kachipo)*	59. *Tenet*	60. *Tid*
61. *Toposa*	62. *Uduk*	63. *Woro*
64. *Yulu*		

2.1. Socio-Political History

Before its partition, Sudan was geographically located in the northern part of the African continent. It shares borders with Egypt and Libya to the north; Uganda and Kenya to the south; Ethiopia and Eritrea to the east; and the Democratic Republic of the Congo, Chad, and the Central African Republic to the west; and Egypt to the north.[27] For almost 200 years, South Sudan has been subjected to exploitation by its northern neighbours. Arab Muslim raids into South Sudan looking for slaves as well as gold, ivory and timber laid the foundation for future cultural, racial and economic conflict.[28]

These tensions were exacerbated by European invaders seeking trade for commodities and new markets.[29] In 1820, the Ottoman-led Egyptian army invaded Sudan, and the country became an occupied territory of Egypt for the next sixty-five years. After the Ottoman Empire's death, the Egyptians were unable to provide a cohesive regime in Sudan whose people, always on the lookout for a possible revolt, overthrew Egyptian rule in 1885 under the leadership of Mahdi.[30]

This respite from foreign intrusion was short-lived as Egypt, led by British colonial forces, again conquered Sudan in 1889. Sudan was then subjected to the combined rule of the Anglo-Egyptian forces for the next sixty-six years, between 1889 and 1955. During this time, the country was also known as Anglo-Egyptian Sudan.[31]

Colonial rule recognised the division between the predominantly Islamic north and the Christian/Ethnic African south, and the country was largely governed as two distinct states.[32] Following British withdrawal in 1956 and Sudan's independence, a supposed system of power-sharing was implemented.[33] However, this arrangement continued the focus of government and military

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[27] Peter Malcolm Holt, *A Modern History of the Sudan: From the Funj Sultanate to the Present Day* (London: Weidenfeld & Nicolson [1961], 1961).
[28] Jane Kani Edward, "Sudanese Women Refugees: Transformations and Future Imaginings," (2007).
[29] Holt and Daly, *A History of the Sudan: From the Coming of Islam to the Present Day*.
[30] Abu Rannat, "The Relationship between Islamic and Customary Law in the Sudan 1."
[31] Gabriel R Warburg, "Historical Discord in the Nile Valley," (1992).
[32] Richard Gray, "A History of the Southern Sudan, 1839-1889," (1961).
[33] Douglas H. Johnson, *The Root Causes of Sudan's Civil Wars*, ed. Institute International African (Bloomington: Bloomington : Indiana University Press, 2003).

power in the north.[34] South Sudan has a long history of oppression which is the outcome of colonisation, the lack of political representation, and the concentration of power within the north. The basis of this oppression did not substantially change with independence of Sudan.[35]

In 1953, Egypt and Britain forged an agreement that promised Sudan's independence within the following three years, and Sudan achieved independence on 1 January 1956.[36] During the process toward independence, the South Sudanese were given assurance by the then power brokers in North Sudan that they would be given a federal system of the government in the south after independence.[37] Despite all these promises, the newly appointed leadership upheld religious and Arabic ideology and ignored cultural differences that existed amongst the people of Sudan.[38]

As a consequence of the new government's breach of their promises, the people in South Sudan rebelled against the government. This conflict later evolved into a civil war that would last over a decade.[39] General Ibrahim Abboud seized took power in a military coup in November 1958, notifying Sudanese citizens over the radio of his ascent to power.[40] The new regime continued the war in the south, and expelled hundreds of missionaries from Sudan.[41] Consequently, the leadership of Abboud, *"opted for intensified Arabization and Islamization of non-Muslims"*,[42] which further escalated the conflict between the North and the South. However, the Anglo-Egyptian colonial powers used legal pluralism to govern the country. Thus, what

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[34] William Twining, "Human Rights: Southern Voices Francis Deng, Abdullahi an-Na'im, Yash Ghai and Upendra Baxi," *Law, Social Justice and Global Development Journal*.

[35] Gray, "A History of the Southern Sudan, 1839-1889."

[36] K Michael Barbour, "The Sudan since Independence," *The Journal of Modern African Studies* 18, no. 1 (1980).

[37] Ibid.

[38] Deng, *Customary Law in the Modern World: The Crossfire of Sudan's War of Identities*.

[39] Douglas H. Johnson, "Judicial Regulation and Administrative Control: Customary Law and the Nuer, 1898–1954," *J. Afr. Hist.* 27, no. 1 (2003).

[40] Alison J. Ayers, "Sudan's Uncivil War: The Global–Historical Constitution of Political Violence," *Review of African Political Economy* 37, no. 124 (2010).

[41] Scopas S Poggo, "General Ibrahim Abboud's Military Administration in the Sudan, 1958-1964: Implementation of the Programs of Islamization and Arabization in the Southern Sudan," *Northeast African Studies* 9, no. 1 (2002).

[42] Ibid.

follows is the overview of Sudan's legal history from colonial rule to the present day.[43]

2.2. Legal History

The legal history of Sudan and South Sudan reflect the divisions and conflicts that have long afflicted these regions. In 1821, the Ottoman Empire invaded Sudan and established foreign rule known as the Turco-Egyptian administration.[44] This administration ruled the country until 1885, when it was deposed by a fundamentalist Islamic movement under the leadership of Mohammed Ahmed. Ahmed became the Mahdi, meaning the Islamic Messiah.[45] Although Sharia Law was imposed by Mahdi, much of the rural north was administered by customary laws that claimed to reflect Islamic principles but were mostly Indigenous.[46] Southern Sudan continued to follow customary practices which had their basis within traditional religious beliefs.[47] After joint British-Egyptian forces overthrew the Mahdist state in 1898, the British-dominated Anglo-Egyptian administration ruled the country until independence on 1 January 1956.[48]

The British established a formal legal system based on English common law, which was modified to an extent to reflect the local conditions of the Sudan.[49] The British tried to respect the Islamic beliefs that dominated in the north and recognised the application of Sharia Law in personal matters. They also recognised that most of the north observed customary practices that differed from orthodox Sharia. In response, they established a system

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[43] Raphael Koba Badal, "Religion and Conflict in the Sudan: A Perspective," *Bulletin of Peace Proposals* 21, no. 3 (1990).

[44] Richard Leslie Hill, "On the Frontiers of Islam: Two Manuscripts Concerning the Sudan under Turco-Egyptian Rule 1822-1845," (1970).

[45] Alice Moore-Harell, "The Turco-Egyptian Army in Sudan on the Eve of the Mahdiyya, 1877-80," *International Journal of Middle East Studies* 31, no. 1 (1999).

[46] Ibid.

[47] MW Daly, "'Summing Up'islam and Politics in Sudan Islam, Secularism and Politics in Sudan since the Mahdiyya. By Gabriel Warburg. London: Hurst, 2003. Pp. Xvii+ 252.£ 45 (Isbn 1-85065-588-X);£ 19.95, Paperback (Isbn 1-85065-590-1)," *The Journal of African History* 45, no. 02 (2004).

[48] Aharon Layish and Gabriel R Warburg, *The Reinstatement of Islamic Law in Sudan under Numayrī: An Evaluation of a Legal Experiment in the Light of Its Historical Context, Methodology, and Repercussions* (Brill, 2002).

[49] Mark Fathi Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (Cambridge University Press, 2013).

of informal justice which allowed for the administration of customary law.[50] In the south, where communities were largely unaffected by Islam, the British allowed for the continuation of customary laws.[51]

The British attempted to extend English common law through the adoption of a penal code and code of criminal procedure which was applied by the statutory courts.[52] At the level of the local courts, customary law was still applied, but it was also guided by statutory law in criminal matters. A code of civil justice allowed the statutory courts to apply customary law as deemed appropriate. Thus, while customary law continued to be recognised, it was incorporated into a formal legal system.

While the customs and traditions of the southern Sudanese ethnic groups were the primary source of law,[53] the colonial rulers took some steps to improve the operations of customary law alongside their laws in the Sudan. First, customary laws operating in Sudan were formally recognised by colonial powers. Customary laws were also addressed with the passage of the *Civil Justice Ordinance 1929* and the Chief's *Courts Ordinance 1931.*[54]

The second set of laws was a novel development which formally recognised chiefs' legal authority to exercise customary jurisdiction in their traditional tribal areas.[55] Section (6) of the *Civil Justice Ordinance* 1929 provided that, "*the Chiefs Court shall administer the Native Law and custom prevailing in the area over which the Court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order.*"[56] Thus, the continuation of customary laws in the colonial era of the Sudan was affirmed.

Many years of British colonial rule left Sudan with a legal system derived from different sources. In the predominantly Islamic north, personal law pertaining to marriage, divorce, inheritance, adoption, and family disputes

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[50] Mohammed Ibrahim Khalil, "Sudan Legal System and Problem of Law Reform" (paper presented at the Sudan Law Reform, Odmurman, 2008).
[51] Ibid
[52] Mohammed Ibrahim Khalil, "Sudan Legal System and Problem of Law Reform," *Law Reform in Sudan*, no. OMDURMAN. Ahfad University for Women (2008).
[53] Natale Olwak Akolawin, "Personal Law in the Sudan—Trends and Developments," *Journal of African Law* 17, no. 2.
[54] Khalil, "Sudan Legal System and Problem of Law Reform."
[55] Mohamed Hassan Fadlalla, *Short History of Sudan* (Iuniverse, 2004).
[56] Akolawin, "Personal Law in the Sudan—Trends and Developments."66

were adjudicated in Sharia Courts.[57] In contrast, customary law was
practiced in the southern region of Sudan and among other non-Muslim
populations, as discussed above. The main legal influence of the British
consists of precedents of common law which are used in some cases.[58] Most
lawyers and judges were also British trained. Soon after Sudan gained
independence in 1956, a discussion was initiated by the new government for
a need to reform or remove the legal system imposed by British
colonisation. As a result, a commission was formed to review the legal
system and to recommend the appropriate legal framework to be used in
Sudan.[59] The commission was in the process of preparing a revision of the
legal system when it was disrupted by further political conflict. Due to the
influence from neighbouring Egypt and the fear of continuation of the
British laws, a group of military officers led by Jaafar Nimeiri and the Free
Officers' Movement, carried out the 1969 Military coup against the elected
civilian government. The regime, which viewed Gamal Abdul Nasser's
government in Egypt as a model, dissolved the existing legal review
commission and formed a new one dominated by twelve Egyptian jurists.[60]

Subsequently, following the unsuccessful 1971 coup attempt against the
Nimeiri government and increasing political disillusionment with Egypt, the
Minister for Justice formed a new committee of Sudanese lawyers tasked
with examination of the Egyptian-based codes. As a result of this review,
the government repealed these codes in 1973, returning Sudan's legal
system to its pre-1970 common law basis.[61] Furthermore, the Sources of
Judicial Decisions Bill called for a section within the civil procedure code,
which allowed judges to apply the concept of "*equality and good
conscience*" in the absence of a provision of law, to be repealed. This was
permitted provided that it be replaced by the Quran or standards of conduct
based on the words and practice of the prophet Muhammad.[62] In September
1983, President Nimeiri issued several decrees, known as the September
laws, which imposed Sharia Law. The legislation to facilitate the

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[57] Ilias Bantekas and Hassan Abu-Sabeib, "Reconciliation of Islamic Law with
Constitutionalism: The Protection of Human Rights in Sudan's New Constitution,"
Afr. J. Int'l & Comp. L. 12 (2000).
[58] Egon Guttmann, "The Reception of the Common Law in the Sudan," *International
& Comparative Law Quarterly* 6, no. 03 (1957).
[59] Abdullahi A. An-na' Im and Francis M. Deng, "Self-Determination and Unity: The
Case of Sudan," *Law & Policy* 18 (1996).
[60] Ibid
[61] Ibid
[62] Guttmann, "The Reception of the Common Law in the Sudan."

implementation of Sharia Law was approved by the People's Assembly in November 1983 without debate.[63] The imposition of Islamic law was bitterly resented by secularised Muslims and the predominantly non-Muslim population of the south.[64]

The abolition of the 1983 September laws was the primary goal of the Sudan People Liberation Movement (SPLM), which refused end hostilities in the south until its demand were met.[65] The Sudan People's Liberation Army (SPLA) and its political wing, the Sudan People's Liberation Movement (SPLM), launched a revolution struggle against the Khartoum government on 16 May 1983 with the goal of creating a new secular Sudan where religion was separated from state. John Garang, the leader of SPLA/M, was an important factor in the peace settlement between the north and south.[66] Garang argued that the conflict between the two was "*more about cultural, economic, and political marginalization of the peripheries than race and religion.*"[67] Garang sought a unified Sudan that was no longer controlled by the concentration of power in the north.[68]

In 1989, Sadiq al Mahdi reluctantly indicated his willingness to consider repealing the September decrees. He announced that on 1 July 1989, the cabinet would consider draft legislation repealing the September laws and would meet with SPLM leaders to resolve the ongoing civil war peacefully. However, another military coup occurred within twenty-four hours before the Sadiq al Mahdi government was due to vote on the abrogation of the September laws. A new military regime led by General Omar Hassan Hamid al Bashir initially indicated they would retain the freeze of the implementation of the September laws, but Bashir changed his mind. Bashir enlisted al Turabi, the leader of the National Islamic front (NIF) after Nimeiri's overthrow, to prepare new laws based on the Islamic principles.

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[63] Ibid.

[64] Ibid.

[65] M. Weller et al., *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff Publishers, 2008).

[66] Jok, Leitch, and Vandewint, "A Study of Customary Law in Contemporary Southern Sudan."

[67] Ibid.

[68] LB Lokosang, *South Sudan: The Case for Independence and Learning from Mistakes* (London: Xlibris Corporation, 2010).

In January 1991, Bashir issued a decree that Islam law would be applied in the court throughout the north but not in southern Sudan.[69]

During Nimeriri's administration, the judiciary system had been divided into two sections: a section led by the Chief Justice, and the Sharia segment led by the Chief Qadi.[70] Both criminal and civil cases were adjudicated by the civil courts. All matters of personal status, such as inheritance, marriage, divorce, and family relations were adjudicated by the sharia courts, comprising religious judges trained in Islamic law.[71] The consolidation of the Civil and Sharia courts were made through executive order which created a single High Court of Appeal to replace both the former Supreme Court and the Office of Chief Qadi.[72] Judges were required to apply civil and sharia law as if they were a single code of law.[73] In addition, the High Court of Appeal, as well as all lower courts, was required to apply Islamic law exclusively.[74]

As a result, the judicial system of Sudan was independent in theory. However, since 1958, due to the country's continuous military government, there has been no stability in the legal system as each regime that came to power imposed its own changes and removed the policies of predecessors.[75] For instance, in July 1989, a decree which gave the president powers to appoint and dismiss all judges, was issued.[76] This example illustrates the

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[69] G Norman Anderson, *Sudan in Crisis: The Failure of Democracy* (University Press of Florida, 1999).

[70] Liv Tønnessen and Liv Tønnessen, "Gendered Citizenship in Sudan: Competing Debates on Family Laws among Northern and Southern Elites in Khartoum," *The Journal of North African Studies* 13, no. 4.

[71] Layish and Warburg, *The Reinstatement of Islamic Law in Sudan under Numayrī: An Evaluation of a Legal Experiment in the Light of Its Historical Context, Methodology, and Repercussions*.47

[72] Abdelsalam Hassan, "History of Law Reform in Sudan," *REDRESS*, no. Khartoum. Sudan (2008).

[73] Ibid.

[74] Jure Vidmar, "South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States," *Tex. Int'l LJ* 47 (2011).

[75] Bantekas and Abu-Sabeib, "Reconciliation of Islamic Law with Constitutionalism: The Protection of Human Rights in Sudan's New Constitution."

[76] Ibid